STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

On Writ of Certiorari to Dillon County
Honorable J. Derham Cole, Circuit Court Judge
Appellate Case No. 2023-000914

TYREEK HAYES,

Respondent,

vs.

THE STATE,

Petitioner.

APPENDIX

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Strikers?

A. It was different period of times but about three minutes and then it just - different time frames.

Q. Okay. Was that throughout the evenings at Strikers?

A. Yes.

Q. Okay. And after Strikers shut down, where did you go?

A. I went right down the road to T. Lee's called Escalade, a little night, a little night bar.

Q. Okay. And do you recall how long you were at T. Lee's for?

A. Um, I want to say probably about twenty, twenty-five minutes.

Q. At T. Lee's?

A. Yes.

Q. Okay. And then after T. Lee's tell me what -- tell me what happened?

A. Um, while I was at T. Lee's -- that's basically another spot where in my neighborhood where, basically, I know everybody, my home boys was there, you got people gambling, good music going on, drinking, a lot association going on. And at that point in time that's where I was tuneup at the bar, you know, Ms. Simpson come in by herself and she came straight to me.

Q. Okay. After you left T. Lee's tell me where you went?

A. After I left T. Lee's I went with Candace to Candace's

house.

Q. All right. Now, -- and who was driving the car?

A. Tanya Moore.

Q. All right. Were there any other people in the car with you?

A. No.

Q. Okay. And how long did it take to get from T. Lee's to -- how long did it take to get from T. Lee's to Candace's house?

A. Probably, about, no more than ten minutes.

Q. Okay.

A. It's across town but no longer than ten minutes.

Q. Okay. And do you recall about what time of night or early morning this was?

A. Um, around about five - five, six in the morning.

Q. Okay. And you -- and then when you got to Maplewood tell me what happened then?

A. Um, well, when we pulled into Maplewood, ah, that's where everybody got out the car and me and Ms. Simpson, we went directly to her house and the other girl went to her apartment.

Q. Okay. And when you went -- tell me what happened once you got into Candace's apartment?

A. Ah, when I got into the apartment everything was good. We continue to communicate while she whined down, you know,

conversation, the conversations steady was going, um, turn the TV on, the TV going, just communication - still communication.

Q. Okay. And did that -- and at that point, did -- what happened after y'all are hanging out for little while in the house?

A. Well, after certain period of time we was hanging out in the living room that's when she decided to go get in the shower and get the smoke smell and all that other type stuff off of her.

Q. And then what transpired after that?

A. She got out of the shower, she, um, put her lotion on everything. That's when she came, she came back to me, she sat on my lap - my lap, excuse me, she sat on my lap, you know, that's when I had woke up because I had dozed off for a minute or two. So when she came back and sat on my lap that's where I put my hand around her waist and that's when we continued talking more.

Q. Okay. And after that event happened, what happened after that?

A. After that, that's when, um, it got some point in time where, um, I had kissed her and when I kissed her, you know, she give me some feedback and one thing led to another.

Q. Now, specifically when you say feedback, could you be

a little more specific? Can you describe that a little bit more?

A. Yes, sir. Um, well, when I kissed her, you know, she kissed me back like in a rough, rough way and she put her arm around me.

Q. Okay. And after that happened tell me what - what transpired after that?

A. After that, that's where, like I said one thing led to another. That's when I picked her up and that's when we went to, um, to her bedroom.

Q. Okay. And when she got to the bedroom tell me what happened then?

A. Um, we got to the bedroom that's when, um, you know, -- well, what she had on she had a little dress on so, um, that really wasn't, it wasn't no issue pulling none of her clothes off or anything. So she helped undress me so that's when the kissing continued and that's when he got to a point she was like, do you got a condom? And I was like no. So what she did was she got up, she went in her closet and she got a condom and she gave it to me and I put it on and I used the condom.

Q. Okay. You put that on yourself?

A. Yes.

Q. Okay. And after that did -- did you have intercourse?

A. Yes.

Q. Okay. And after that occurred tell me what happened -- well, between the time you got there and by the time y'all were intimate, how much time lapsed during that time?

A. Probably about a good thirty, no longer than thirty minutes. I'm gonna say thirty minutes.

Q. Okay. And then after you and her were, after y'all engage in relations tell me what you recall after that?

A. After we engaged and everything that's when, um, you know, we had consensual intercourse like normal.

Q. Okay. After the intercourse tell me what you recall happening then?

A. Oh.

Q. Did you fall asleep at some point?

A. Yeah, I did.

Q. Okay.

A. So I had -- I had fell asleep on the couch. I fell asleep on the couch. But that's when we had went to the bedroom ---

Q. No, I'm talking about after - not before you, before y'all ---

A. Oh, you're talking about in the bedroom?

Q. Right. Just tell me what happened after y'all had slept with each other?

A. That's when some, some guy came in the room.

Q. Now, Tyreek you said -- did y'all -- at the time was

there anything making noise, was there a TV on?

A. There was a little speaker, little speaker box.

Q. Okay. And that was to -- was that the TV or ---

A. No, that was the, um, music plugged up to a phone.

Q. Okay. That was like -- so was music playing?

A. Yes.

Q. Okay. And -- all right. And was the music playing continuously while you were there?

A. Yes.

Q. Okay. And tell me what -- tell me -- all right now, after y'all had been with each other, tell me what happened then?

A. What you mean in the bedroom?

Q. Tell me what transpired like what happened after, you know, ---

A. Oh, um, well, when in the bedroom at some point in time after we was having consensual intercourse that's when, um, some guy came in the room on us.

Q. Okay. And tell me what happened when that happened? Tell me what happened then?

A. Well, when I noticed there was a guy at the door that's when, you know, I jumped back and that's when, um, he got loud. At first he was talking to her it was like, um, what you got going on, this, that and the third. And that's when, um, he was like, he was like, oh, this what

you got going on. He became -- he got loud. He became violent and that's when he started making threats towards me and that's when he left the room for second.

Q. Okay.

A. And when he left the room that's when, um, Ms. Simpson followed behind him. And I'm pretty sure it was her boyfriend because, um, she specifically said, "babe" and from my knowledge babe, that your guy.

Q. Okay. And let me ask you, Tyreek, when you were in the house did you see -- was there -- did you see any property that would've belong to an adult male?

A. Yeah, I seen some Air Jordan's in the living room in, um, the corner.

Q. Now, those Air Jordan's, that an adult would wear or a child would wear?

A. Adult.

Q. Okay. And did you see anything else in that apartment that may have belonged to -- well, was there any other items in that apartment that would belong to an adult male?

A. Um, yes, in the bedroom.

Q. And that was what?

A. That was, um, pants and maybe a shirt - shirt or two here and there.

Q. All right. Now, going back to when this person came in and confronted you and her and made threats and then

left the room, tell me what you recall happening after that?

A. Say it one more again.

Q. Okay. Sorry. Fast forwarding, you recall this individual coming into the room?

A. Yes.

Q. And tell me what happened after him and Candace left the room?

A. Um, when him and Ms. Simpson when they left, when they left the room, um, he, from my knowledge from listening, they was in the kitchen. They was arguing. She was basically telling him calm down, calm down. But he would never calm down. And that's one thing led to another. That's when they were arguing and then it they was fight'in and then I heard like a loud noise, I guess he slammed her on the floor.

Q. Okay. What do you recall happening after that?

A. Um, after that, that's when I specifically, I was putting on my clothes fast and in a hurry. And that's when, um, when I left out the room - when I got myself together, I left out the room. And when I left out the room that's when I was about to head for the exit of the front door and that's when I hear this girl gasping and she was telling me, "Reedy help me", "Reedy help me" so that's when, you know, I had to help her. It wouldn't be right if

I didn't. So when I turned around I helped this woman and that's when I kicked this guy, her boyfriend, off her and that's what I was going to charge at him while he was turned around but that's when he grabbed the knife so fast that's when I jumped behind her.

Q. Okay. And what was he doing?

A. At that point in time, you know, he was, he was making threats. He was coming forward. He was swinging the knife out of control. That's when he was cut'in her in the kitchen.

Q. Okay.

A. And then he was cut'in me as well on my arm and that's when I just continue to stand behind her.

Q. Okay. Tell me what you recall happening after that?

A. Um, after that it got to the point where, you know, I wanted exit for the front door but the apartment so small - the apartment so small I felt like at the time, I felt like if I run for this front door, you know, she out the way and it's just me and he's gone stab me in my neck or anything like that. So at that point in time when, um, when we was moving to the door that's when we hear a knock at the door. Do I know it is? I don't know who it is. And that's when the girl, she finally came in, and it's her sista. And so when he -- so when she came into the apartment that's when, you know, the kids came in, you know, that's when she said,

what's sista going on with my sista? What's going on here? And at that point in time everything was at a standstill, you know, her sista was like she was at a standstill because she couldn't believe what she was really seeing. And that's when, um, and that's when, um, the boyfriend he started making his way towards her, talking. He was like, "shit, you know what's going on." "Don't act like you don't know." "You know what's going on." "You know what your sista got going on." And that's when, um, and that's when the girl, the girl push him because he was trying to leave.

Q. The girl being, who?

A. Ann.

Q. Okay. Go ahead.

A. She push him. She pushed him back because he was trying to leave, but the sista wanted answer. And when the sista wasn't get'in no answers, you know, she wouldn't let nobody leave the apartment. And so me, for my knowledge, I'm still stand behind this woman because I don't know what this guys capable of I don't know what, you know, don't know what this man is gonna do. So at that point in time - so at that point in time that's when, um, them two, the boyfriend and Ann, they get into it, you know, she fall that's when she scream ---

Q. Now, when you said they get into it, it's a physical

confrontation?
A. Yes. It's, um, they fight'in - fight'in, that's what it was. And for my knowledge she was, um, he was cut'in her and stuff that's when she get up and she leave out the front door with the two minor kids.
Q. And when did -- where did you run out?
A. I ran out the back door. The back patio door.
Q. Okay. And after that where did you run to?
A. Um, my girlfriend house. I had a girlfriend that stay over there in Dover.
Q. Okay. And, Tyreek, just so were all clear, you had a girlfriend at the time?
A. Right.
Q. And who was that?
A. Shalanda Livingston.
Q. Okay. And did -- and you didn't -- did you tell that to Ms. Simpson that you had a girlfriend?
A. Nah, I didn't tell her at first.
Q. Okay. Well, and then you ran to Shalanda's house, is that correct?
A. That's correct.
Q. And did you tell Shalanda what happened?
A. No, I didn't tell my girlfriend what happened.
Q. Okay. And I think at some point you -- let me make sure, at some point you -- and tell me, okay, so about what

time did you get to Shalanda's house?
A. With me guess and taking a good guess ---
Q. Don't -- don't guess. Based on your - based on your recollection about what time did you get to Shalanda's house?
A. I want to say seven - seven or eight.
Q. Seven, eight, okay. And Tyreek did you ever - did you ever tell Shalanda what happened?
A. Nah, I never told my girlfriend what happened.
Q. Okay. Did you ever tell Shalanda to ever get rid of anything of yours?
A. Um, no, I didn't.
Q. Okay. And to your knowledge, you know, between that time and when you went the next day to talk to Investigator Turner, did you ever -- well -- did you ever - did you ever have conversation with Shalanda about this particular incident?
A. No.
Q. Okay. And then when you got to -- and did you -- and the next day, did you go up to the police department when they wanted to speak with you?
A. Yes.
Q. Okay. And who gave you a ride up there?
A. Um, one of my people I know from around the way, um, what was his name - what was his name - well, his nickname

was Butthead that's what they call him.
Q. Chris?
A. Right.
Q. And did at that point -- and that was how long after - how long after this incident did you find out that you needed to go to the police station?
A. Probably, I want to say a few minutes - a few minutes after I got to my girlfriend's house that's when I heard about what was being said, um, well what I was being accused of.
Q. Okay. Now, when you went up to the -- when you went up to the police station did they asked to see any kind of, um, any kind of marks on you person?
A. Yes. The first thing the investigator told me, um, was pull your shirt up and I was like, why do I pull my shirt up? And he said, because she said that she bit you and she said that she scratched your back up.
Q. Did you have any bite marks or any scratch marks?
A. No bite marks. No scratch marks.
Q. Okay. And was there a slight wound - was there a slight ---
A. There was, um, ---
Q. --- injury that you had from the knife, a knife that hit you?
A. Yes.

Q. Okay. Where was that?
A. On my -- on my hand up to my arm.
Q. Okay. And did hurt you bad?
A. No, it didn't hurt me.
Q. Okay. And did you voluntarily show them, show them your body when asked?
A. I volunteer everything.
Q. Okay. And, Tyreek, when they asked for a cheek swab sample, did you give that to them?
A. I gave it to them.
Q. Okay. How many times did you give them the cheek sample?
A. Um, to my knowledge, two times.
Q. Okay. And why did you do that?
A. I ain't did nothing wrong. Give it to them.
Q. And -- give me one second -- I can't remember if I've ask you this already but you never -- did you ever direct Shalanda do anything for you that day to throw anything away?
A. No.
Q. Okay. Tyreek, did you rape Candace Simpson?
A. No, sir.
Q. Did you stab Candace Simpson?
A. No, sir.
Q. Did you choke Candace Simpson?

A. No, sir.

Q. Did you stab Ann Covington?

A. No, sir.

THE COURT: Tyreek, please answer any questions the government has.

Cross-Examination by Ms. Burchstead:

Q. So you had no injuries?

A. Ma'am?

Q. You didn't have any bite marks? You didn't have any stab marks, did you?

A. Yes.

Q. You were stabbed?

A. Yes. Well, stabbed, cut.

Q. Right. You have any stabbed wounds, you didn't go to the hospital?

A. No.

Q. You didn't get treated by EMS?

A. No.

Q. So let's back up for a minute, you said y'all were communicating for a while before you had sex, right?

A. Right.

Q. Consensual sex?

A. Right.

Q. About thirty minutes before the sex?

A. Right.

Q. Okay. And then sex?
A. Right.
Q. And then some guy shows up?
A. Right.
Q. You have no idea who this guy is?
A. At the - at that time, no. But later on I found out who he was.
Q. Mmm, hmm. All right. So some dude runs in and y'all were in the bedroom when he comes in?
A. Right.
Q. And he's upset?
A. Right.
Q. And you just stand there?
A. No -- there was only one door.
Q. Right. So you put your clothes on?
A. Right.
Q. And they are getting into a fight and you needed to help her?
A. Did I help her?
Q. I think you said on direct that "you needed to help her".
A. Say it -- I couldn't understand what you were saying, miss.
Q. Did you say on direct exam "you needed to help Candace with this dude"?

A. Oh, right.
Q. Huh, huh, so where were y'all when you were helping her?
A. I was, um, we was in the kitchen.
Q. You're in the kitchen, so how did you get to the kitchen?
A. Um, after I put my clothes on I was about to head for the exit door that's when I turn around and helped her.
Q. Okay. And you helped her. So the guy had a knife?
A. Well, he grabbed one.
Q. Mmm, hmm. And you stopped him from attacking her, right?
A. No.
Q. No?
A. No.
Q. So you just let him attack her?
A. It was -- he attacked both of us.
Q. Because you got all cut up, right?
A. No, I didn't.
Q. No, you didn't.
A. Because she was in front of me.
Q. Your hands aren't cut from grabbing any knife or anything?
A. Right.
Q. Mmm, hmm. So let me see, Ann shows up and the dude

attacks Ann, is that right? They get into a fight and he attacks Ann?

A. That's correct.

Q. Okay. And you just stand there and watch that happen too?

A. The apartment was so small I couldn't make no move.

Q. Okay. So you are a man and ran away?

MR. SWILLEY: Objection, Your Honor. Judge, that ---

THE COURT: All right. Rephrase the question.

Q. Did you run away or did you actually fight this guy?

A. I ran. I ran.

THE COURT: Speak up.

A. I ran. I ran.

Q. Okay. So in your help of these ladies you didn't call 911, right?

A. No phone.

Q. And after this happened you don't go to law enforcement and give a description? You don't immediately after this happened you're not trying to help find this guy? You don't go back and check?

A. Right.

Q. And you got to Shalanda's around seven or eight?

A. That time period, yes.

MS. BURCHSTEAD: I begged the Court's indulgence.

Q. Just one clarity, what door did you go out?

A. Um, the back patio door.
Q. Okay. And what - what door did anybody else go out?
A. Be specific.
Q. What door did Ann go out?
A. The front.
Q. You saw Ann go out the front?
A. Yes.
Q. And Candace and the dude was still there when you left?
A. When I left, nah, the dude, he left first.
Q. The dude left first?
A. Right.
Q. What door did he go out?
A. He went out the back patio.
Q. So you just left Candace there?
A. I helped her and then I left.
Q. Okay. And you got to Shalanda's around seven or eight?
A. Correct.

MS. BURCHSTEAD: Nothing further.

MR. SWILLEY: Just a follow-up.

THE COURT: Yes, sir.

Redirect Examination by Mr. Swilley:

Q. Tyreek, were you scared?
A. I was.

Q. Okay.

MR. SWILLEY: That's all I have.

THE COURT: Anything else, Ms. Burchstead?

MS. BURCHSTEAD: No, Your Honor.

THE COURT: All right. You can step down.

MR. HAYES: Thank you, sir.

THE COURT: Anything else, Mr. Swilley?

MR. SWILLEY: The defense would rest at this time.

THE COURT: Okay. Any rebuttal from the State?

MS. BURCHSTEAD: No, Your Honor.

THE COURT: All right. Ladies and gentlemen, I'm going to ask you return to the jury room for a short while, while we take up a couple more legal matters and see where we stand as far as conclusion of this case. Again, do not discuss the matter until you've heard all of the evidence and all the arguments and the charge on the law. Thank you.

(Whereupon, the jury exits the courtroom at at 2:29 p.m.)

THE COURT: Mr. Swilley, any other motions?

MR. SWILLEY: Your Honor, I'd renew my motion for a directed verdict of not guilty.

THE COURT: All right. And I will, again, respectfully deny your motion for directed verdict on the same basis as I did with the conclusion of the State's case. Okay. Counsel, how much time do you need to get

ready for your closing arguments?

MS. BURCHSTEAD: Not a whole lot. If we want to do a charge in conference and make sure we're straight on that.

THE COURT: Yeah, I've got to finish getting my charge here together. Do you have any request you want to submit?

MR. SWILLEY: I actually would have a request, Your Honor, that I found for the charge. If I could kind of email it to your clerk?

THE COURT: Sure. That will be fine.

MR. SWILLEY: I don't have a printer.

THE COURT: Sure.

MS. BURCHSTEAD: If I can find my notes I think most of what I was gonna request is the standard stuff. I didn't know if we wanted to talk about any lesser included and how to address that. I'm looking for my notes, judge. I don't have any specific typed up. Obviously, we'd want the specific intent and reference circumstances as you can infer specific intent. I can't find my notes, judge. It will probably be your standard charges I would imagine, Your Honor.

THE COURT: Okay.

MR. SWILLEY: Judge, do you want to arguing charge today?

THE COURT: I'd like to. I mean, it still what time, 2:20, 2:30? I don't see any reason why we don't. I mean, is there any objection to that, I mean, we've got plenty of time.

MS. BURCHSTEAD: Do you want to approach?

MR. SWILLEY: That's fine, I guess.

THE COURT: That's why I ask you how much time you needed to prepare for your closing argument.

(Whereupon, a bench conference was held off the record)

THE COURT: All right. We'll finish up with this charge, do you want me to email or have a hard copy printed off? I can do either way.

MR. SWILLEY: Email is fine with me. I've got computer.

MR. KOZAK: Email is fine with us. You can send it to my email.

MS. BURCHSTEAD: Yeah, we have technical difficulties in the fields sometimes. But just so I'm clear, are we still discussing whether we're going to the lesser included's or we doing that.

THE COURT: I haven't heard anything about it so. There's been no request that's been made to me so.

MR. SWILLEY: Judge, I don't -- I guess, I would request lesser included's, I guess, I'm obligated to. ABHAN and A&B first, I guess. And I don't know if there's

gonna be of any consequence but I probably ought to get to request it.

THE COURT: What's the State's position with regards to any lesser included of ABHAN and A&B first?

MS. BURCHSTEAD: I don't think we can really object to lesser included's being presented if there's evidence that the jury find those, probably, is in this case. I would simply asked that in a charge we make it clear there's two counts of attempted murder and that they can find, you know, attempted murder or a lesser on either ---

THE COURT: Oh, yeah.

MS. BURCHSTEAD: --- it doesn't have to be the same.

THE COURT: I will ---

MS. BURCHSTEAD: Right.

THE COURT: Well, I -- I'll do that.

MS. BURCHSTEAD: Thanks, judge.

THE COURT: Okay. We'll stand at ease for a while.

(Whereupon, the court takes a break for legal matters)

(Whereupon, the court is back on the record at 2:54 p.m.)

THE COURT: Okay. Ms. Faulk?

MS. FAULK: Yes.

THE COURT: I need for you to go back in and talk to your fellow jurors and find out what their pleasure would be or what their desire would be, let me explain what

it is. We've got to let the lawyers make their closing arguments and I have to charge you with the law, so we're probably talking about two hours worth of stuff before we would give it to you and your fellow jurors to start deliberating. We can do that today and go into the evening with regards to your deliberations or we can wait and come back tomorrow morning and do everything, do the lawyers arguments, my charge, and that's probably gonna take, to be on the safe side, we'll say two hours. Let them argue for, you know, it may take them thirty to forty-five minutes to argue. Then I'll probably take at least thirty minutes with my charge on the law. So we're looking at probably a good, safe bet, two hours before we ever get it to you ---

MS. FAULK: Okay.

THE COURT: --- before you begin to deliberate. What time is it now? It's almost 3 o'clock so you would not get, to begin your deliberations until probably 5 o'clock or after this afternoon. So, again, I'm gonna let you be the judges, and when I say you, you and all your fellow jurors. So if you go back and discuss with them what they'd rather do, would they rather come back at 9:30 or ten in the morning and then we can probably get it to you probably by noon tomorrow and y'all can deliberate tomorrow afternoon or we can do it tonight, if you want to?

MS. FAULK: Okay.

THE COURT: That's entirely left up to you and your juror's?

MS. FAULK: Okay.

THE COURT: Take your time. We'll be here waiting for your response.

(Whereupon, the court takes a break for a response from the jury)

THE COURT: Yes, ma'am, Ms. Faulk?

MS. FAULK: They said they would rather wait till in the morning.

THE COURT: They'd rather wait until in the morning?

MS. FAULK: Yes.

THE COURT: Okay. And that's fine. All right. What I need to do is bring them all back in because I want to give them the instructions again not to talk about the case and then I'll talk to the lawyers, okay.

(Whereupon, the jury enters the courtroom at 3:00 p.m.)

THE COURT: All right. Ladies and gentlemen, as Ms. Faulk has already probably told you and discussed with you, the only things that are left to be done are for the lawyers to make their closing arguments to you and then I need to charge you on the law. But as I explained to her that's gonna probably take about two hours at a minimum. So that would put us past 5 o'clock starting deliberations.

I understand that y'all would rather come back tomorrow morning, entertain the closing arguments then and my charge on the law and then begin your deliberations, am I correct?

(Whereupon, the all jurors agrees to his question)

THE COURT: Okay. All right. The reason I brought you back in again then is to tell you one more time please do not discuss this case when you go home tonight with anybody. We're getting very close to the end as you know. But you cannot -- don't talk about it. It's not time for deliberations because you cannot deliberate till after I tell you what the law is that you will apply to the facts as you find them. So hopefully this will be the last time I maybe have to tell you don't talk about the case anymore until I send you back for deliberations. But we'll break for the evening, get an early start on the evening and have you back here 9:30 tomorrow morning, everybody will be ready? I can make it ten if you want me to?

MS. BURCHSTEAD: Nine, thirty suits the State.

MR. SWILLEY: Nine, thirty is fine.

THE COURT: Is 9:30 or ten better for the jury?

(Whereupon, all jurors agree that 9:30 is better)

THE COURT: Nine, thirty. We'll start back at 9:30 tomorrow morning. So again be back in the jury room around 9:15 and we'll start at 9:30. Thank you. Y'all have a good evening too.

(Whereupon, the jury exits the courtroom at 3:02 p.m.)

THE COURT: All right. Counsel, this gives you plenty of time to get ready. Can y'all stick around until I make sure the charge and let's get that out of the way and make sure we're okay on that?

MR. SWILLEY: Yes, sir.

THE COURT: That way tomorrow morning we won't have to do anything but let y'all argue and then I charge.

MS. BURCHSTEAD: Absolutely, yes, sir.

THE COURT: Okay. So y'all will be back in the solicitor's office. Where will you be, Mr. Swilley?

MR. SWILLEY: I'll just being there in that room beside, right there.

THE COURT: Okay. Because I was gonna say you need a room to work out of or something.

MR. SWILLEY: I know right.

(Whereupon, court is adjourned for the day at 3:04 p.m.)

Friday, July 26, 2019

(WHEREAS, this matter was scheduled for a trial, all parties appeared along with their counsels of record. The proceedings began at 9:37 a.m.)

THE COURT: All right. Counsel, are we ready?

MS. BURCHSTEAD: The State's ready.

MR. SWILLEY: Judge, there is one thing I wanted to take up in accordance with our charge conference last night. I had asked the court to charge a different additional charge pertaining to circumstantial evidence in addition to the State's or the court's charge on direct and circumstantial evidence. I actually pulled State versus Logan and I just wanted, if I could briefly be heard on that. I have a copy for the court as well. Your Honor, fortunately, I think these pages are numbered but if you flip to, it looks like, I guess, the fourth page from the end. Logan goes on to state, "trial court should be constrained from providing a jury charge ---

THE COURT: Hang on. Let me catch up with you.

MR. SWILLEY: I'm sorry.

THE COURT: All right. Go ahead.

MR. SWILLEY: Your Honor, it goes on to state, for relevant argument, "trial court should not be constrained

from providing a jury charge encompassing the determinations critical for analyzing circumstantial evidence as it appears in some cases. Additionally, defendant should not be restricted from requesting a jury charge that reflects the requisite connection of collateral facts necessary for a conviction. Thus, we hold the trial court should provide the following language as circumstantial evidence charge, in addition to a proper reasonable doubt instruction, when so requested by the defendant." And it goes on to provide in the opinion the charge as it relates to circumstantial evidence. And it goes on, and Your Honor, I have a copy also of the relevant charge that the court provides. I can summarize that. Give that to counsel. And the court -- it goes on to say - in addition to what you were gonna charge, Your Honor, it says, "the law makes no distinction between the weight or value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond the reasonable doubt. If these circumstances merely betray the defendant's behavior as suspicious, the proof has failed." And then it goes on, "the State has the burden of proving the defendant guilty beyond a readable doubt. And this

burden rests with the state regardless of whether the State relies on direct evidence, circumstantial evidence or some accommodation of the two." And Your Honor I think that the court is pretty unequivocal when it states that, when the defendant request this charge when there's circumstantial evidence, as in this case, that he's entitled to it and I am requesting it. So what I would just respectfully request the court give that charge verbatim that the Supreme Court of South Carolina lays out in State v. Logan, State vs. Clarence Logan and that's 405 S.C. 83 (2013).

THE COURT: Any response, counsel?

MS. BURCHSTEAD: Your Honor, in reviewing it as we stated in chambers yesterday we believe that a charge that has been used for years is sufficient, defer to Your Honor in how you to interpret this case. It said "should provide" not "shall provide"and I think the goal here is, the proper instruction for the jury to be able to analyze the circumstantial evidence and the State's position is the charge that has always been given is sufficient, however, we defer to Your Honor.

THE COURT: Okay. All right. Mr. Swilley, after reviewing the case, and you have made the request, I'm going to grant your request. I'll charge what's in this case, the language in the case directly from the case.

MR. SWILLEY: Thank you, judge.

THE COURT: Okay.

MR. SWILLEY: Your Honor, may I have one minute to use the restroom before we get started.

THE COURT: Yeah. Nerves.

(Whereupon, the court takes a break)

THE COURT: All right. Any other matters, counsel, before we bring the jury?

MS. BURCHSTEAD: Not from the State.

MR. SWILLEY: There are not, Your Honor.

THE COURT: All right. Gary, bring them in.

(Whereupon, the jury enters the courtroom at 9:48 a.m.)

THE COURT: Good morning, ladies and gentlemen.

(Whereupon, the jury greets the judge)

THE COURT: I Hope you had a good evening last night. The State may proceed.

MS. BURCHSTEAD: Thank you, Your Honor. May it please, the court?

Closing agrument- Ms. Burchstead:

Reedy All Boss, Tyreek Hayes is going to show who's the boss. He wanted what he wanted and he was going to take it. He got turned down and he turned violent. On October 1, 2016, in the early morning hours he raped and strangled Candace Simpson in her apartment for around three hours. She was going in and out of consciousness, repeat sex acts, holding on for her life, afraid for her life

until her sister shows up and then he attacks both of them with the knife slicing at both of their necks. This case is pretty simple. It was a rape followed by a brutal attack of both women.

Tyreek Hayes is charged with criminal sexual conduct in the first degree, two counts of attempted murder, kidnapping, and possession of a weapon during the commission of a violent crime and he is guilty of all of those.

Now, the judge is going to charge you on the law. Give you some instructions before you go back to deliberate. And he'll give you a very thoroughal explanation of what the laws are and what the State has to prove and what Mr. Hayes is charged with. I want to give you just a little bit of context right now, I have just a basic understanding of what those charges are while you listen to me present our position and Mr. Swilley.

Criminal sexual conduct in the first-degree common name is rape. Criminal sexual conduct, first-degree requires a sexual battery with aggravated force. Sexual battery can include intercourse oral sex, it's any penetration however slight.

Aggravated force, in this case we would suggest. is being held against her will, the forcible confinement which leads to that kidnapping charge. Mr. Kozak told you in

opening statement it's not what people necessarily think about when you charge kidnapping. You don't have to be bound up or, you know, duct tape or ropes or something, you don't have to be stashed in a car and taken somewhere. Kidnapping under South Carolina law is the unlawful seizure or confinement of another. Not being able to leave.

Attempted murder, a little bit trickery here with all the definitions and, again, the judge is going to instruct you on that. But drilling it down in it's bear sense as y'all listen to us, you have to have an attempt and that just means you try to do it and you weren't successful, right. And you have to do this attempt with the intent to kill, malice. Malice is that buzzword there. That malice can be found through circumstantial evidence. You can look at the surroundings if you believe there is malice there. Malice is expressed or implied. It can be informed in an instant. It is a disregard for human life. You can look at whether there is a deadly weapon. But really do we have an intent to inflict an injury with that disregard for human life. And again that's just drilling it down to kind of the simplest terms. The judge is going to give you a more thoroughal instruction on that. But, in this case we're suggesting to you, it is attempted murder and the judge is also gonna charge you on what are called lesser included offenses. You have assault battery of a high and

aggravated nature and assault battery in the first degree. The judge will instruct you on those. The main difference is that there different levels and you don't necessarily have that malice, that desire to kill, but maybe just injure. We don't believe that's what this case is. And we'll go through some of the evidence here in just a minute. But remember were slicing at necks, stabbing, knives, violet attack, following a rape. So the State believes the attempted murder is the appropriate charge. But you will have all those charges instructed to you and y'all can decide what you think.

So you heard a lot of testimony. Saw some other evidence. Let's look back at what's been presented to you from the State's perspective.

September 30, 2016, a Friday night, Candace is gonna go out have a girls night, just a night out. They gonna go to Strikers. She leaves out with a couple girls. And prior to that night she'd been talking to Reedy All Boss on Facebook and, yeah, probably liked him a little bit. They're chatting. Laying that foundation, right. They go to Strikers, have a night, leave around 230. The club closes, I believe we heard a couple of folks say, club closed at 2:30, hang out in the parking lot, chat a little bit, end up that T. Lee's. So Candace sees Reedy Boss, now we know that to be, Tyreek Hayes at T. Lee's. They chat.

I'm not sure exactly how long they're there but not too long, I'm gonna suggest probably about an hour so. And remember she was with her cousin Tonya. So Tonya gives Reedy Boss, and she knew him as Reedy, Tyreek Hayes and Candace a ride back to Maplewood. Remember Candace lives near Tonya and Tonya is going to drop them off in front of her place and they're thinking that Tyreek's gonna head over to Dover Village. Remember that's right next door. You got Maplewood and right next to that you've got Dover Village, and we'll take a look at some of the maps here in the minute. So they're thinking he's going to go over to Dover Village. He asked if he could come in and Tonya tells you it's her impression that Candace said, you know, "you're not gonna get any" but she does let him in. And you may be wondering why she let him in. I suggest you she's wondering the same thing. It's probably the biggest mistake of her life. She let him in. Maybe they were thinking something was gonna happen maybe not, but it obviously turned violent. She showers. Comes out. She asked him to leave because she's got to do hair in the morning, it's early. It's probably, what, 4:30 maybe five or somewhere between four and five at this point, if we gone to Strikers and hung out a little bit. Went to T. Lee's. Stay maybe for an hour. You get home. Talk little bit and have a shower. So somewhere between four and five,

right. So she showers. She needs him to go. He's not gonna leave. He's gonna take what he wants. He's gonna show her who's boss. He gets violent. He gets her in the bedroom. Now, remember this apartment is small. There's one door to the bedroom. And you've got your front door and your side door, kind of, off from the kitchen and we'll look at the pictures here in a minute. But it's tight. It's a small little apartment. She gets to the bedroom she screams. He strangling her. She's calling for help but he is strangling her. And you've seen those pictures, we're gonna look at them. He strangled her. She quit, she's a mother. I suggest to you she is thinking at this point if I just give him what he wants it'll stop. She's trying to minimize damage at that point. She wants to live for her kids. She wants to live. And maybe she cannot get an STD or something of that nature. She doesn't know what he has so she begs him to wear a condom. Just do it. Just get it over with. So they're struggling. They end up on the floor. If she runs out the door how far is she gonna get. He's obviously been dominating her. She can't get out the door. She's begging for condom, just do it. But it doesn't end! It doesn't end! It goes on for hours. She's in and out of consciousness. He wants oral sex. There may or may not have been some anal penetration, remember that rape kit. There's sperm or sperm fractions, DNA in her

mouth, anus, thighs. I didn't hear anything about a condom breaking. He follows her to the bathroom. I suggest to you while she's in and out of consciousness he may have even thought he killed her at one point because he strangled so much she passed out. I suggest to you, he himself, is now in damage control is trying to think what am I gonna do. Maybe he goes to the kitchen and stashes a knife. She's in and out of consciousness. At that point is her word against his, right. Remember she told you from that witness stand she was afraid because he said you're gonna tell. She thought he was gonna kill her because he thought she was gonna tell. But then it really goes off the rails even more violent when Ann shows up with those kids. Ann think she's walking in on some and then her sister screaming whether she says "rape" or "he's gonna kill me" she could've said both. But Ann figures out something bad wrong here and then we have this chaotic violent attack. They don't know where the knife came from. It could've already been in the bedroom. Maybe he got it from the kitchen. At some point, I suggest he got from the kitchen. Remember those pictures from the kitchen, and again, we're gonna look at some of this stuff. The knives in the drain. So there's an attack on Ann. Ann told you there were scuffling in the bedroom. The kids are just, you know, hanging out in the living room, hallway area.

Attacks Ann. I suggest to you that knife broke. Remember we've got the blade that was found in the bedroom with Ann's DNA on it. Don't know wether there's a handle but we found a blade a few days later with Ann's DNA on it. Candace realizes he stabbing Ann, jumps to save her sister, and then she starts getting it. Ann, thank goodness, gets out of there with those kids. She runs to the neighbor to Elaine. Presumably Elaine calls 911. We know 911 was called when she went to Elaine's. So while she's over there trying to get 911 to help she sees Tyreek looking out the door. I thinks he still in damage control. He's trying to figure out who knows what and locks that front door. This whole time it's just a violent attack that's very fast and very violent. Both women have slashes on their neck, Candace's is deeper. You heard the doctor talk to you, there lucky the knife wasn't any bigger than a little steak knife. Multiple, multiple wounds. They're both fighting for their lives. Ann is already out with the kids. Candace is still struggling. She takes that moment when he's peeking, to get out. And you see all the blood in the kitchen. She runs out. Her bloody footprint, she's naked and bleeding just trying to live. She gets to Elaine's. Elaine's apartment has blood all over it from where she's dripping blood. And they think Reedy Boss it still in there, Tyreek Hayes is still in there when law

enforcement arrives. Remember Lorie Tyler, Officer Tyler, she gets there and the first thing she's being told is Reedy Boss and he still in there. Remember that 911 call, the CAD sheet, yeah, we don't have the call. Somebody didn't get the call but you have the information from the call. Immediately Reedy Boss, stabbed all over, Reedy Boss and that call comes in at 9:29. When law enforcement arrives, Reedy Boss, we think he still in there. But he had left. He ran. He actually did go to that girlfriends apartment over in Dover Village. So when he's running, State's 1 blown up, remember we put these pins in so we've got Candace an Elaine's apartment and we've got the baseball field over here, the baseball complex with the field behind it. He comes over this way, runs out. I suggest he stopped somewhere in here wipes that second knife, and chunks it in the field. And we'll look at those knives here in a minute. Same type of knife, steak knife, Diamond Cut. The one on the field they couldn't get any prints or DNA on it, nothing, because it had been wiped. It was a bent blade. When you're stabbing with a steak knife, this isn't some butcher knife, this is a little steak knife and you're stabbing people. I suggest to you that blade is gonna bend that's why that knife is bent. That was the second knife that was used. That one was probably the one used in the kitchen with Candace. And he

runs on over here to Shalanda's and the shirt, the same day, ends up up in this dumpster. And what's on that shirt? Ann and Candace's DNA, their blood.

Both Candace and Ann came to this courtroom and sat right there for y'all to look at them and listen to what they had to say and they told you, Tyreek Hayes, Reedy Boss, did this to both of them. They've been consistent since 2016 that he's the one that did it. Why would they make it up? Why would you not want the person who actually tried to kill you be held responsible? From the time they're bleeding and Candace is naked and running to Elaine's the first thing that's told to 911, to the neighbor, is Reedy Boss. They don't have time to talk about how they're gonna pin it on somebody else if it's not really him. They're surviving and shout'in out truth. Reedy Boss tried to kill them after he raped Candace.

And then they pick him up out of a photo lineup. Now, some nuances in what happened in that apartment bedroom, not bedroom,, okay. Maybe there's not a hundred percent match, but you know what I think there's a hundred percent match that's a bigger problem. That would be a collaborated story where they're trying to come into falsehood. The fact that there are some slight differences to me just indicates they was complete chaos and they had a different perception at different times. But what's

consistent is that Reedy Boss was slicing at them with a knife and that they had to get out of there or die. They're not talking about who to pick out of photo lineup. The police figure out from getting on the scene, Reedy Boss, Facebook, they get this lineup prepared. You got your pictures. They both individually picked him out and still maintain that he did this.

All right. So we talked about the particular laws or the crimes that he's charged with and the laws that we have to show. So let's go in a little bit of detail here on the elements. Criminal sexual conduct in the first-degree, we've got penetration. We've also got DNA, potential oral, potential anal. Candace told you multiple sex acts. He strangled her. He held her against her will. Remember the doctor and the nurse, the doctor said consistent with strangulation and the nurse said strangulation. You can look at it yourself. I don't think it takes an expert to look at these pictures and figure out strangulation. He's not forcing himself on her why is he strangling her. And he's holding her against her will. She quit calling for help. She was in and out of consciousness. She was trying to survive for her kids then she's in and out of consciousness. He kidnapped her in a sense she couldn't get away. He held her against her will.

The knife attacks on both of them, again, you can look

at the surrounding circumstances. We suggest to you the knife is a deadly weapon during this crime and the way it's used. The stab wounds particularly the slices at the neck. Just a violent nature, the graphic nature. That's the attempted murder. The doctor had to put Candace back together. He told you that. A bigger knife, less of a struggle, they'd be dead. And again two knives, one is found with Ann's blood. The other is wiped clean but bent near the location. There's no question Tyreek Hayes did this. There's no question how violent it is. We talked about how Candace and Ann coming here and telling you who did this to them. You judge the credibility of the witnesses. You decide who's telling the truth and who's not telling the truth. Who has something to gain from not being truthful? You look at the witnesses. You look at their demeanor. You decide who's been truthful and who's not. What matches who story? What story makes more sense? There's no reason for Ann and Candace to make this up and they have been consistent since Candace has been running naked and bloody.

The defendant testified. He told you his version. I suggest to you it didn't make any sense. It didn't make any sense. I couldn't -- I couldn't even follow it,. I don't if you could but I couldn't. He's just standing there while Ann's getting attacked. He's gonna help and

yet he runs away. And that's fine if you want to run, but he doesn't run for help. He doesn't run and call 911. He doesn't run and get his -- if he's the victim of some random dude, some dude did this, he doesn't get any treatment. He has some old little flesh wound. Blood all over that apartment is Candace and Ann's. The ones that go to the hospital is Candace and Ann. No one is calling 911 but Candace and Ann. Elaine actually called. Instead, he goes on that run right to his girlfriends and the shirt gets thrown into the dumpster. And that shirt has the DNA, remember we had the testimony from Mr. Stewart from sled and we had the prints guy, it's just prints are not as common as you think. And I tell you it doesn't matter in this case. We don't even have Ann or Candace's prints in that house. Prints, they just don't tell us anything in this case. But there's nothing else that indicates anybody else did this. And the DNA on the shirt, remember, DNA can transfer pretty easily. There was that minor third contributor. Yeah, I know who it could be, but the major blood on that is Candace and Ann's. I mean, it could've been girlfriends DNA. He could've been anything. There's no reason to think it was someone else that committed the crime.

And let's talk just a little bit more about the defense testimony. Did he ever explain to y'all

strangulation? No, because he can't. It wasn't a perfect investigation. It's pretty rare you get everything airtight. But you got what you need to convict. We don't have the 911 call we've got the transcript, Reedy Boss. Candace is stabbed all over and Reedy Boss did it.

In opening statement Mr. Swilley was talking to y'all about the power that you have and that you don't need to listen to the government because the government says so. The government is the State of South Carolina. And I'm proud to be here representing the State, the citizens of the state. You do have the power. You have an important job. You have the power to do the right thing. The right thing is to seek justice and if the evidence is there to convict. It is clear in this case what happened. The evidence is there. Let's take a quick look back at some of these photos. I'm not to go through all of them. You'll have them back in the jury room. Sorry, their small. But they follow Candace's story. And you've got the apartment, P4, the keys. Who locked that door? Tyreek Hayes. When he was peeking out see what was going on. He locked that door and everybody ran the side. You've got blood everywhere. Blood on the door. Of course, we know we got the condom in the bedroom. You've got braids. Her hair on the floor. The bedroom, again, I'm not gonna put a lot of emphasis on all these pictures. You'll have them back

there. I just want to show you a few. But remember a small apartment. They end up in the kitchen. You've got that blood on the floor. Blood on the wall. All right. There's no question this is violent. Drips of blood. Hair -- hair in the kitchen. Why are you gonna say somebody else did this? Blood. Just blood. Blood everywhere. Knocked up table. All right. Remember all the blood, I don't need to show you all the blood. You know it. You've seen it. Here's Candace and Ann rather - I'm sorry I didn't give the court reporter numbers, we're going through the State's photos - number 49, Ann in the hospital. She's gone make this up. See that slice on her neck. State's 50, Ann neck, an attempt to slice her neck. Fifty-one in the hospital. Remember Candace's defensive wounds those bloody hands, State's 52. Candace in surgery, State's 58. State's 60 remember those defensive wounds. You know who didn't get offensive wounds? Tyreek Hayes. He wasn't grabbing any knives. He was using knives. State's 67, look at her face, Candace. Remember the nurse told you she was worried about Candace's being able to use your hands again, she's a hairdresser. State's 72 and 73 she was strangled. Strangled, clearly.

The State has the burden of proof. We have to show you these crimes are committed beyond a reasonable doubt. The jury reach verdicts all the time. It's not an

unreachable goal here. It just means proof that leaves you firmly convinced. And in this case there is no doubt, there is no doubt about it. Due justice fine Tyreek Hayes guilty of all five counts.

Thank you.

Closing Arguments- Mr. Swilley:

So every time I got to get up here and do one of these arguments I always try to think about how I can put, you know, use a story or some kind of analogy to put in perspective of what I'm trying to show the jury because, I mean, a lot of this stuff is foreign to you because you guys are lay people. Maybe this is the first time you've ever come to court. So I was straining – and it gets harder every time - I was straining really hard to try and think of some kind of example I could, I could show and prove my point of what I'm trying to show. So I started thinking back when I was a kid and I started thinking well I bet everybody that went to school from whenever until now probably learned about Christopher Columbus. And that Christopher Columbus, you know, he was credited with discovering America. Well, you know, you've got people that criticized that and says we didn't really discover America because the Native Americans were already here and, you know, that's not really fair. Here's what he did do and this is what I remember learning in school and here's

what did happen. You remember Christopher Columbus wanted to get a bunch of money so that he could go and, you know, explore because he had this crazy theory that the earth wasn't flat. And he went out and investigated it and he got the Queen of Portugal to go give him some money because she wanted him to go find or maybe it was King Ferdinand, I forget, but to go find, you know, spices, and gold, and stuff. But he had this wild idea that the earth was round and he got laughed out for that. And you know what happened he went out investigated it and he was right. He was right. He went out and he found out that what he had been investigating the whole time that there's no edge of the earth to fall off of, he was right. And had there been an investigation in to certain leads in this case it would've turned out differently had that happen. But it didn't. What we have here and I've talked about, you know, because I said so the first time and that's what this all boils down to. It didn't take long to convince the authorities, for Candace and then, Ann to convince the authorities of their story. That their story was the story. And at that point that was it. That was the gospel. And everything they gathered after that was called confirmation bias. A confirm the bias they already have. I had my easel over there that just collapsed but there are several differences that you have in the story between

Candace and you've got Ann. Now, although the situation was chaotic this was not, this was not -- this is not a -- this is not -- this is not a chain of events that's hard to get confused. Okay. Thing about the most dramatic events of somebody's life and they're not really going to change or deviate the way that these changes, that these stories have deviated, right. They don't match up. If you notice Candace and Ann were in here or I guess, Candace testified first. Ann wasn't in here during Candace's testimony. The reason why is because you don't want them to have to be able to piggyback off of each other. And when they weren't in here their stories were vastly different. Vastly different. So the big difference based on what we heard is, who left the house first, Candace or Ann? Now, if I recall correctly, you have Candace who she claims that she was -- she comes in between four and five, right? All right. Now, you've got this young man who she says whose last name and first name that she claims she never knew, she invites this man into her home, okay. Based on what we've seen and what we know from our everyday common sense that's not something that happens, okay. You don't bring somebody, man or woman or anybody, anybody that you're going to do anything with into your home between four and five in the morning on a Friday night if you don't know them. And what we know for sure based on this toxicology

she was sober. She had just as much wherewithal then as she's got now. Actions speak louder than words and you know what else speaks louder than words inaction, and I'm gonna talk about that here in the second. So you have Candace between four and five said she brings somebody in whose name she doesn't know, but she knows Tyreek Hayes. All right. Dillon ain't but so big. And he played ball with her brother. She knows him from around. She's been talking with him for weeks, right. She knows Tyreek Hayes. She knows who is. That's just that. And then at some point she says after twenty minutes that somehow he begins to attempt to kiss her - and excuse my handwriting - and that goes into, she says no and then that segues into he doesn't take no for an answer and he drags her by I believe she testified her waist to the bedroom and forces himself on her. And based on what we've heard that this happened and that she at some point based on her testimony and this is new, okay, this is Candace now, not Candace at the time she was talking to the police about what happened, she begs him to wear a condom, okay. With which according to her he complies and she's been raped, okay. What do we know, and I don't mean to get graphic with you, but prophylactic or protection comes in a wrapper, okay, comes in a square. We all know that. You have to open it up like you would open up a candy bar or anything in a wrapper with two hands, all

right. And to apply said prophylactic said condom you have to use two hands, okay. That can take anywhere between, you know, one to five to ten seconds, right. When you do that there's ten seconds with which she could've run out the door which by the way according to them was just in the middle of the night in Maplewood unlocked. So according to her, she recklessly brings somebody she doesn't know into the house and leaves the door unlocked and then all of a sudden she's being, according to her, she's being violently raped, strangled, and raped and nobody hears anything. And even though she testified that he threatened, she says he threatened if she screams he would choke her out but that whole scene right there that's in disarray, okay. Based on what she said there would've had to have been a struggle. There would've had to have been a lot of noise going on and with those thin walls in Maplewood for Elaine Manning to hear, all right. And, in case you didn't notice, we didn't hear from Elaine Manning. The woman who actually called 911, we didn't hear from her.

So at some point Candace says that he holds her there, she's in and out of consciousness without any kind head trauma or anything else. I mean, she says that she passed out because of strangulation but she doesn't have any brain damage or anything of that nature and all of a sudden she falls asleep or passes out and she wakes up and Tyreek

Hayes is sitting there staring at her and she awakens. Let me think about that for a second, so she goes in and out of consciousness. She passes out. And then she wakes up and he sitting there and he just happens to be staring at her. And then, of course, he wants oral sex which, again, it's facts that were added here today never before recorded during the course of this investigation, three years later never mentioned anything about that to anybody with law enforcement, not recorded at all, at all. All right. That's a big deal. If you're forced to perform oral sex on somebody that's something you're not going to leave out, right. And not only did they talk to her at the hospital, but law enforcement talked to her briefly at the scene, right. And then later on several times, I mean, she testified that she's met, she had met with law enforcement again I think even Investigator Turner testified he went out and talked with him again after he had spoken with Tyreek, which I'm going to get to in a second, but that's a big deal. This is not -- this is not -- what they're saying the facts are it's not a difficult thing to keep straight and remember. That's brand-new. If something so traumatic happened to you that story is not gonna change. So all of a sudden according to Candace, Ann comes in -- Ann comes in and then she screams, she claims she screamed, "help me, he raped me". And at that point according to

Candace he and Ann started fighting and she says it looks like, you know, she she comes in - Ann comes in there during the bedroom, Ann sees them, they start a fight, right. Okay. Well, all of a sudden it looks like he's hitting her but he's got a knife, where did the knife come from? The knife just didn't appear out of thin air. And here's what I'm asking you to consider. Who -- you don't keep a knife in the bedroom, okay. She didn't testify that she saw him walk up to the kitchen and get a knife and then walk back, which by the way if that had really happened, that's plenty of time to escape. Knives don't appear in bedrooms and we're going to get to that later.

So at some point she testified he apparently has a knife, you know, the knife comes around from wherever in the bedroom or from the hall or wherever, wherever it supposedly they came into contact with each other with the knife, Candace jumps on his back supposedly after she been, according to her, repeatedly choked, right, and raped, she jumps on his back. And then at some point Tyree begins to stab her. And then according to Candace, according to Candace now, here we go again, Ann runs with the kids and locks herself in the bedroom, all right, with the children. And supposedly after that Candace ran off or got out of the door, she says she kicked open the screen door. She said she went through the screen door and somehow I believe, if

it was Tyreek I don't know if she said he was trying to get in here but these - these - these facts don't add up. If you break them down and you take a look at it there's no way. And law enforcement didn't do that because they took what they told them, their side of the story is the gospel, never questioned it. And because they never questioned it they never followed up on it. And then Candace testifies that she went out the back door and walked all the way around and then comes back towards Elaine Manning's apartment. Now, we've got this aerial view, right, of Maplewood. And at some point Candace would've, according to her, she comes out here and walks all the way around to the front, right, to supposedly Elaine's apartment, P3. That's a good -- that's a good walk. Look at that it's in an L shape, right. You walk all the way around, - well, why wouldn't you run off and bang on some of the other apartments that are closer like on the other side. She goes straight to Elaine's. It's almost like it was seem that she was following somebody out the door. Because that -- because Elaine's apartment was not the closest, it's not the closest place to run to. Think about that. She supposedly walked all the way around to Elaine's apartment but if you're running away from somebody, if you're running away from somebody you gonna run to the nearest place to safety and that's not the nearest place of safety. Why

didn't she run to her friend Tonya's house which is closer to somebody that she knew better? That may or may not be -- well, and it may or may not be -- I think Tonya testify that she lives in the same building but that's out here, it's a long way to walk around past many other people when you're running and more safe avenues of escape when you're looking for help. She said she went out the back and walked all the way around. That's not where you go when you're running from somebody. Luckily, Ann - I lost my blue marker but it's okay, ah, here it is - Ann says that she walked in and she makes the mistake - the mistake that she thought they were having, thought they were having consensual sex, okay. If that were true, how would you mistake what Candace describes and then what Ann says that she saw first of all? Well, first of all I thought having consensual sex and I was going to leave and then Candace runs out and screams "he's trying to kill me" not she didn't run out screaming "he raped me" like Candace said on the stand. Now, if that had really happened and you had seen your own sister run out of a door or run to a door in the bedroom and scream "he killed me" -- ah, "he raped me, he raped me" you would remember that. That would be somewhat -- I'd say somebody would remember that. That would be ingrained in your mind and apparently that didn't happen because it's not. These are deviations from each

other that would not be there unless the story was false, unless it was was cooked up. I mean, the facts are facts, y'all. This is the testimony. Look at the evidence. Look at the testimony and look at the evidence. And then he ask Ann, did you ever lock yourself in the bedroom? No. I didn't locked myself in the bedroom. All right. According to Ann, Ann says that she's the one that left first and took the kids over to Elaine Manning's house. According to Candace, Candace escaped while at some point Tyreek Hayes was going after Ann or that Reedy All Boss was going after Ann. Well, who left first? Those stories they don't, they don't line up. They don't line up. And at some point - at some point at no point did anyone ever take a look at all the differences and say oh, hold on now, wait a second, all this stuff doesn't add up. And Ann if I'm not mistaken, and again if you want to hear the testimony when you go in the jury room you can just request that it be replayed for you, the evidence, it's in evidence, supposedly Ann runs out with the children and Candace is still in there and then Candace is still in the house and then when she goes to Elaine's, Ann says that she sees Tyreek Hayes peek out the door of the apartment of the front door. That's the first time that's ever been said. Now, we don't have when statements were taken, remember the statement of Ann was trying to be recorded on the body

camera, the body camera is dead. Lorie Tyler's body camera the battery was dead. So they don't go back and get another statement from her to see if the story sticks because, why? Because they said so, I mean, case closed. They got the guy. What they say is what were gonna do. What we're gonna go with. But here luckily, luckily and Lorie Tyler did a very good job of, at the beginning, interviewing Ann. And remember she does incident reports. They're correct. They're accurate. They're precise and they're detailed, right. Nowhere in any of this report that she took, that she made, that she pays attention to, that she reviews does it ever mention, did she ever mention Ann saying that he peeked out of the door after I had gone to Elaine Manning's house? What we know based on the evidence that Ann had told Lorie Tyler was that she mistook what she says she saw as consensual, that Candace runs out, that Candace begins to scream. She testified that -- Ann informed Lorie Tyler that, at that time in the bedroom, that Tyreek began poking her or that the suspect began poking her with a knife that, again, magically appeared in the bedroom because people keep bedrooms or keep knives in the bedroom, no. So here's where the story starts to unravel and no one paid attention to that. So I want to kinda jump into that investigation and you have - there was no - look at these and these aren't even all of them -

there's no part of that apartment complex or that house and it's not a mansion it's apartment complex that they didn't photograph, okay. There's no part of that apartment complex that they didn't photograph. And supposedly five days later, on October 5th as you heard, Candace on her own free will and accord brings to the police a knife blade, a knife blade, okay. Supposedly she said her son had found behind the nightstand. Okay. So now you've got, you got plenty of time to think well, you know, I got to have a reason to keep this, that there would be a knife in the bedroom so she brings up a knife blade that was found in the bedroom without a handle, without the part which would be traced back to somebody who's holding the knife, right. And you heard the State say, well, I would assert to you that that knife handle broke. Nobody talked about anything about a knife handle breaking at all. If that knife -- if that blade had been in that house at the time of the, of her being stabbed, they would've found it. Make no doubt about it, okay. And this investigation was misguided but it was not un-thoroughal. That thing would've been found. There's no way. It would've been found. And it's not a coincidence that, that blade was brought to the police without the handle. Now, you can take a look at this knife, this knife blade is like the one that was found in the field it's just like the one - and again I'm going to

talk about that knife blade that was found in the field in the minute- it's a good thing I didn't go to med school - it's just like the one the blade that was turned, that thing was riveted on. That thing -- that's not -- look at that, that thing is stuck on there. There is no way that, that thing would've come off during the stabbing. Somebody took that thing off of that other blade. And they took it off because they didn't want the police to know that, they didn't want the police to have that handle. Because you know where that things going, it's going to sled. And it's gonna be searched for DNA -- it's gonna be checked for DNA which it was and miraculously that knife blade had Ann's DNA on it, okay. So she brings back the knife blade with no handle to the police that tested positive that had Ann's DNA on there, okay. Not a coincidence. It wasn't in the house at the time that the police investigated it. And somehow miraculously it ends up and Candace's possession, okay.

Now, Ms. Burchstead brought up, you know, what reason did they have to lie? And you know what, we don't know because was no investigation of that. I don't know if it's fear of somebody. I don't know if it's love with somebody. And I don't know if is a combination of both, all right. But that right there wouldn't have happened had somebody else not been involved. And nobody gave it a second

thought. Nobody gave it a second thought. Nobody.

What else you have, I'm gonna segue into -- let's talk about the State's missing pieces for just a second, all right. Now, this 911 call that was missing, all right, you heard testimony from Ms. Anika Sellers that, that call is on the system for a year and then it gets erased, okay. Now, I don't know why you didn't take it upon yourself to preserve, I say calls, there were calls, there were 911 calls, plural, multiple, that were erased from that system because no one preserved them. And the reason why the police didn't preserve them it's not because they didn't do that intentionally, and actions speak louder than words and they didn't think they needed it. Like we've got our guy. What do we need the 911 call for, we got him - the calls rather. But you look at this CAD first call: stabbed everywhere; losing blood; Elaine calls this in; male party left. Male party left. It doesn't say anything about Reedy Boss. Stabbed everywhere; losing blood; Elaine called this in; male party left; unknown direction travel; it was very hard to understand female party because she was yelling on the phone. All right. The first one was placed at 9:29. The next one was placed at 9:32. Next, 9:37 advised that law enforcement is on the scene; 9:38, male party called in to advised that there was an emergency Maplewood Apartments. He advised P3, okay. Called the

male party back, 911 call male party back and got no answer. Then went back to the voice recording to see if could get the name of the male party it sound like some guy name "Radio" on Facebook, okay. And this is when everybody is in there yelling, right. Later on, the male party call back advised his name was James. He was asked did he know the victim's name because it was hard to understand the original caller, if he knew the guy that did the stabbing. This guy stated that he didn't know, he just pulled up and was advised to call 911. And no one on the scene was interviewed other than -- well, I no one on the scene was interviewed, no one on the scene was really formally interviewed except for Candace and Ann. No one on the scene was really even spoken with except for Candace, Ann and Elaine and there never was an interview with Elaine, formal interview, at all period. And you know why? They didn't think they needed to and actions speak louder than words. Hey, we don't need it. We believe them. They've got the guy. We don't need to talk to her. We don't need to interview her. We don't need to memorialize any statement. Going back, so even though the police got that 911 call nothing was followed up on that. Nothing whatsoever was followed up on that. Another missing piece that we saw, let's go to that -- let's go to that forensic sexual exam - somewhere in here - what you have in that

forensic sexual exam is you have the questionnaire. You have the questionnaire of -- what you had in this forensic sexual exam is we had nurse Bass come and testify, right. And nurse Bass, you know, she filled out all of the stuff, made sure all of this stuff was accurate, okay. And according to Candace on the stand, remember, she said he went with me to the bathroom and I couldn't use the bathroom, right. She told the sexual assault nurse that she both urinated and defecated and also that she both ate, no, excuse me, vomited. She vomited. Which there is no vomit found anywhere at that house. And then it goes on to say that - and I don't mean to get too graphic with you - but description of contacts mentions penis and it mentions finger, yes. It doesn't mention unsure, it mentions yes. It doesn't mention anything about anybody assert any fingers inside of her, all right. And these people that fill these out and go over these are professionals, all right. They're not going to get this kind of stuff wrong. And then unsure, kissing unsure, biting unsure, oral sex unsure, and then the patient states she's unsure because she passed out multiple times after strangulation. Well, she testified that she had to perform oral sex with which she was, according to her, was conscious so you would know whether or not that was going on. Nobody scrutinize this. Nobody looked at it. Nobody gave it a second thought.

Nobody. And you know what else about the sexual assault protocol, we heard from nurse Bass that didn't conduct the genital, she said I didn't do the genital inspection, Dr. Mijalli who investigated all the stabbed wounds and everything else about the choking but we didn't hear from any doctor who nurse Bass testified did the genital examination and that was because there was no trauma to the genital area. There was a woods light highlight areas where there was fluid which is consistent with the sexual encounter. There's no lacerations, no cuts, no bruising, no redness, no swelling, no nothing but to indicate consensual sex. It doesn't indicate there was any force sexual contact whatsoever. That's why you didn't hear from the doctor that did the genital inspection.

Now, investigator Turner testified, and I want to make this clear, everything that Jason Turner said on that stand is the truth as far as what he did and what he didn't do. He was honest. Made no doubt about what he did do, made no doubt about what he didn't do. He was -- everything was accurate. And he mentioned about after he talked to Tyreek Hayes, you know, he told him in the interview I'm gonna follow up on this and I don't, you know, we don't have -- everybody is treated equal. We don't have anybody, um, we're gonna go back and confront them with this. And I asked him, you didn't go back and confront them about this.

And he said, yeah, I did. And he did. But it was so -- it was so -- he as them -- he went back and said, confronted them with the story and they said, no that's not true and then that was it. He created a vast array of supplemental incident reports. And he says the paperwork usually starts after the arrest of you're an investigator. He didn't even make a mention in this incident report of going back and talking to them because it wasn't even an afterthought to him. He didn't -- he didn't put any thought into whether or not what Tyreek told him needed to be followed up on. He'd already made up his mind from the get-go. And his investigation after that everything that happened was confirmation bias. It's confirmed bias and didn't think twice about.

We don't have any other standards of DNA to compare to any of the stuff because they didn't go get them. They didn't follow up and they didn't think they needed to follow up on it to get any other standards or see if there were any other standards to collect. Because they said so. It's a dangerous thing. You know every body part that somebody has the tongue can do the most damage. I guess figuratively speaking as far as damage to somebody's life and I'm not trying to take away for one second or tried to distract you from the fact that these two women were assaulted with a knife and wounded, okay. That happened.

But he didn't do it. And we would probably know who did if certain things were done that weren't done that needed to be done.

Like I say, y'all, this is not a complicated series of events to get straight. Also I want to call your attention, while we're on the subject of knives over here, this knife that miraculously appeared just the blade with no handle, there was a knife, the only knife found during the course of this investigation while the police investigated, they found one knife on scene when they responded and that knife was at Elaine Manning's house. Remember the Paula Dean knife we talked about laying next or in the very close vicinity I believe was testified to, to blood. The blood that was indicated was from one of these two women. And Ms. Manny didn't want that thing taken into custody. But investigator Turner, he took it into custody at that time just to be safe, but where did it not end up? Sled. Never got sent down there. Why? They didn't think it need to. You find a knife near blood where a victim of a stabbing took place and you never sent it down to sled. And actions speak louder than words. Never made it. Were no follow-up interviews or questions of any of the other neighbors around and they didn't interview Tonya Moore who is a friend of Candace, who said they dropped them off and conveniently said, "you're not get'in

anything". You remember Tonya Moore who said she was out with her friend girl and then accordingly, then she changed her story and says that it was just her, Candace and Reedy, right. She can't even keep that story straight. You know, she conveniently said told us, "you can come in but you're not get'in anything" okay.

What happened was that the government - I mean, the government collectively if you want to call it the State call it the State but it's the government to which you pay taxes - took their word as the gospel and then that was it that led the investigation. Their word is not the gospel. Tyreek didn't get, he didn't get treated as an equal. This is America everybody suppose to be equal, he didn't get treated as an equal. Because they took their words, they took these women words as the gospel. Now, I want to talk to you about Tyreek and Ms. Burchstead talked a little bit about when he got up there and how history doesn't make sense. I want to tell you this, does Tyreek make himself out to look like a hero? No. I asked, the only question I ask on redirect was, "were you scared?" "Yes." I mean, he said I got between him and the girl. I mean, that's not something you want to be proud of, right. And here's another thing when he got up and got - and I want to explain this to you about Tyreek - first of all, everybody in America has got the Fifth Amendment Right. He didn't

have to go down to talk to Jason Turner. He could've asked for a lawyer. And you know what that would've been used against him. You would've never heard about it. He didn't have to talk to them and give a recorded statement, he did. He didn't have to get up on this stand and testify and withstand cross-examination from somebody who is a professional cross examiner. These ladies did but he didn't and he did. He didn't have to give his cheek swab. They would've gotten anyway with a warrant or an order but he didn't have to give it but he didn't, he gave it twice. He didn't have to do that. And if he had not testified here the same thing would've applied, you would've been instructed, you don't take that into consideration. But here's what didn't happen on cross-examination, never not once and Tyreek gave a recorded statement, never not once was he, was he contradicted by what he said previously for what he said today because they would have done it, they do it for a living. They would've found it. Never not once was he contradicted from the prior statement. Never not once.

Like I said, Tyreek wasn't treated as an equal in this investigation which you should have. But fortunately you all sworn under oath to be fair and impartial without bias and that's your duty. You got to do that. And these things can't be ignored any longer. And one of the things

I think me and the State agree on is that you guys have as much power as you're probably ever gonna have and you've got the power to set it right. As I said, you know, you don't work for the government this is why trials exist. This is why they have to have -- this is why they have to have evidence and had to have it looked at by somebody who doesn't work and who's not employed and who has no allegiance of the government in situations like this.

Now, I've been in charge with Tyreek's case for a long time. When I sit down I can't -- I'm done. I have no more power. I have -- I can't do anything else at this point all of that transfers to y'all. I'm asking y'all to use that power the way it's supposed to be used. The State hasn't proven him guilty of any of these crimes beyond a reasonable doubt. The State says there is no doubt. Who are you going to believe them or your lying eyes? It's the way they make it look. You can see it, is there and it's there for a reason and the reason is that he didn't do this. He didn't -- there was no rape and he didn't stab anybody. I'm asking y'all to find him not guilty because that's your duty.

Thank you.

THE COURT: Ms. Burchstead?

MS. BURCHSTEAD: Thank you, Your Honor.

Closing Arguments- Ms. Burchstead:

You know why I didn't ask him about what he had said before because what he told you on the witness stand didn't make any sense. I didn't need to. He didn't really explain anything to you just some other dude did it. Some other dude did it while he stood there and watched part of it, bounced around, it just didn't make any sense. I didn't think I needed to beat him up anymore. His story from that witness stand what he chose to tell y'all yesterday didn't make any sense. He got between him and the girl but he's not injured at all. He's got no like the one old little wound, right. He didn't have any defensive wounds. He didn't actually get between the girl. He didn't provide any help. No injuries. No calls to EMS, 911. And remember the timeline he puts himself at Shalanda's between seven and eight and 911 is called at 9:29, does that make any sense? No. Because he still raping and strangling Candace. And you don't attack her with the knife if you didn't rape her and strangle her. Maybe he wasn't gonna do it until the sister showed up.

And the knife that was found by Candace's son that she brought to law enforcement she didn't know what night have been found in the field. She didn't know they were both black Diamond and they matched. She just knew, hey, look we found this I better get this to law enforcement with Ann's blood on it. What do they do, go cut Ann later, make

it up. They're not making this up. Naked and running, are we gonna be critical of where she ran? Are you kidding? She's trying not to die. She's following her sister who probably left a blood trail herself.

And the 911 call at 9:29: stabbing everywhere. And, yeah, Mr. Swilley went back through and may notation it doesn't actually say Reedy Boss until later, and you'll have it in the jury room to look at, it said "went back and listened" when you go back and actually listen to the recordings then transcribed in there what it was, it was Reedy Boss. That's still even within a few minutes. Law enforcement goes there, it's Reedy Boss. Reedy Boss! Reedy Boss! Reedy Boss! Naked and bleeding, it's Reedy Boss! You're not thinking about pinning it on someone else. And if you want to pin it on someone else, do you really have to blame Tyreek? If you're trying to protect someone maybe you just don't say who did it. I don't know. Somebody attacked me. You're not gonna pin it on somebody else. The truth is that Tyreek did this. He went after both of them with the knife. And, yeah, if she's in and out of consciousness he absolutely could have gotten the knife from the kitchen and held it in the bedroom. He's probably trying to figure out what he's gonna do then Ann shows up and now he's got to do it. And it was chaotic. Sure, a little bit of differences in their stories. Locked in the

bedroom. Not locked in the bedroom. If they wanted to fabricate they had three years to get together and say, hey let's get all the details just right so we can really get this guy. No, they came in and told you the truth. You're scuffling, you might not remember in the door or not in the door. And Candace did not say that Tyreek went running after Ann. No. Looked out the door, Ann says she sees him looking out the door. He looks out the door and he locks it. And Candace goes out the only available exit that side door in the kitchen. You've got the pictures. You see that side door, remember that screen door busted through. She's running for her life. That was the chance she had.

And the sex assault kit, this is an adult woman, not necessarily going to find tearing, okay. Especially, if she's passed out when he's doing it. We know he attacked her with a knife. We know she was strangled. Are we really critical of whether she remembers going to the bathroom and not? I believe her testimony was "couldn't go". My interpretation of that was she couldn't go at first. Pardon for this but sometimes when you get in there, you know, you can't quite do it right away. Who cares? Is that what this case is about? No! She was sober when she talked to law enforcement. Should also had just been attacked. She answered the questions asked. Maybe they didn't ask her if there was oral sex and she was

in and out of consciousness. That rape protocol questionnaire, she doesn't remember! She doesn't remember because she was in and out of consciousness. She is consistent that she was strangled, held against her will, raped, and then she and her sister were sliced at the neck and stabbed and ran for help and immediately, immediately, Reedy Boss. Three years later from that witness stand, crying, "that man did it" because he did. There is no doubt, none. And we ask that you find him guilty.

Thank you.

THE COURT: All right. Ladies and gentlemen, let's take a rule short break before I charge you on the law. We'll be back in about ten minutes. And again do not discuss the case. We'll get you back in very shortly.

(Whereupon, the jury exits the courtroom at 11:02 a.m.)

THE COURT: All right. Let's take a short ten minute break, go to the restroom, get back.

(Whereupon, the court takes a short break)

(Whereupon, the court is back on the record at 11:18 a.m.)

THE COURT: All right. Is everybody in that needs to be in?

MR. SWILLEY: I believe so.

MS. BURCHSTEAD: Yes, sir.

THE COURT: All right.

(Whereupon, the court is waiting for the audience to get in

and be seated)

THE COURT: All right. There will be no going in and out while I am charging the jury on the law. Everybody was good during the arguments. There was no up and down. But I don't need in and out during the charge to the jury. All right. Bring the jury in.

(Whereupon, the jury enters the courtroom at 11:20 a.m.)

THE COURT: All right. Ladies and gentlemen, before I charge you on the law which you're to apply to the facts as you find them in this case, I want to first thank you for your patience this week. But most of all I want to thank you for the attention that you have paid. You been a very attentive jury throughout the course of this trial so you've done a great service for the State and the defendant and the court, itself. I want you do know that very much appreciated by the court. I'm gonna ask that you please bear with me as I go through this charge. It's rather lengthy but I'm required by law to provide this information to you. A lot of it I'll have to read to you so I asked that you bear with me with regards to that. There's no way I can memorize all of this and speak to you directly, but do be patient. Pay attention. Try not to let your thoughts wander because this is the law that you will apply to the facts in this case.

Judge's Charge:

Now, the indictments in this case charged the defendant with criminal sexual conduct in the first degree, kidnapping, attempted murder as to Candace Simpson, attempted murder as to Ann Covington, and possession of a weapon during the commission of a violent crime. I remind you that the fact that the defendant was arrested, charged and indicted in this case, is not evidence in this case and cannot be considered by you as evidence of guilt in this case, nor does it create any presumption or inferences of guilt. This document that I hold are simply the formal, written instrument which contains the charges made against the defendant. They are the formal documents by which this case is brought into this court.

Now, the indictments in this case allege several different offenses against as I have just said. Indictment one is 2016-875 for attempted murder. And that attempted murder is with regards to Candace Simpson. The second indictment is 2016-GS-17-876 which is for criminal sexual conduct first degree. Indictment number three is 2016-877 which is for kidnapping. Indictment number four is 2016-878 which is possession, which is for possession of a weapon during the commission of a violent crime. And then the other indictment, the last one, is 2016-879 which is attempted murder as to Ann Covington.

Each one indictments charges a separate and distinct

offense. You must decide each indictment separately on the evidence and the law applicable to it uninfluenced by your decision as to any other indictment. The offenses of assault and battery of a high and aggravated nature, and assault and battery in the first degree, the elements of which I will explain to you later are what we call lesser included offenses of attempted murder and they may be considered by you in your deliberations. The defendant may be convicted or acquitted on any or all of the offenses charged. You will be asked to write a separate verdict of guilty or not guilty for each indictment.

Now, the defendant has pled not guilty to this indictment, and that plea puts the burden on the State of South Carolina to prove the defendant guilty. A person charged with committing a criminal offense in South Carolina is never required to prove himself innocent.

I charge you that it is an important rule of the law that the defendant in a criminal trial, no matter what the seriousness of the charge may be, will always be presumed to be innocent of the crime for which the indictment was issued unless guilt has been proven by evidence satisfying you of that guilt beyond a reasonable doubt. This presumption of innocence does not end when you begin your deliberations, but it accompanies the defendant throughout the trial until you reach a verdict of guilt based on

evidence satisfying you of that guilt beyond a reasonable doubt.

The presumption of innocence is like a robe of righteousness placed about the shoulders of the defendant which remains with the defendant until it has been stripped from the defendant by evidence satisfying you of the defendants guilt beyond a reasonable doubt.

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

What is reasonable doubt in the law? A reasonable doubt is the kind of doubt that would cause a reasonable person to hesitate to act. The State has the burden of proving the defendant guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true, such as by the greater weight or preponderance of the evidence. In criminal cases, the States proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendants guilt. There are very few things in this world that we know with absolute

certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crimes charged, you must find the defendant guilty. If on the other hand, you think there is a real possibility that defendant is not guilty, you must give the defendant the benefit of the doubt and find him not guilty.

I remind you that, during this trial, you and I have certain duties to perform. As the trial judge, it is my responsibility to preside over the trial and I've also have the duty to rule on the admissibility of the evidence offered during this trial. You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record in this case during this trial, you must disregard that testimony. You are to consider only the testimony which has been presented from this witness stand, any exhibits which have been made a part of the record in this case, and any stipulations of counsel.

I have the additional duty to charge you the law applicable to this case. As the presiding judge, I am the sole judge of the law of this case, and he did sure duty as jurors to accept and apply this law as I now state it to you. If you already have any idea as to what the law is or

what the law ought to be and it does not agree with what I now tell you the law is, you must abandon these ideas because you are sworn to accept the law and apply the law exactly as I state it to you.

In every case tried in this court before a jury, the jury becomes the sole and exclusive judge of the facts in a case. A trial judge cannot intimate, state, comment on, or make any statement to a trial jury about the facts of a case. Since you, the jury, are the sole judge of the facts in this case, you are not to infer from what I have said during this progress of this trial in ruling upon the admissibility of evidence, or otherwise, or anything that I say now during the course of this instructions to you, that I have any opinion about the facts in this case. The law does not allow me to have an opinion about the facts in this case. This is a matter solely for you, the jury, to determine. As jurors, it is your duty to determine the effect, value, weight, and truth of the evidence presented during this trial.

There are two types of evidence which are generally presented during a trial, direct evidence and circumstantial evidence.

Direct evidence directly proves the existence of a fact and does not require deduction.

Circumstantial evidence is proof of a chain of facts

and circumstances indicating the existence of a fact.

Crimes may be proven by circumstantial evidence. The law makes no distinction between the weight or the value to be given to either direct or circumstantial evidence, however, to the extent the State relies on circumstantial evidence, all of the circumstances must be consistent with each other, and when taken together, point conclusively to the guilt of the accused beyond a reasonable doubt. If these circumstances merely portray the defendant's behavior as suspicion, the proof has failed.

The State has the burden of proving the defendant guilty beyond a reasonable doubt. This burden rest with the State regardless of whether the State relies on direct evidence, circumstantial evidence, or some combination of the two.

Now, those definitions, excuse me, sometimes are somewhat confusing when we talk about direct and circumstantial evidence. Obviously direct evidence is something that you've seen, you have direct knowledge of it and you know what it is. I give you an example; if we were to go outside and look up at the sky and we see a jet plane going across, we see it, we're looking at it. We know that, that's a jet plane and that's direct evidence. If we go out or another group goes out a little bit later and they look up at the sky and all they see is that white

vapor trail that's left by jet a plane, they don't to the jet. But they know from experience that jet planes leave that white vapor trail so they would know that a jet plane had just crossed the sky, even though they didn't see it, they know it because the circumstantial evidence of the vapor trail being left behind. I tried to give that as a somewhat of a simple explanation, something I can understand myself, quite frankly.

Now, Necessarily, you must determine the credibility of witnesses who have testified in this case. Credibility simply means believability. It becomes your duty as jurors to analyze and to evaluate the evidence and determine which evidence convinces you of its truth.

In determining the believability of witnesses who have testified in this case, you may believe one witness over several witnesses or several witnesses over one witness. You may believe a part of the testimony of a witness and reject the remaining part of the testimony of that same witness. You may believe the testimony of a witness in its entirety or reject the testimony of a witness in its entirety. You may consider whether any witness has exhibited to you any interest, bias, prejudice, or other motive in this case. You may also consider the appearance and manner of a witness while on the witness stand.

Now, our rules of evidence ordinarily do not permit

witnesses to testify to opinions or conclusions. An exception to this rule exists for witnesses we call "expert witnesses." And we had several expert witnesses testify. You heard me qualify them as experts throughout the trial. A witness who, by education and experience, has become expert in some art, science, profession, or calling may state an opinion as to relevant and material matter, in which the witness claims to be an expert and may also state the reasons for the opinion.

You should consider any expert opinion received in evidence in this case and, like any other evidence, give it the weight you think it deserves. If you decide that the opinion of an expert witness is not based on sufficient education and experience, or if you conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

An expert witness' testimony is to be given no greater weight than that of other witnesses simply because the witness is an expert. Further, you are not required to accept an experts opinion, even though it is not contradicted.

Now, There has been evidence presented that witnesses have made prior statements which are not consistent with the witnesses' present testimony. You may use this

evidence to decide whether to believe the witness. You may also use evidence of the earlier contradictory statements to determine the truth of those statements. It is up to you to decide whether to believe the earlier statements or the testimony given at trial.

If a witness has shown to have knowingly testified untruthfully concerning any material matter, you may consider this in determining whether to trust the witness' testimony as to other matters. You may reject all testimony of that witness or give all or part of the testimony the weight you think it deserves.

Now, with regards to the particular charges that these indictment contain, first of all we'll look at first, criminal sexual conduct in the first-degree. Our law states, and the defendant is charged with criminal sexual conduct in the first-degree, the first element which the State must prove beyond a reasonable doubt is that the defendant engaged in a sexual battery with the victim. A sexual battery is sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another persons body. Except when the intrusion is accomplished for medically recognized treatment or diagnostic purposes.

If you find that the State has not shown beyond a

reasonable doubt that a sexual battery occurred, you would must stop deliberating and your verdict would have to be not guilty.

If you find that a sexual battery did occur, you must then decide whether the State has proven beyond a reasonable doubt, excuse me, if you find that a sexual battery did occur you must then decide the State has proven beyond a reasonable doubt that the defendant used aggravated force to accomplish the sexual battery.

Aggravated force means the use of physical force or physical violence of a high and aggravated nature to overcome the victim. This includes the threat of use of a deadly weapon or strangulation or anything of that nature that is violent.

The victim then, it must be shown, the victim submitted to sexual battery while the victim was also the victim of forcible confinement, kidnapping, robbery, extortion, burglary, housebreaking, or any other similar act or offenses.

The defendant caused the victim, without the victim's consent, to become mentally incapacitated or physically helpless. This is another elment.

Mentally incapacitated means that the victim was rendered temporarily unable to evaluate or control his or her conduct. This condition may be caused by some illness,

defect, the influence of a substance, or some other cause.

Physically helpless means that the victim was unconscious, asleep, or for any other reason physically unable to communicate consent to the sexual battery.

An attempt -- an attempt is an effort to accomplish a crime which does not succeed. An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended. The State must show more than mere preparation and intent. There must be some overt act committed in the effort to commit the crime.

Intent means intending the result which actually occurs; not accidentally or involuntary. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent.

As to the charge of attempt murder, in order to prove this crime, the State must prove the defendant attempted to kill another person with malice aforethought, either express or implied.

Malice is hatred, ill-will, or hostility towards another person. It is the intentional doing of a wrongful act without just cause or excuse and with an intent to inflict an injury or under circumstances that the law will infer an evil intent.

Malice aforethought does not require that malice

exists for any particular time before the act is committed, but malice must be exist in the mind of the defendant just before and at the time of the act is committed. Therefore, there must be a combination of the previous evil intent and the act.

Malice aforethought may be expressed or inferred. These terms, "express" and "inferred" do not mean different kinds of malice but merely the manner in which malice may be shown to exist. That is either by direct evidence or by inference from the facts and circumstances which are approved. Express malice is shown when a person speaks words with express hatred or ill will for another or when the person prepared beforehand to do the act which was later accomplished; for example, lying in wait for a person or any other acts of preparation going to show that the deed was within the defendant's mind would be express malice.

Malice, however, may be inferred from conduct showing a total disregard for human life. Inferred malice may also arise when the deed is done with a deadly weapon. A deadly weapon is any article, instrument, or substance which is likely to cause death or great bodily harm. Whether an instrument has been used as a deadly weapon depends on the facts and circumstances of each case.

The following are examples of instruments which may be

deadly weapon: a pistol, a shotgun, a rifle, a dagger, a knife, a razor. Fist is a deadly weapon: a hand or fist is not normally considered a deadly weapon. However, under some circumstances, depending on the manner and means of its use, the wounds inflicted, and other relevant facts, a hand or fist may be considered a deadly weapon. It is for you to decide in this case, beyond a reasonable doubt, whether or not a hand or fist is a deadly weapon.

Ordinary objects may become deadly weapon when the facts show that they had been used to inflict seriously bodily harm or death.

If facts are approved beyond a reasonable doubt sufficient to raise an inference of malice to your satisfaction, this inference would be simply an evidentiary fact to be considered by you, the jury, along with the other evidence in this case, and you may give it the weight you decide it should receive.

A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs; not accidentally or involuntary. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. Evidence of the character of the act, the character of the instrument use,

the manner in which it was used, the purpose to be accomplished, and the resulting wounds or injuries may be considered in determining the intent with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and willfully commits an act, the natural tendency of which is to destroy another's life.

Kidnapping: The defendant is charged with kidnapping. The State must prove beyond a reasonable doubt that the defendant knowingly and unlawfully seized, confined, inveigled, decoyed, kidnapped, abducted, or carried away another person without authority of law.

To do a thing unlawfully is to do it willfully against the law.

Knowingly means with knowledge, consciously, not accidentally.

Seize means to take hold of suddenly or forcibly.

Confined means to limit, restrict, or enclosed within bounds, imprisoned, or shut or keep in.

Inveigle means to lure, entice, or lead astray by false representations, promises, or other deceitful means.

Decoyed means to lure by, or as if by, decoyed. A decoy is something to entice a person into a trap.

Kidnap is to remove a person against his will by unlawful force or by fraud.

Abduct means to carry off secretly or by force for an illegal purpose.

Carry away means to remove.

The State does not have to prove that the defendant did all of these things. Instead, if you find beyond a reasonable doubt that the defendant did any of these things, you may find the defendant guilty of kidnapping.

Something done without authority of the law is something which the law does not sanction, permit, allow, condone, or provide justification for.

The kidnapping does not have to be for any personal or monetary gain for any illegal purpose, but may be for any reason whatsoever.

The defendant is charged with possession of a weapon during the commission of a violent crime. The State must prove beyond a reasonable doubt that the defendant was in possession of a knife or visibly displayed what appeared to be a knife during the commission of a violent crime.

A knife is a cutting instrument consisting of a sharp blade fastened to a handle.

In order to find the defendant guilty of possession of a weapon during the commission of a violent crime, you must first find the defendant guilty of either committing a violent crime or attempting to commit a violent crime. Criminal sexual conduct in the first degree, kidnapping,

attempted murder, assault and battery of a high and aggravated nature, and assault battery in the first degree are all violent crime.

A person commits the offense of assault battery of a high and aggravated nature if the person unlawfully injures another person, and great bodily injury to another person results; or the act is accomplished by mean likely to produce death or great bodily injury.

Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

Assault and Battery first-degree, a person commits the offense of assault and battery in the first degree if the person unlawfully; injures another person, and the act either involves non-consensual touching of the private parts of an adult, either under or above clothing, with lewd and lascivious intent; or occurred during the commission of a robbery, burglary, kidnapping, or theft; private parts mean the genital area or buttocks of a male or female or the breasts of a female.

A person may also commit the offense of assault and battery in the first degree if the person unlawfully: offers or attempts to injure another person with the present ability to do so, and the act either: is

accomplished by means likely to produce death or great oddly injury; or occurred during the commission of a robbery, burglary, kidnapping, or theft.

Great bodily injury means bodily injury which causes a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of a bodily member or organ.

The defendant in this case contends that another person committed the charged crime and that he had nothing to do with it. The law places no burden on the defendant to prove that someone else committed the crime. Thus, there is no burden upon him to prove the other person's guilt. The burden is on the prosecution to prove beyond a reasonable doubt that the defendant was present at the scene and that he committed the crime. The State must prove that allegation, along with all the other elements of the offense, beyond a reasonable doubt.

Now, ladies and gentlemen, there are nine possible verdicts which you may find in this case: guilty as to criminal sexual conduct in the first degree, not guilty as to the criminal sexual conduct in the first degree; guilty as to kidnapping; not guilty as to kidnapping; guilty as to attempted murder on Candace Simpson; not guilty as to attempted murder on Candace Simpson; guilty as to attempted murder on Ann Covington; not guilty as to attempted murder

on Ann Covington; guilty as to possession of a weapon during the commission of a violent crime; not guilty as to possession of a weapon during the commission of a violent crime; guilty as to assault battery of a high and aggravated nature on Candace Simpson; not guilty as to assault and battery of a high and aggravated nature on Candace Simpson; guilty as to assault and battery of a high and aggravated nature on Ann Covington; not guilty of assault and battery of a high and aggravated nature on Ann Covington; guilty as to assault and battery in the first degree on Candace Simpson; not guilty as to assault battery in the first degree on Candace Simpson; guilty as to assault and battery in the first-degree on Ann Covington; or not guilty as to assault battery in the first-degree on Ann Covington. There is no significance whatsoever in the order in which I state these possible verdicts; it is simply that one must be stated first.

Ladies and gentlemen, ma'dam foreperson, I have a jury verdict form for you that you will use in the courtroom upon the conclusion of your deliberations once you have reached a verdict. It has instructions on part of this. It starts out and it deals with the criminal sexual conduct in the first-degree charge and then it goes down to the kidnapping charge. Then we have attempted murder on Candace Simpson which you'll find some instructions

underneath. It's states, if you find the defendant guilty do not consider the next two lesser included offenses. But if you find him guilty on the attempted murder you stop right there with regards to that offense. However, if you find that the defendant is not guilty of attempted murder you would consider the next two lesser included offenses. First would be the assault and battery of a high and aggravated nature charge. And again if you find the defendant guilty on that charge, you would stop. You would not go any further considering any other assault charge. However, if you were to find him not guilty of assault battery of a high negative nature you would then go down and consider the next assault charge which is assault battery in the first-degree and you would find the person guilty or not guilty of that charge. And then we go down with attempted murder on Ann Covington, it follows the same procedure. And you'll have the instructions here that tells you, if you find him guilty here, just stop. If not, you continue on to the assault and battery of a high and aggravated nature, if you find him guilty, you stop. If you don't find him guilty you continue down to assault battery in the first-degree on Ann Covington. And then the last charge is the possession of a weapon during the commission of a violent crime and you'll consider that. So that is all the indictment charges that are to be

considered separately and to be dealt with. The only thing that is to be considered beyond that would be the attempted murder charges which I've explained having the lesser included offenses of assault battery first-degree and assault battery of a high and aggravated nature. So actually there are three things that you could consider with regards to the attempted murder charge. Now, this can be somewhat confusing. I hope it's not. I hope it will be self-explanatory when you go back into the jury room. But, of course, at any time you have any questions or anything you can present that in writing on a piece of paper, hand it to the bailiff or to the deputy whoever's outside the jury room and that will be presented to me, then I can get you back in here and possibly answer any questions that you might have during the course of your deliberations.

Now, I remind you that your verdict must be verdict must be a unanimous verdict. All 12 of you must agrees on the verdict. Once that verdict has been reached, Madam foreperson, you will check the appropriate boxes, guilty or not guilty, as these offenses, you will then sign your name on the bottom of the last page. And then you will knock on the door and let somebody know that you have reached a verdict and that will be presented to the court and we'll bring you back into the jury room at that point in time to announce the verdict, at that point in time.

Now, I'm going to ask you to retire to the jury room at this time. Don't start discussing it. I've got to take up some matters with the attorneys and make sure they have no exceptions to anything that I've said. Make sure that they don't request that I tell you anything else. We've got to get all of the exhibits together and bring them into you, into the jury room. You go ahead and retire now, get comfortable. And just very shortly the deputy or bailiff will bring to you all the exhibits and the verdict form and they will say begin your deliberations and then you can start at that point in time. Okay. Thank you very much. Thank you very much for your tentativeness throughout this trial. Oh, wait a minute, let me have the two alternates. I'm sorry. Let me have the two - the two alternates stay here.

(Whereupon, the jury exits the courtroom at 11:49 a.m.)

THE COURT: Ms. Bethea?

MS. BETHEA: Yes.

THE COURT: And Ms. Cooke?

MS. COOKE: Yes, sir.

THE COURT: All right. Since all of our twelve jurors have remained throughout the trial and are here today we have no need for you to serve any further. I always hate it when alternates have to sit through an entire trial particular like this one and then I'll get to

be involved in and participate in the final decision to be made. Now, you are welcome to stay around, hang around and see what happens, see what your fellow jurors do with regards to this case. You don't have to. But you are welcomed to. Further, you don't have to talk to anybody about your opinion or what you think if you don't want to. However, you can if you want to. If somebody were to approach you as you were leaving or even the next day or two and say, what would you have done? What was going on? What were your thoughts? You can say I don't want to talk to you. And if you say that, that should end it. Or you can answer them and talk to them if you want to. If you were to tell somebody that you didn't want to talk about it and they continued to pursue you or harass you or try to get the information out of you, all you need to do is to let the clerk of court know, let the deputy sheriff's office know and I'll take care of that individual if they harass you anyway. But it's entirely left up to you, voluntary on your part. Again, you are welcome to stay, stick around, see what happens with regards to your fellow jurors or you're welcome to leave. I do want to thank you for your service. Thank you for responding to your summons to come here. As we explained earlier our justice system would not work without jurors and people who are willing to serve as jurors. As I said earlier this is the most

important civic duty that you can perform for your county, and your state, and your country. You have any questions you want to ask me?

MS. BETHEA: Can we stay in the courtroom?

THE COURT: Ma'am -- you can stay, yeah, in the courtroom. You can hang around, you know, or whatever and if we end up getting lunch for the other jurors if they want to stay let's get lunch for them, Madam, clerk, okay, because they've worked hard this week even though they're not getting to make the final decision.

Now, counsel, is there any exception to my charge?

MS. BURCHSTEAD: No, Your Honor.

MR. SWILLEY: No, Your Honor.

THE COURT: Okay. All right. Then we'll gather the exhibits together and get them to the jury along with this verdict form so they can get started.

(Whereupon, the jury starts deliberations at 11:59 a.m.)

THE COURT: All right. Counsel, we have a couple of question from the jury. The first one is, we would like to see/read his statement? The second one is all the transcript/interviews from call? I assume they mean the 911 call. Obviously, the statement is not admitted into evidence. They can't see it. The transcript all they had what the CAD ---

MS. BURCHSTEAD: CAD ---

THE COURT: --- report, that's been introduced and I'll tell them that's all they can consider just what's been introduced into evidence.

MR. SWILLEY: Judge, I would just request or explain to the jury that the record is closed and they have to decide the case off what they've heard ---

THE COURT: Yeah, I'm gonna do that. They can only consider what's been introduced during the course of the trial and I'll explain that to them.

MR. KOZAK: Your Honor, are they asking for the statement he made on the stand or his statement that was referenced ---

THE COURT: I assume they mean his statement ---

MS. BURCHSTEAD: To Law enforcement.

THE COURT: --- the written statement ---

MR. KOZAK: Okay.

THE COURT: --- it doesn't say, it just says his statement. I can ask her when she comes to verify that so. It don't -- it doesn't say his testimony.

MS. BURCHSTEAD: Right.

THE COURT: It says, statement.

MS. BURCHSTEAD: I would agree with, Your Honor. And if we can just direct their attention to the CAD and maybe give them the exhibit number for the CAD so they're clear on what it is.

THE COURT: Do you know the number of that, Lisa?

COURT REPORTER: Yes, sir. It's number 82.

THE COURT: Eighty-two?

COURT REPORTER: Yes, sir.

THE COURT: It's not a full transcript but it's ---

MS. BURCHSTEAD: Right. That's what they had.

THE COURT: --- statement -- bring in the jury in, all of them.

(Whereupon, the jury enters the courtroom at 12:18 p.m.)

THE COURT: All right. Madam Foreperson, I have the questions that you have submitted to the court. The first one is we would like to see/read his statement? Are you speaking about the statement that he made to law enforcement?

MS. FAULK: Yes.

THE COURT: Okay. All right. There's no way that you can see that. The reason being it was not introduced into evidence and it was not made an exhibit or part of the record and since is not part of the record I can't let you, I can't let you see it. And the second statement is all the transcript/interviews from call? I assume you mean the 911 call? That -- there is no transcript that I know of with regard to that. If there was one or is one it was not introduced into evidence. Now, there is what they call the CAD report which is exhibit number 82 which has I guess a

brief description of what the 911 calls were and that's the only thing we have with regards and the only thing that you can consider. The record is closed. The only evidence or exhibits that you can consider are those that you have back in the jury room with you. Anything else that was not introduced in evidence is not part of the record in this case and cannot be considered by you. Purely and simply you make your decision based on the oral testimony of those witnesses and the physical evidence which was introduced in the form of certain exhibits. Now, does that give you an explanation that you understand?

MS. FAULK: Yes.

THE COURT: Okay. Thank you. If you have any other questions don't hesitate.

(Whereupon, the jury exits the courtroom at 12:20 p.m.)

THE COURT: For the record, counsel, this has been marked as Court's Exhibit Number One.

(Whereupon, the Question by the Jury has been marked and entered into evidence as Court's Exhibit No. 1)

THE COURT: Okay. We'll stand at ease.

MS. BURCHSTEAD: Thank you, judge.

(Whereupon, the court goes back on the record at 2:57 p.m.)

THE COURT: All right. Counsel, the question is, what will happen if we can't agree on one of Tyreek Hayes' charges? Signed by Debbie Faulk, the foreperson. What I

am inclined to do is to ask them how close to being deadlock they are with regards to that one issue. Give them a semi Allen charge which would be the one Allen charge, tell them to go back -- I don't really want to tell them that, you know, we can take the verdicts on the other indictments because they may just throw in the towel and not give the consideration to this last charge. So I want to be careful in how I answered this. That's why I'm going over it with you. First of all to get some feel -- I'm certainly not going to ask for a count. I'm going to tell them right off the bat, and in light of this latest case that's come down about being coercive and everything, we've got to be careful. But I want to ask them about maybe something to the effect, how far apart are you without giving me any numbers? Do you think further deliberations would allow you to, you know, reach a verdict? Without, again, trying to tell them what would happen with the other charges if they reached a verdict. Any objections to how I am planning to approach this?

MR. SWILLEY: Your Honor, so you just plan on giving them an Allen charge? Is that -- you're just gonna give them an Allen charge?

THE COURT: I'm basically, at this point time, gonna give them, you know, an Allen charge with regards to this one, apparently one charge that there hung up on. And

that would be the one Allen charge, I'm not gonna give them one Allen charge, of course, mean, they come back later they'd have to agree to go back and deliberate, otherwise, I'd have to declare a mistrial with regards that one issue that one charge so. I can't give them two Allen charges.

MR. SWILLEY: Right.

THE COURT: I mean, there's not much way around not giving one now at this point since I've got this question so.

MR. SWILLEY: I thinking Allen charge would be appropriate at this time it seems like.

MS. BURCHSTEAD: I don't disagree, you know, as it relates to, you know, meaningful deliberations would be fruitful to continue as to that charge, yeah, basically the Allen charge.

THE COURT: I'm mean, it's -- I can't really sort of touch on an Allen charge without doing an Allen charge. I mean, ---

MS. BURCHSTEAD: Right.

THE COURT: --- if I even touch on it then that's gonna trigger an Allen charge with Appellate Court, you know, whether I do it in full or not and then, you know, I can't do it but once.

MS. BURCHSTEAD: Right. Agree.

MR. SWILLEY: That's correct.

THE COURT: Sort of an unusual question so.

MS. BURCHSTEAD: I beg the Court's indulgence.

THE COURT: Sure. But you understand I don't want to tell them, you know, what happens to the other charges if they can agree on this ---

MS. BURCHSTEAD: Right.

THE COURT: And that's what they're actually asking but, you know.

MS. BURCHSTEAD: That's what Mr. Kozak and I were discussing. If they're not asking what happens to the other charges then I don't think we need to discuss them but we just don't want to get into a situation where they think it has to be a package deal. So as long as it's an Allen charge as to the one charge I think that's appropriate as to the one count.

THE COURT: It's a little bit of an odd question. I won't be directly answering their question by doing an Allen charge but ---

MR. KOZAK: What ---

THE COURT: Yes, sir, Mr. Kozak?

MR. KOZAK: What -- what I think we're concerned about is that they may not think they can give a verdict on some of the charges if they can't reach a verdict on all of the charges; and, so when you asked them or give them Allen charge they come back holding all the charges because they

think they have to come to a verdict on all of them.

THE COURT: I agree.

MR. KOZAK: That's the only thing we're concerned about.

THE COURT: Yeah.

MR. KOZAK: It's a tricky situation.

THE COURT: Sir?

MR. KOZAK: It's a tricky situation.

THE COURT: And I agree I don't want to, I don't want them to go back if they reached the decision and unreach it, so to speak. I mean, it is what it is. Technically, I guess I could tell them, you know, if they reached the decision, those decisions stand but I'm encouraging them and go ahead and give them the Allen charge and go back on this one other charge.

MR. KOZAK: I think a good -- I'm not trying to give you instructions ---

THE COURT: No, I'm ---

MR. KOZAK: --- but something along the line of not being able to reach a verdict on one charge does not necessarily effect the verdict on the other four. I don't know -- something along those lines where ---

MR. SWILLEY: Well, Judge, we don't know, I guess, we don't really know what particular charge it is and I think the verdict on one ---

THE COURT: We don't know what the charge is and we don't know what they've done on the others, I mean ---

MS. BURCHSTEAD: Right.

MR. SWILLEY: Well, the verdict on one could effect one om the other, I guess, feasibly as to the weapons charge to the kidnapping or attempted murder that could be construed or that could be misconstrued I think. I don't know -- my position -- my position is just to be safe just to give the jury just an Allen charge, I guess, that's what I'm asking for.

MS. BURCHSTEAD: Your Honor, according to Pauling versus State, you know, if they're deadlocked I think it's appropriate to advise the jury that only the charges on which they can't agree would have to be retried and just to incorporate that in the Allen charge. As Mr. Kozak said we just want the jury to understand it doesn't have to be a package. It can be but it doesn't have to be. As long as that's clear I think we're comfortable with that.

THE COURT: All right. Well, in my initial charge I told them that you must decide each indictment separately on the evidence, you know, and the law applicable to it is to be uninfluenced by your decision as to any other indictment. I might can reemphasize that some want and state to them, you know, each indictment stands on its own. And, you know, if you've reached decisions on some they're

not to be effected by what you do on any charge that you can't reach a decision on, something to that effect.

MR. SWILLEY: Okay.

MS. BURCHSTEAD: That's sounds good to the State, Your Honor, and go ahead with the Allen charge as to the one their hung, yes, sir.

THE COURT: Okay. All right. Bring them in.

(Whereupon, the jury enters the courtroom at 3:06 p.m.)

THE COURT: Madam court reporter, mark this as the next exhibit.

(Whereupon, the Question by the Jury has been marked and entered into evidence as Court's Exhibit No. 2)

Allen Charge:

THE COURT: All right. Ms. Faulk, I have your question. For the record the question reads: What will happen if we can agree on one of Tyreek Hayes' charges? First of all, let me caution you as I explain things to you or if I ask you any question, do not at any point in time tell me of any type of split or how the jury may be voting on this particular charge, do you understand that? Don't give me the split whatsoever as far as that's concern.

Now, with regards to your question I'm going to reread some of what I've read to you earlier when I first began my charge on the law when I talked about all the different separate indictments that he's charged with. You remember

I said each indictment charges a separate and distinct offense. You must decide each indictment separately on the evidence and the law applicable to it on influenced by your decision as to any other indictment. In other words, each one of these charges stands on its own. Now, it appears from your question that you have one particular charge that you can't agree on, is that correct?

MS. FAULK: That's correct.

THE COURT: Okay. What I must do with regards to that is that if you've reach any agreement on the others as I said, you know, they stand on their own. This other charge that you have if you have become deadlocked on it, so to speak, I have a particular charge I need to give you which will pertain to the one you can't agree on.

Now, as you all know the decision has to be unanimous on each and all the charges. Apparently you have reached an unanimous decision on some of them but there's one you're still left undecided. Everybody knows that when a matter is in dispute, things are in dispute it's hard for two people to agree on something. The court is very much aware when you've got twelve people trying to agree on something it's even more difficult. But, and in most cases absolute certainty cannot be reached or expected, however, you have a duty to make every reasonable effort to reach a unanimous verdict and in doing this you should consult with

one another, express your own views, and listen to the opinions of your fellow jurors. Tell each other how you feel and why you feel that way. And you may have already been doing this in your other deliberations. But you have to discuss your differences with open minds.

Although, the verdict of the jury must be unanimous. Every one of you has the right to your own opinion. The verdict you agree to must be your own verdict. The result of your own convictions and you should not give up your firmly held beliefs merely to be in agreement with your fellow jurors.

A majority should consider the minorities position and the minority should consider the majority's position. You should carefully consider and respect the opinions of each other and reevaluate your position for reasonableness, correctness, and impartiality. You must lay aside all outside matters and re-examine the questions before you based on the law and the evidence in this case.

If you're not able to reach a decision with regards to this one charge it would become necessary for me to declare a mistrial. And in that case, it doesn't mean anybody wins or loses on that particular charge. What it means is that at some point in time in the future, we'll come back here and we'll have to try that charge that was not decided upon. And it would be some other jury sitting where you

sit right now. The same people would be here. The same lawyers would be here. The same questions would basically get asked again. The same testimony would be introduced. We just go through the whole process we've done this week again. You are selected in the manner at the same source of any future jury would be selected and there's no reason for me to think that any other juror is going to be any better than the twelve of you, any more intelligent than you, any more impartial than you or any more conscientious than any of you are and they couldn't be any more competent than you are. So with that said and they'll be no other different evidence as I've told you. Nothing will be more clearer to them than has been made clear to you in this particular case. So what I want to do is ask you to go back into the jury room and reconsider this one charge that you are having problems with and see if you cannot reach, within a reasonable time, a decision, a unanimous decision, with regards to this one particular charge. As I indicated earlier -- as I indicated earlier they all stand on their own. So if you've reach decisions on the others you done your job with regards to them. But I ask that you go back now and try to reach a decision on this one last, this one other charge that you're having difficulty with. Any questions?

(Whereupon, the jury indicates no)

THE COURT: Okay. Thank you. You may return to the jury room.

(Whereupon, the jury exits the courtroom at 3:12 p.m.)

THE COURT: All right. Any exceptions to what I explained to the jury?

MS. BURCHSTEAD: Not from the State.

MR. SWILLEY: No, Your Honor.

THE COURT: Okay. All right. Thank you. We'll see what they.

(Whereupon, the jury starts their deliberations again)

THE COURT: All right. Counselor, we have a verdict. Anything we need to take up before we bring the jury in?

MS. BURCHSTEAD: Not from the State.

MR. SWILLEY: No, Your Honor.

THE COURT: All right. Bring them in.

(Whereupon, the jury enters the courtroom at 3:33 p.m.)

Verdict:

THE COURT: Madam Foreman, I understand you've reached a verdict?

MS. FAULK: Yes, sir.

THE COURT: Would you hand the form up to the officer for me, please?

(Whereupon, the foreperson complies)

THE COURT: Thank you. All right. Madam clerk,

would you publish the verdict please?

THE CLERK: Yes, Your Honor. On Your Honor's docket the State of South Carolina versus Tyreek Dashawn Hayes, criminal sexual conduct in the first degree, not guilty. Kidnapping, as to the kidnapping, guilty. Attempted murder on Candace Simpson, guilty. On the assault battery of the high and aggravated nature on Candace Simpson, no verdict. On the assault and battery in the first degree on Candace Simpson, no verdict. On the attempted murder on Ann Covington, guilty. On the assault and battery of a high and aggravated nature on Ann Covington, no verdict. Assault and battery in the first degree on Ann Covington, no verdict. Possession of a weapon during the commission of a violent crime, guilty. Signed by foreperson Debbie. If this is all of your verdicts, would you please raise your right hand?

(Whereupon, all jurors raised their right hands)

THE COURT: Does the defendant wish to poll the jury?

MR. SWILLEY: I do, Your Honor.

THE COURT: All right, sir.

THE CLERK: When I call your name you need to stand where you're seated and then I'll ask you a question, okay? I'll start with the foreperson, Debbie Faulk. Is this your verdict? MS. FAULK: Yes.

THE CLERK: Is it still your verdict?

MS. FAULK: Yes.

THE CLERK: Thank you. Connie Wheeler, is this your verdict?

MS. WHEELER: Yes.

THE CLERK: Still your verdict?

MS. WHEELER: Yes.

THE CLERK: Thank you. Michael Roberts, is this your verdict?

MR. ROBERTS: Yes.

THE CLERK: Still your verdict?

MR. ROBERTS: Yes.

THE CLERK: Thank you. Terry Webster, is this your verdict?

MR. WEBSTER: Yes.

THE CLERK: Still your verdict?

MS. WEBSTER: Yes.

THE CLERK: Thank you. Jarvis Dixon, is this your verdict?

MR. DIXON: Yes.

THE CLERK: Still your verdict?

MR. DIXON: Yes.

THE CLERK: Thank you. Terry Self, is this your verdict?

MR. SELF: Yes.

THE CLERK: Still your verdict?
MR. SELF: Yes.
THE CLERK: Patricia Derry, is this your verdict?
MS. DERRY: Yes.
THE CLERK: Still your verdict?
MS. DERRY: Yes.
THE CLERK: Thank you. Donta Norman, is this your verdict?
MR. NORMAN: Yes.
THE CLERK: Still your verdict?
MR. NORMAN: Yes.
THE CLERK: Thank you. Daisy Cuiman, is this your verdict?
MS. CUIMAN: Yes.
THE CLERK: Still your verdict?
MS. CUIMAN: Yes.
THE CLERK: Thank you. Carlton Hilburn, is this your verdict?
MR. HILBURN: Yes.
THE CLERK: Still your verdict?
MS. HILBURN: Yes.
THE CLERK: Thank you. Johnny Dial, is this your verdict?
MS. DIAL: Yes.
THE CLERK: Still your verdict?

MR. DIAL: Yes.

THE CLERK: Thank you. Keith Leonard, is it your verdict?

MS. LEONARD: Yes.

THE CLERK: Still your verdict?

MR. LEONARD: Yes.

THE CLERK: Thank you. That's it, all twelve, Your Honor.

THE COURT: Okay. Thank you, ma'am. All right, ladies and gentlemen of the jury, that concludes your service with regards to this trial. Concludes your services, obviously, this week it being Friday afternoon with regards your jury duty. First thing I want to do is thank you for your service and what you've done here this week. You have provided a valuable service to the County of Dillon, State of South Carolina and that does not go unnoticed by the court. I just don't sit here and say this just to be hearing myself talk. I sincerely mean how much I appreciate the fact that you responded to your summons and we have a lot of people that take off and run and look for excuses not to serve, but you all came forward and were willing to serve and ready to go forward and we do appreciate that. It's not easy serving on a jury. It's inconvenient serving on a jury and we're mindful of that and we understand that. But I do want you to know, as I

said earlier, I know of no more valuable civic duty that someone can perform other than serving on jury duty - the next thing other than that that's more important on that - would be serving in the military. So you've done a job that is not one that people thank you for very often. It's pretty much a thankless job but a necessary job in order for our judicial system to work. And, again, I do appreciate very much your willingness to serve and the job you've done here.

Now, no one can criticize you for what you've done and the decision that you mad. Nobody can harass you about it or anything of that nature. With that being said, after you leave here if you want to discuss your decision with somebody that's fine. If some of the lawyers would to contact you and want to discuss the decision and you're willing to talk to them, that's fine. You can talk about it now. I kept caution you not to all along but it's over and done that now and you can discuss it. But on the other hand if you don't want to talk about it to anybody, you don't have to. If someone were to come up to you and say, hey, Ms. Faulk, how y'all do this? How did it work out? If you want to talk to them it's fine. But if you say I don't want to talk about it, then they are supposed to leave you alone. If someone were to continue to press you for a discussion or something after you've told them you don't

want to talk, you let me know, and you let me know by way of contacting the sheriff's department or the Clerk of Courts Office about that person and I'll take it up with them and I'll deal with them. But it's purely up to you. I just want you to understand that you're free to talk or you can be quiet if you want to.

Now, in a few moments we will be or I will be sentencing Mr. Hayes, you don't have to stay for that but you're welcome to stay if you want to. You can go back out, collect your stuff, and come back in the courtroom and you're welcome to sit here or as I said, you're free to go home at this point in time because you have performed your duty and it's greatly appreciated. So I'll leave it up to you. Do you have any questions about procedure in general, not specifics about the case, but any questions you want to ask the court that I might possibly can answer for you?

(Whereupon, no juror responses)

THE COURT: Okay. Again, thank you very much for your service.

(Whereupon, the jury exits the courtroom at 3:42 p.m.)

THE COURT: Anything from the defendant?

MR. SWILLEY: Your Honor, I just, um, a couple of thing I just wanted to inform the court of. Judge, Mr. Hayes served 1018 days at the Dillon Detention Center. He, at the time of his arrest he was working two jobs ---

THE COURT: I'll let that go toward sentencing. We'll come up a little bit closer in a few minutes. I don't know if you had any motions or anything ---

MR. SWILLEY: Oh, Your Honor, um, I'm sorry. I'd move for the court to vacate the guilty verdict and I'd make I motion for new trial at this time.

THE COURT: Okay. Any response?

MS. BURCHSTEAD: We believe the jury reached a verdict and it's not appropriate.

Sentencing:

THE COURT: Right. I agree. The jury has spoken. The case was well tried by both the State and you, Mr. Swilley. The jury had sufficient facts upon which to reach the verdict that they did and I think the verdict is a reasonable one, and, therefore, I will respectfully deny your motion. Anything from the State?

MS. BURCHSTEAD: Not as to the trial, Your Honor.

THE COURT: Okay. All right. Bring Mr. Hayes around for sentencing.

MS. BURCHSTEAD: Your Honor, we're just finishing the paperwork, if you'll give us just one minute to pass that up.

THE COURT: All right. That's fine just let me know when you're ready.

MS. BURCHSTEAD: Yes, sir.

THE COURT: All right. Mr. Hayes, if you'll come around, please.

(Whereupon, Mr. Hayes complies)

THE COURT: Does the State wish to come forward?

(Whereupon, Ms. Burchstead steps forward)

THE COURT: All right. Mr. Swilley, I'd be glad to hear from you before I sentence the defendant and I'll certainly hear from the State if they wish to be heard from.

MS. BURCHSTEAD: Thank you.

MR. SWILLEY: Your Honor, as I began earlier, Mr. Hayes actually is, um, he's twenty-five. He's got two children age eight, and eight-year-old daughter and a four-year-old son. At the time he was arrested he was working two jobs. One was at Purdue and the other one was at Bojangles and he was just trying to support his children. I think I stated he had 1018 days in jail. He's lived his whole life in Dillon in an impecunious household come to find out. He's got three other siblings. I've been in contact with his mother. He does have a family that look out for him. Your Honor, he does, he does wish to address the court, however, I've advised him not to address the court pertaining any facts of the case and that's for appellate and perhaps post-conviction relief purposes. So I've advised him of that and asking the court not to

penalize him for not mentioning anything pertaining to that. But I would respectfully request that the court considering not imposing the high-end of the sentencing range under the statues. And I guess that's really all that I have and I guess, he wants to address the court whenever the court wants to hear.

THE COURT: I'll be glad to hear from him now.

MR. HAYES: Um, I stand before you and the court, basically, making good faith effort and all I'm asking you to do on my behalf is, if it's not for me for my children and my family is, show mercy on my behalf. I've, um, I've been away for three years and since day one, you know, I completely ask for mercy. I'm not asking for the full sentence. Since it's you, I've never been in front of you, never stood in front of you, never really gave law enforcement or anybody no problem and at the end of the day all I'm asking you can you please show mercy. Thank you.

MR. SWILLEY: And, Your Honor, just one more thing, as far as a prior criminal history I think the only thing on the NCIC is a strong armed robbery which he was given a suspended YOA sentence. It was, from understanding, it was a situation that had been a physical confrontation over some money that someone had owed him that resulted in some charges. But other than that I don't think he's had any, any significant run-ins with the law. So I'd ask the court

to bear that in mind as well.

THE COURT: Thank you, Mr. Swilley. Ms. Burchstead?

MS. BURCHSTEAD: Your Honor, specific to the prior record it is a 2015 strong armed conviction which was reduced from an armed robbery and my recollection and understanding of that is that it involved a pistol whipping situation and that was prosecuted here by the solicitor office so I don't know for sure the bases, the factual basis for that conviction. But it was reduced from an armed robbery. That was in 2015 and these crimes were committed while out on YOA parole. And we ask, obviously, Your Honor has heard the facts of the case and we just ask that you be mindful of the fact that we have two counts of attempted murder, two victims, and two women who were lucky to be alive. Thank you, judge. And just so Your Honor is aware, the victims are present in the courtroom. They know Your Honor has heard the facts in the case. They don't feel the need to address the court.

THE COURT: Okay. I was going to ask you if they wish to speak, okay.

MS. BURCHSTEAD: I'll just verify that. That's correct.

THE COURT: Okay.

MS. BURCHSTEAD: Thank you, judge.

THE COURT: Okay. All right. Mr. Hayes, the jury has spoken and they have found you guilty with regards to four of the five indictments that were handed down against you. The nature of these offenses is terribly troubling. This was certainly a violent crime if ever there were a violent crime. The photographs bear that out without me having to go into great detail. You asked for mercy but no mercy was shown to these two victims in any way whatsoever. They're lucky to be here today. Thank goodness they are still here today. Otherwise, you'd be looking at a murder charge instead of an attempted murder charge. But the jury was convinced unanimously and beyond a reasonable doubt that you attempted to murder both of these young ladies and I cannot ignore that fact in sentencing you. The jury, obviously, gave you the benefit of the doubt with regards to the criminal sexual conduct charge. But they were certainly convinced of your guilt with regards to the remaining charges.

Therefore, the sentence of the court with regards to indictment number 2016-GS-17-0875, attempted murder, the Court sentences you to the State Department of Corrections for a term of 30 years. With regards to indictment 2016-GS-17-0879, attempted murder, the sentence of the court is you be committed to the State Department of Corrections for a term of 30 years. Those sentences run consecutively.

With regards to the kidnapping charge, indictment 2016-GS-17-0877, the sentence of the court is you be committed to the State Department of Corrections for a term of 15 years. That sentence also run consecutive to the other sentences. And with regards to the sentence of possession of a weapon during the commission of a violent crime, the sentence of the court is - and that's on indictment 2016-GS-17-0878 - the sentence of the court is you be committed to the State Department of Corrections for a term of 5 years, again, that run consecutive to the other charges. You will be given credit for time served of 1018 days. Good luck to you. That's the sentence of the court.

MS. BURCHSTEAD: Thank you, Your Honor.

THE COURT: That's a total of 80 years.

(Whereupon, conclusion of the case on July 26, 2019)

CERTIFICATE

I, the undersigned Lisa S. Carter, Official Court Reporter for the Fourth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit Court for Dillon County, South Carolina, on the 23rd and 26th days of July, 2019.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

Lisa S. Carter

Lisa Carter

Circuit Court Reporter

January 12, 2020

ORIGINAL

ARREST WARRANT

2016A1720100575

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

THE STATE 201510001

against

Tyreek Dashawn Hayes

Address: ~~913 Moqueen St.~~ 197 Black oak Place

Dillon, SC 29536-4741

[redacted]

Sex: M Race: B Height: 5'11" Weight: 165

DL State: SC DL #: [redacted]

DOB: [redacted] Agency ORI #: SC0170100

Prosecuting Agency: Dillon Police Department

Prosecuting Officer: J. Turner - 0008

Offense: Murder / Attempted Murder

Offense Code: 3410

Code/Ordinance Sec: 16-03-0029

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Tyreek Dashawn Hayes on 10-2-16

Sgt Jeffrey Cook

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 1220
301 West Main Street
Dillon, SC 29536

VICTIM FORM RECEIVED BY JAIL

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA $19

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

Personally appeared before me the affiant J. Turner who being duly sworn deposes and says that defendant Tyreek Dashawn Hayes did within this county and state on or about 10/1/2016 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) in the following particulars

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

Defendant did in the city of dillon at maplewood apts on 10/01/2016 stab the victim Candice Simpson multiple times in the neck and upper chest area in an attempt to murder her.

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

Affiant's Address: 401 West Main Street, Dillon, SC 29536-3352

Affiant's Telephone: (843)774-0051

FILED
GWEN T. RYATT
CLERK OF COURT
DILLON COUNTY
2016 OCT -4 PM 2:03

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 10/1/2016 defendant Tyreek Dashawn Hayes did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) as set forth below

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 10/2/2016

(L.S.)

Signature of Issuing Judge

James Francis "Tip" Rogers

Judge Code: 6520

Judge's Address: P O Drawer 431, Dillon, SC 29536-

Judge's Telephone: (843)774-0049

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

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229

ORIGINAL

ARREST WARRANT

2016A1720100579

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

THE STATE 2016-10001

against

Tyreek Dashawn Hayes

Address 913 Mcqueen St.,

Dillon, SC 29536-4741

Phone: SSN [redacted]

Sex. M Race: B Height: 5 9 Weight 165

DL State: SC DL #: [redacted]

DOB [redacted] Agency ORI # SC0170100

Prosecuting Agency: Dillon Police Department

Prosecuting Officer: J. Turner - 0008

Offense: Kidnapping / Kidnapping

Offense Code: 0095

Code/Ordinance Sec: 16-03-0910

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Tyreek Dashawn Hayes on 10-3-16

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 1220
301 West Main Street
Dillon, SC 29536

VICTIM FORM RECEIVED BY JAIL _____

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
Dillon)

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21, 2003 SCCA 518

Personally appeared before me the affiant J. Turner who being duly sworn deposes and says that defendant Tyreek Dashawn Hayes did within this county and state on or about 10/ 1/2016 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) in the following particulars:

DESCRIPTION OF OFFENSE: Kidnapping / Kidnapping

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts.

That on October 1. 2016 in the City Limits if Dillon at 220 South Longstreet Road Apt P-4. one Tyreek Dashawn Hayes did unlawfully , confine victim. Candace Betrice Simpson from without authority of law.

FILED
GWEN T. WYATT
CLERK OF COURT
DILLON COUNTY
2016 OCT -4 PM 2:03

Signature of Affiant

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
Dillon)

Affiant's Address 401 West Main Street
Dillon, SC 29536-3352

Affiant's Telephone (843)774-0051

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 10/ 1/2016 defendant Tyreek Dashawn Hayes did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) as set forth below.

DESCRIPTION OF OFFENSE: Kidnapping / Kidnapping

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me on 10/ 3/2016 (L.S.)

Signature of Issuing Judge

Mackie Darrill Hayes (Dillon)

Judge Code: 8195

Judge's Address Post Office Drawer 431
Dillon, SC 29536-

Judge's Telephone (843)774-0049

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

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ORIGINAL

ARREST WARRANT

2016A1720100580

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

THE STATE 2016-10001

against

Tyreek Dashawn Hayes

Address 913 Mcqueen St.,

Dillon, SC 29536-4741

Phone: SSN [redacted]

Sex: M Race: B Height: 5 9 Weight: 165

DL State: SC DL # [redacted]

DOB: [redacted] Agency ORI #: SC0170100

Prosecuting Agency: Dillon Police Department

Prosecuting Officer: J. Turner - 0008

Offense: Weapons / Poss. weapon during violent crime

Offense Code: 0549

Code/Ordinance Sec: 16-23-0490

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Tyreek Dashawn Hayes on 10-3-16

Signature of Certified Law Enforcement Officer

RETURN WARRANT TO:

General Sessions
PO Box 1220
301 West Main Street
Dillon, SC 29536

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
Dillon)

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 21 2003 SCCA 518

Personally appeared before me the affiant J. Turner who being duly sworn deposes and says that defendant Tyreek Dashawn Hayes did within this county and state on or about 10/1/2016 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) in the following particulars:

DESCRIPTION OF OFFENSE: Weapons / Poss. weapon during violent crime

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That on October 1, 2016 in the City Limits of Dillon, one Tyreek Dashawn Hayes did knowingly and wilfully possess and display what appeared to be a knife during the commission of a violent crime.

FILED
2016 OCT -4 PM 2:03
CLERK OF COURT
DILLON COUNTY
ROBERT T. BYATT

Signature of Affiant

STATE OF SOUTH CAROLINA)
☐ County/ ☒ Municipality of)
Dillon)

Affiant's Address: 401 West Main Street
Dillon, SC 29536-3352

Affiant's Telephone: (843)774-0051

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 10/1/2016 defendant Tyreek Dashawn Hayes did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) as set forth below.

DESCRIPTION OF OFFENSE: Weapons / Poss. weapon during violent crime

Having found probable cause, and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me)
on 10/3/2016)
(L.S.))
Signature Presiding Judge)
Mackie Darrill Hayes (Dillon))
Judge Code: 8195)

Judge's Address: Post Office Drawer 431
Dillon, SC 29536-

Judge's Telephone: (843)774-0049

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

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624

ORIGINAL

ARREST WARRANT

2016A1720100581

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

THE STATE 2016-10001

against

Tyreek Dashawn Hayes

Address: 913 Mcqueen St.,
Dillon, SC 29536-4741

Phone: SSN [redacted]

Sex: M Race: B Height: 5 9 Weight: 165

DL State: SC DL #: [redacted]

DOB: [redacted] Agency ORI #: SC0170100

Prosecuting Agency: Dillon Police Department

Prosecuting Officer: J. Turner - 0008

Offense: Murder / Attempted Murder

Offense Code: 3410

Code/Ordinance Sec: 16-03-0029

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Tyreek Dashawn Hayes on 10-7-16

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:
General Sessions
PO Box 1220
301 West Main Street
Dillon, SC 29536

VICTIM FORM RECEIVED BY JAIL

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

AFFIDAVIT

ORIGINAL

Form Approved by S.C. Attorney General April 2nd 2003 SCCA 518

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

Personally appeared before me the affiant J. Turner who being duly sworn deposes and says that defendant Tyreek Dashawn Hayes did within this county and state on or about 10/1/2016 violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) in the following particulars.

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts.

That on October 1, 2016, One Tyreek Dashawn Hayes, did within the City Limits of Dillon at 220 South Longstreet Road Apt P-4 commit the above said crime by stabbing victim, Ann Shenine Covington ,causing several laceration to her neck, right hand /fingers and left forearm with a knife.

FILED
2016 OCT -4 PM 2:03
CLERK OF COURT
DILLON COUNTY

Signature of Affiant

STATE OF SOUTH CAROLINA

☐ County/ ☒ Municipality of

Dillon

Affiant's Address: 401 West Main Street
Dillon, SC 29536-3352

Affiant's Telephone: (843)774-0051

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 10/1/2016 defendant Tyreek Dashawn Hayes did violate the criminal laws of the State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of Dillon) as set forth below.

DESCRIPTION OF OFFENSE: Murder / Attempted Murder

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable.

Sworn to and subscribed before me on 10/3/2016

(L.S.)

Signature of Issuing Judge

Meckie Darrill Hayes (Dillon)

Judge Code: 8195

Judge's Address: Post Office Drawer 431
Dillon, SC 29536-

Judge's Telephone: (843)774-0049

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

ORIGINAL ORIGINAL ORIGINAL

625

STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

The Honorable Roger E. Henderson, Circuit Court Judge

Indictments: 2016-GS-17-0875, 2016-GS-17-0877, 2016-GS-17-0878, 2016-GS-17-0879

The State of South Carolina
v.
Tyreek Dashawn Hayes

RECEIVED
AUG 05 2019
SC Court of Appeals

NOTICE OF APPEAL

Appellant Tyreek Dashawn Hayes appeals the guilty verdicts and sentences imposed upon him by the Honorable Roger E. Henderson on July 26, 2019 on indictments 2016-GS-17-0875, 2016-GS-17-0877, 2016-GS-17-0878, 2016-GS-17-0879, for Attempted Murder (2 Counts), Kidnapping, and Possession of a Weapon during Commission of a Violent Crime. Appellate was sentenced to thirty years on Indictment 2016-GS-17-0875, fifteen years on Indictment 2016-GS-17-0877, five years on Indictment 2016-GS-17-0878, and thirty years on Indictment 2016-GS-17-0879 all to be served consecutively for eighty (80) years imprisonment.

Respectfully Submitted.

Matthew Swilley
Attorney for Appellant
129 S. Coit Street
Florence, SC 29501
Phone: 843-250-3632
Fax: 843-353-2500

August 2, 2019

Dillon, South Carolina

Other Counsel of Record:
Ms. Megan B Burchstead, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211

STATE OF SOUTH CAROLINA
In The South Carolina Court of Appeals

APPEAL FROM DILLON COUNTY
Court of General Sessions

The Honorable Roger E. Henderson, Circuit Court Judge

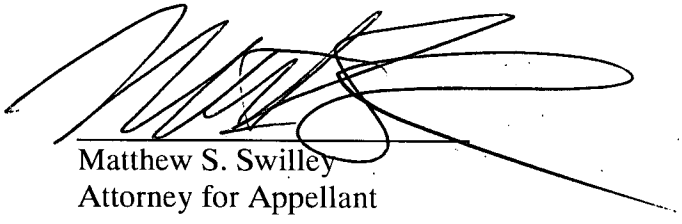
Indictments: 2016-GS-17-0875, 2016-GS-17-0877, 2016-GS-17-0878, 2016-GS-17-0879

The State of South Carolina
v.
Tyreek Dashawn Hayes

CERTIFICATE OF SERVICE

This is to certify that a copy of the Notice of Appeal in the above-captioned case was served upon counsel for the State by the undersigned by sending a copy via U.S. Mail to the following address:

Ms. Megan B Burchstead, Esq.
S.C. Attorney General's Office
PO Box 11549
Columbia, SC 29211



Matthew S. Swilley
Attorney for Appellant

RECEIVED
AUG 05 2019
SC Court of Appeals

Florence, South Carolina

August 2, 2019

RECEIVED
AUG 05 2019
SC Court of Appeals

FOURTH JUDICIAL CIRCUIT PUBLIC DEFENDER
MATT RIVERS
CIRCUIT PUBLIC DEFENDER

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: The State of South Carolina v. Tyreek Dashawn Hayes
Indictments:
Notice of Appeal

Ms. Kitchings:

Please find enclosed with this letter an original Notice of Appeal and a stamped copy of a Notice of Appeal filed with the Dillon County Clerk of Court's Office in the above-captioned case along with a Certificate of Service on opposing counsel. Please be aware that I represented Mr. Hayes as an Assistant Public Defender and the S.C. Commission on Indigent Defense should be representing Mr. Thomas for his appeal. Please let me know if your office needs anything else from me pertaining to this matter. Thank you.

Sincerely,

Matt Swilley

CC: Megan Burchstead, S.C. Attorney General's Office
Bob Dudek, SCCID
Tyreek Hayes

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1

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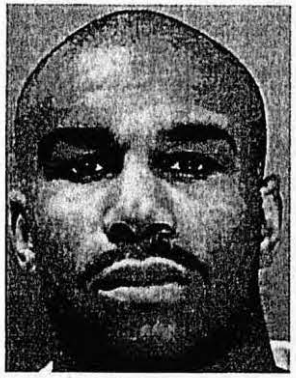
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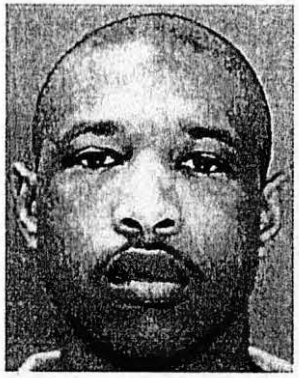
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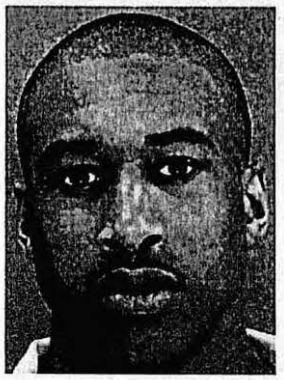
(w) Ann Covington
She Nine



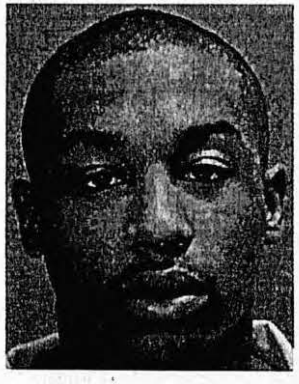
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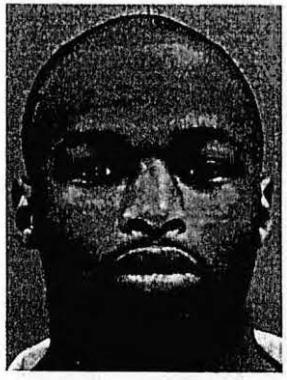
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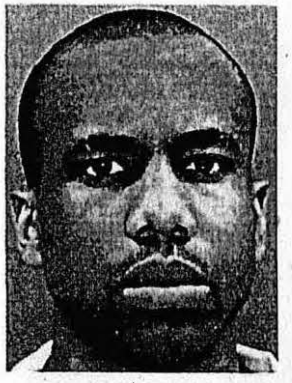
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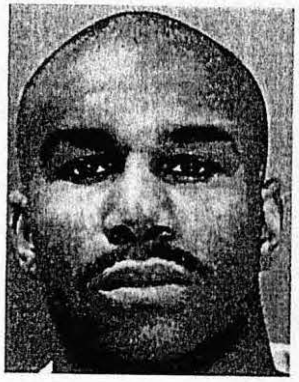
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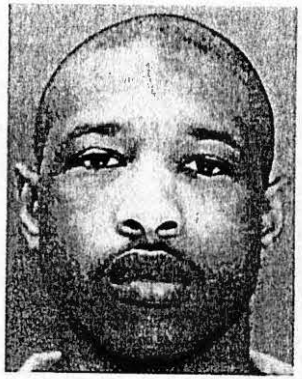
10/1/2016 6:50pm

Jason Turner

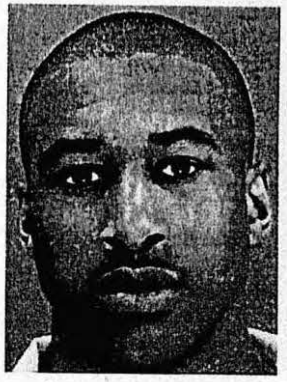
Clifton Covington Clifton Covington



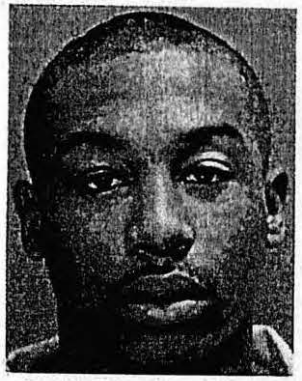
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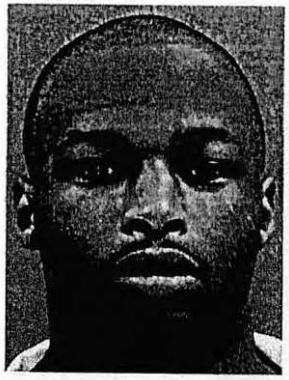
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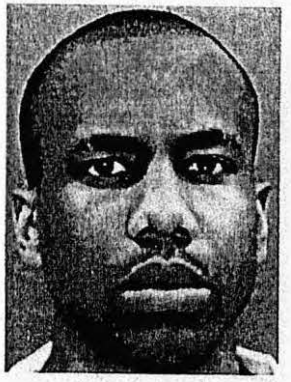
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634

10/1/2016 5:55pm @ Hospital

Jason Jones

Latoya Simpson

Latoya Simpson

From: Debbie Faulk
Juror 43

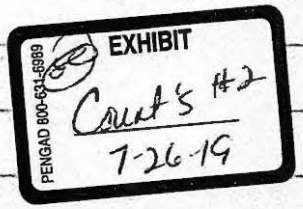
- We would like to see/read his statement
- All the Transtripes / interviews from all



~~If we can't agree on 1 of Tyreek Hayes~~

What will happen if we can't agree on one of Tyreek Hayes charges

Debbie Faulk
43



WITNESSES

J. Turner

Dillon Police Department

Law Enforcement Case #: 201610001
085

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to:

Defendant

ARREST WARRANT NUMBER
2016A1720100575

ARRESTED ON: 2016-10-02

ACTION OF GRAND JURY

TRUE BILL

Loretta Ellerbe
Grand Jury Foreperson

12/8/16
Date

VERDICT

Petit Jury Foreperson

Date

DOCKET NUMBER:
2016-GS-17-0875

The State of South Carolina

County of Dillon

COURT OF GENERAL SESSIONS

Term:
December 2016

THE STATE

vs.

Tyreek Dashawn Hayes

INDICTMENT FOR

Murder/Attempted murder Penalty statutes 16-03-0029; Felony Class A - eff date 6-02-2010

§16-03-0029

CDR Code: 3410

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

INDICTMENT FOR

Murdttempted murder Penalty statutes 16-03-0(Felony Class A - eff date 6-02-2010

§16-03-0029

At a Court of General Sessions, convenea December 8, 2016, the Grand Jurors of Dillon County present upon their oath:

ATTEMPTMURDER

CDR: 3416-3-29

That Tyreek Dashawn Hayes did in Dillon, on or about 2016-01, with specific intent to kill, attempt to kill Anna Covington with malice aforethought, either expressed or impl in violation of Section 16-3-29 of S.C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary tc the statute in such case made and provided.

William B. Rogers

WILLIAM B. ROGERS, JR.
SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Dillon)
STATE VS.)
Tyreek Dashawn Hayes)
AKA:)
Race: Sex: M Age: 25)
DOB: [redacted] SS#: [redacted])
Address: [redacted] Mcqueen St.,)
City,State,Zip: Dillon, SC 29536-4741)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016-GS-17-0875
A/W#: 2016A1720100575
Date of Offense: 10/1/2016
S.C. Code § : 16-03-0029
CDR Code #: 3410

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murder/Attempted murder Penalty statutes 16-03-0029; Felony Class A - eff date 6-02-2010 (Not More than 30)

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Megan E Fundyk Solicitor #5 Jud. Cir. 71716 SC Bar# _____ Defendant _____ Attorney for Defendant _____ SC Bar#

WHEREFORE, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 30 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: 2016-GS-17-0878, 0879 & 0877
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the SCDOC.
TS 1818 Days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso (Public Def/Probation)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114 (BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.75
TOTAL		$ 128.75

Clerk of Court/ Deputy Clerk
Court Reporter: Lisa Carter

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp.
May serve W/E begining
Substance Abuse Counseling
Random Drug/Alcohol testing
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

FILED GWEN THYATT CLERK OF COURT DILLON COUNTY 2019 JUL 26 P 4:41

☐ Appointed PD or appointed other counsel,
Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.
Presiding Judge
Judge Code: 2759
Sentence Date: 07/26/19

SCCA/217 (04/2018)

WITNESSES

J. Turner

Dillon Police Department

Law Enforcement Case #: 2016-10001
085

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

_____
Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to:

_____

_____
Defendant

ARREST WARRANT NUMBER
2016A1720100579

ARRESTED ON: 2016-10-02

ACTION OF GRAND JURY

TRUE BILL

Loretta Ellerbe
Grand Jury Foreperson

12/8/16
Date

VERDICT

_____
Petit Jury Foreperson

_____
Date

DOCKET NUMBER:
2016-GS-17-0877

The State of South Carolina

County of Dillon

COURT OF GENERAL SESSIONS

Term:
December 2016

THE STATE

vs.

Tyreek Dashawn Hayes

INDICTMENT FOR

Kidnapping / Kidnapping

§16-03-0910

CDR Code: 0095

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

INDICTMENT FOR

Kidnapping / Kidnapping

§16-03-0910

At a Court of General Sessions, convened on December 8, 2016, the Grand Jurors of Dillon County present upon their oath:

KIDNAPPING

CDR: 0095 16-03-0910

That Tyreck Dashawn Hayes did in Dillon County on or about October 1, 2016, unlawfully seize, confine, inveigle, decoy, kidnap, abduct or carry away one Candace Simpson, without authority of law, in violation of Section 16-03-0910, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

William B. Rogers

WILLIAM B. ROGERS, JR.
SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Dillon)
STATE VS.)
Tyreek Dashawn Hayes)
AKA:)
Race: Sex: M Age: 25)
DOB: [redacted] SS# [redacted])
Address: [redacted] Mcqueen St.,)
City,State,Zip: Dillon, SC 29536-4741)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016-GS-17-0877
A/W#: 2016A1720100579
Date of Offense: 10/1/2016
S.C. Code § : 16-03-0910
CDR Code #: 0095

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☑ CONVICTED OF or ☐ PLEADS
TO: Kidnapping / Kidnapping (0-30)
in violation of § 16-03-0910 of the S.C. Code of Laws, bearing CDR Code # 0095
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Meg K Dyakon 71716 _____ _____ _____
Solicitor Asst. AG. SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 15 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: 2016-GS-17-0875, 0876 & 0878
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the SCDOC.
1018 TS Days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
_____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso (Public Def/Probation)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114 (BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.75
TOTAL		$128.75

Clerk of Court/ Deputy Clerk
Court Reporter: Lisa Castel

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp _____
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

FILED
GWEN T HYATT
2019 JUL 26 P 4:45
CLERK OF COURT
DILLON COUNTY

☐ Appointed PD or appointed other counsel,
Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.
Presiding Judge
Judge Code: 2754
Sentence Date: 7-26-19

SCCA/217 (04/2018)

WITNESSES

J. Turner

Dillon Police Department

Law Enforcement Case #: 2016-10001
085

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to:

Defendant

ARREST WARRANT NUMBER
2016A1720100580

ARRESTED ON: 2016-10-02

ACTION OF GRAND JURY

TRUE BILL

Loretta Ellerbe
Grand Jury Foreperson

12/8/16
Date

VERDICT

Petit Jury Foreperson

Date

DOCKET NUMBER:
2016-GS-17-0878

The State of South Carolina

County of Dillon

COURT OF GENERAL SESSIONS

Term:
December 2016

THE STATE

vs.

Tyreek Dashawn Hayes

INDICTMENT FOR

Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

§16-23-0490

CDR Code: 0549

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

INDICTMENT FOR

Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death

§16-23-0490

At a Court of General Sessions, convened on December 8, 2016, the Grand Jurors of Dillon County present upon their oath:

POSSESSION OF A WEAPON DURING THE COMMISSION OF A VIOLENT CRIME

CDR: 0549 16-23-0490

That Tyreek Dashawn Hayes did in Dillon County, on or about October 1, 2016, possess a firearm, or visibly display what appeared to be a firearm, or visibly displayed a knife, during the commission or attempted commission of a violent crime, in violation of Section 16-23-0490, S. C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

WILLIAM B. ROGERS, JR.
SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Dillon)
STATE VS.)
Tyreek Dashawn Hayes)
AKA:)
Race: Sex: M Age: 25)
DOB: [redacted] SS# [redacted])
Address: [redacted] Mcqueen St.,)
City,State,Zip: Dillon, SC 29536-4741)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016-GS-17-0878
A/W#: 2016A1720100580
Date of Offense: 10/1/2016
S.C. Code § : 16-23-0490
CDR Code #: 0549

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Weapons / Poss. weapon during violent crime, if not also sentenced to life without parole or death (5 years)
in violation of § 16-23-0490 of the S.C. Code of Laws, bearing CDR Code # 0549
☒ NON-VIOLENT ☐ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)
The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☒ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Solicitor/1st A.G. 71716 SC Bar# | Defendant | Attorney for Defendant | SC Bar#

WHEREFORE, the Defendant is commited to the ☑ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 5 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.
☐ CONCURRENT or ☑ CONSECUTIVE to sentence on: 2016-GS-17-0879, 0877, 0875
☐ The Defendant is to be given credit for time served pursuant to S.C. Code §24-13-40 to be calculated and applied by the SCDOC.
TS 1018 Days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.
Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
Proviso (Public Def/Probation)	$500	$
§ 14-1-212 (Law Enforce. Funding)	$25	$ 25.00
§ 14-1-213 (Drug Court Surcharge)	$150	$
§ 50-21-114 (BUI Breath Test Fee)	$50	$
§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.25
TOTAL		$ 128.25

Clerk of Court/ Deputy Clerk
Court Reporter: Lisa Carter

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corps ☐
May serve W/E begining _____
Substance Abuse Counseling ☐
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

FILED
GWEN T HYATT
2019 JUL 26 P 4:11
CLERK OF COURT
DILLON COUNTY

☐ Appointed PD or appointed other counsel,
Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.
Presiding Judge
Judge Code: 2754
Sentence Date: 07/26/19

SCCA/217 (04/2018)

WITNESSES

J. Turner

Dillon Police Department

Law Enforcement Case #: 2016-10001
085

WAIVER OF PRESENTMENT

After being fully advised as to my legal rights, I hereby waive presentment to the Grand Jury.

Defendant

I hereby appear in my own proper person and plead guilty to the within indictment or to:

Defendant

ARREST WARRANT NUMBER
2016A1720100581

ARRESTED ON: 2016-10-02

ACTION OF GRAND JURY

Grand Jury Foreperson

Date 12/8/16

VERDICT

Petit Jury Foreperson

Date

DOCKET NUMBER:
2016-GS-17-0879

The State of South Carolina

County of Dillon

COURT OF GENERAL SESSIONS

Term:
December 2016

THE STATE

vs.

Tyreek Dashawn Hayes

INDICTMENT FOR

Murder/Attempted murder Penalty statutes 16-03-0029; Felony Class A - eff date 6-02-2010

§16-03-0029

CDR Code: 3410

William B. Rogers, Jr., Solicitor

STATE OF SOUTH CAROLINA)
)
COUNTY OF DILLON)

INDICTMENT FOR

Murder/Attempted murder Penalty statutes 16-03-0029; Felony Class A - eff date 6-02-2010

§16-03-0029

At a Court of General Sessions, convened on December 8, 2016, the Grand Jurors of Dillon County present upon their oath:

ATTEMPTED MURDER

CDR: 3410, 16-3-29

That Tyreck Dashawn Hayes did in Dillon, on or about 2016-10-01, with specific intent to kill, attempt to kill Candace Simpson with malice aforethought, either expressed or implied, in violation of Section 16-3-29 of S.C. Code of Laws, 1976, as amended.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

WILLIAM B. ROGERS, JR.
SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF Dillon)
STATE VS.)
Tyreek Dashawn Hayes)
AKA:)
Race: Sex: M Age: 25)
DOB: [redacted] SS#: [redacted])
Address: [redacted] Mcqueen St.,)
City,State,Zip: Dillon, SC 29536-4741)
DL#: [redacted] SID#:)
*CDL Yes☐ No☐ CMV Yes☐ No☐ Hazmat Yes☐ No☐

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2016-GS-17-0879
A/W#: 2016A1720100581
Date of Offense: 10/1/2016
S.C. Code § : 16-03-0029
CDR Code #: 3410

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Murder/Attempted murder Penalty statutes 16-03-0029; Felony Class A - eff date 6-02-2010 (Not More than 30)

in violation of § 16-03-0029 of the S.C. Code of Laws, bearing CDR Code # 3410
☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS ☐ §17-25-45
(CSC w/minor 1st or CSC w/minor 3rd)

The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. _____ (defendant's initials)
The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.
ATTEST:

Megan Buchstead Asst. Sol. 71716 _____ _____ _____
Solicitor SC Bar# Defendant Attorney for Defendant SC Bar#

WHEREFORE, the Defendant is commited to the ☒ **State Department of Corrections,** ☐ **County Detention Center,**
for a determinate term of 30 days/months/years or ☐ under the **Youthful Offender Act** not to exceed _____ years
and/or to pay a fine of $ _____; provided that upon the service of _____ days/months/years and/or payment
of $ _____; plus costs and assessments as applicable*; the balance is suspended with **probation** for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of probation, which are incorporated by reference.

☐ CONCURRENT or ☒ CONSECUTIVE to sentence on: 2016-GS-17-0877, 0875 & 0878
☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied by the SCDOC.
TS 1018 Days
☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

Pursuant to 18 U.S.C Section 922, it is unlawful for a person convicted of a violation of Section 16-25-20 or 16-25-65 (Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ **RESTITUTION:** ☐ **Deferred** ☐ **Def. Waives Hearing** ☐ **Ordered**
Total: $ _____ plus 20% fee: _____ $ _____
Payment Terms: _____
☐ Set by SCDPPPS _____
_____
Recipient: _____

*Fine:		$
§ 14-1-206 (Assessments 107.5 %)		$
§ 14-1-211(A)(1) (Conv. Surcharge)	$100	$ 100.00
§ 14-1-211(A)(2) (DUI Surcharge)	$100	$
§ 56-5-2995 (DUI Assessment)	$12	$
§ 56-1-286 (DUI Breath Test)	$25	$
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§ 56-5-2942(J) (Vehicle Assessment)	$40/ea	$
3% to County (if paid in installments)		$ 3.75
TOTAL		$ 128.75

Clerk of Court/ Deputy Clerk
Court Reporter: Lisa Carter

PTUP _____
_____ days/hours Public Service Employment
Obtain GED ☐
Attend Voc. Rehab. or Job Corp. _____
May serve W/E begining _____
Substance Abuse Counseling
Random Drug/Alcohol testing ☐
Fine may be pd. in equal, consecutive weekly/monthly pmts. of $ _____ beginning _____
$ _____ paid to Public Defender Fund
Other: _____

☐ Appointed PD or appointed other counsel, Proviso requires $500 be paid to Clerk during probation and shall be collected before any other fees.
Presiding Judge
Judge Code: 2754
Sentence Date: 07/26/19

FILED GLEN THYATT CLERK OF COURT DILLON COUNTY 2019 JUL 26 P 4:47

SCCA/217 (04/2018)

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Dillon County
Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREEK DASHAWN HAYES,

APPELLANT

CERTIFICATE OF SERVICE

Pursuant to the Supreme Court's Order "RE: Operation of the Appellate Courts During the Coronavirus Emergency," dated March 20, 2020, the undersigned hereby certifies a true copy of the Record on Appeal in the above-referenced case has been served upon William M. Blitch, Jr., Esquire, at the primary e-mail address listed in the Attorney Information System (AIS), which is wblitch@scag.gov, this 14th day of December, 2020.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with 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."

Respectfully Submitted,

RECEIVED
Dec 14 2020
SC Court of Appeals

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S.C. 29211-1589

ATTORNEY FOR APPELLANT

This 14th day of December, 2020.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

RECEIVED
Dec 21 2020
SC Court of Appeals

Appeal from Dillon County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2019-001303

The State, Respondent,

vs.

Tyreek Dashawn Hayes, Appellant.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
S.C. Bar No. 15608

Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

ATTORNEYS FOR RESPONDENT

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Other Authorities

Rule 801(c), SCRE 8

Rule 801(d)(1)(C), FRE 8

Rule 801(d)(1)(C), SCRE 8

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STATEMENT OF ISSUES ON APPEAL

I. The trial court did not err in admitting testimony of a police officer that the victim identified Appellant by his Facebook name because it is not hearsay. Further, the trial court did not err in finding it was an excited utterance. Finally, any possible error is harmless in light of the other evidence in the record.

STATEMENT OF THE CASE

The Dillon County Grand Jury indicted Appellant on charges of criminal sexual conduct in the first degree, two counts of attempted murder, kidnapping, and possession of a weapon during commission of a violent crime. He proceeded to trial before the Honorable Roger E. Henderson and a jury. The jury acquitted him of criminal sexual conduct, but found him guilty of all other charges. Judge Henderson sentenced him to thirty years for each count of attempted murder, fifteen for kidnapping and five for possession of a weapon. The sentences ran consecutively for a total of eighty years in prison.[1] On August 2, 2019, Appellant served his Notice of Appeal and subsequently served his Initial Brief of Appellant on July 27, 2020.

[1] Appellant's Statement of the Case includes unnecessary commentary regarding the jury charges given by the trial court which are entirely unrelated to the subject and issue on appeal. The State disagrees with the inclusion, especially in the procedural Statement of the Case, but the State's motion to strike was denied. It is also important to note, that notwithstanding counsel's commentary and characterizations, Appellant's trial court did not object to the jury instructions given, and specifically indicated his desire for the Allen charge referenced in Appellant's Statement of the Case. (T.595; 600; 603-604; R.478; 483; 486-487).

STATEMENT OF FACTS

Candace Simpson met someone named Reedy Boss, or Reedy All Boss, on Facebook and began communicating with him. (T.106-107; R.21-22). Reedy Boss was later identified as Appellant. On the evening of September 30 and into the morning of October 1, 2016, Simpson planned to head to a local club called Strikers with some friends and left her kids at her mom's house where her sister, Ann Covington also lived. (T.106; 108-109; R.21; 23-24). After going to Strikers, Simpson and a friend went to T Lees, another club. (T.111-112; R.26-27). While at T Lees, Simpson saw Appellant. (T.113; R.28).

Appellant asked for a ride home from T Lees because he lived in the apartment complex next to the one Simpson lived in. (T. 113; R.28). When they all got out of the car, Appellant asked about coming into Simpson's apartment. (T.115; R.30). Simpson went to wash off the smoke and change clothes. When she came back out, she originally sat in a recliner while Appellant sat on her sectional. He asked her to come over by him, and when she did, he started trying to kiss her. Simpson told Appellant to leave, but he would not. (T.116; R.31).

Instead, Appellant pulled Simpson into her bedroom. She tried to scream and bang on the wall to get the attention of her neighbor, but Appellant choked her immediately. He continued to drag her into the bedroom by the waist such that her feet were not touching the ground. (T.117; R.32). She begged him to stop, but he refused. She begged him to wear a condom at least, they ended up on the floor getting a condom. Appellant then raped Simpson. (T.118-119; R.33-34). Simpson passed out after Appellant began penetrating her with his penis. (T.119; R.34).

When she woke up, it was daylight and Appellant was just standing there watching her. (T.119-120; R.34-35). Appellant indicated he wanted to have sex again, but Simpson did not want sex. He asked her to do oral sex, and she agreed believing she would be choked if she did not

perform oral sex. (T.120; R.35). Ultimately, Appellant choked Simpson again. She begged him to stop, telling him she had children. Appellant said Simpson would tell and she kept begging for her life. She woke up again after the choking, and could barely walk. (T.120; R.35).

Someone came over and Simpson saw that it was her sister. Simpson told Covington that Appellant raped her. Covington told him to leave, but instead he and Covington started "fussing" and Simpson believed Appellant was punching Covington, at the time not knowing he had a knife. (T.123-124; R.38-39). Simpson jumped on Appellant and Covington was able to get free. Simpson tried to run, but Appellant grabbed her. He then tried to cut her neck, but she was able to get her hands up. He drug her into the kitchen and stabbed her. (T.123-125; R.38-40). Ultimately, Appellant went to the front door because he heard it open, and Simpson was able to escape out the sliding door in the back. (T.126; R.41). Simpson had to bust through the screen to get out and away from Appellant. She ran to her neighbor's house without clothes on and with multiple stab wounds. (T.127; R.42).

Someone called 911 and an ambulance arrived to take Simpson to the hospital. (T.128; R.43). After being treated and receiving stiches and staples, she was shown a photo lineup. She identified Appellant in the lineup. (T.129; 303; State's Exhibits 84 & 86; R.44; 45; 498; 500). At trial, Simpson again identified Appellant as the person who raped her, choked her, wounded her and her sister with a knife, and held her against her will. (T.137-138; R.52-53).

Covington testified that when she brought Simpson's son back she walked in on what she thought was Simpson and someone having sex. After she backed out of the bedroom, she explained that Simpson came out and said the person was trying to kill her. Covington was not going to allow the person to go back in the room where Simpson was located, but he got on top of Covington. Covington thought he was hitting her, but instead he was stabbing her. (T.197-198;

R.112-113). She managed to escape when Simpson jumped on Appellant's back. Covington went next door and asked them to call 911. (T.199-200; R.114-115). She stated Simpson finally came around the building and to the neighbor's apartment. Simpson had no clothes on, and both Simpson and Covington were bleeding from the knife wounds inflicted by Appellant. (T.203; R.118).

STANDARD OF REVIEW

In criminal cases, the appellate court sits to review errors of law only. State v. Wilson, 345 S.C. 1, 5-6, 545 S.E.2d 827, 829 (2001); State v. Butler, 353 S.C. 383, 388, 577 S.E.2d 498, 500 (Ct. App. 2003). "The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." State v. Pagan, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id.

"A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice." State v. Kelley, 319 S.C. 173, 176, 460 S.E.2d 368, 370 (1995). "Prejudice occurs when there is reasonable probability the wrongly admitted evidence influenced the jury's verdict." State v. Byers, 392 S.C. 438, 444, 710 S.E.2d 55, 58 (2011).

ARGUMENT

I. The trial court did not err in admitting testimony of a police officer that the victim identified Appellant by his Facebook name because it is not hearsay. Further, the trial court did not err in finding it was an excited utterance. Finally, any possible error is harmless in light of the other evidence in the record.

Appellant contends the trial court erred in admitting the testimony of Investigator Tyler who stated that Simpson identified her assailant by his Facebook moniker—Reedy All Boss. Appellant maintains this was inadmissible hearsay and the trial court erred in admitting it under the excited utterance exception. The testimony was not hearsay and so no exception was necessary. Further, if an exception was required, there was sufficient evidence to support the trial court's determination it was an excited utterance. Finally, even if it could possibly be admitted in error, any error was entirely harmless as the testimony was cumulative to additional testimony in the record and court not have conceivably affected the outcome of the trial.

At trial, the State asked Investigator Tyler, one of the first officers on the scene after the 911 call, if Simpson identified her assailant. Appellant objected as hearsay, and the State responded it was an excited utterance. The trial court ruled it was an excited utterance and was the victim making the identification. (T.243-244; R.154-155).[2] Thereafter, Investigator Tyler indicated Simpson told him her assailant was someone she knew as "Reedy All Boss," someone she knew from Facebook. (T.244; R.155).

[2] Appellant argument raised on appeal is not preserved for review. At trial, Appellant objected to hearsay. The State offered the excited utterance exception for admission and the trial court agreed. Appellant never maintained that the State failed to present sufficient evidence to support its claim of an excited utterance, nor did he contend the trial court needed to make more specific findings. As a result, the bulk of Appellant's argument regarding the sufficiency of the ruling and the sufficiency of the State's supporting evidence of an excited utterance was never raised to or ruled upon by the trial court. See State v. Stahlnecker, 386 S.C. 609, 617, 690 S.E.2d 565, 570 (2010) ("For an issue to be properly preserved it has to be raised to and ruled on by the trial court."); State v. Haselden, 353 S.C. 190, 196, 577 S.E.2d 445, 448 (2003) (holding a defendant may not argue one ground at trial and another on appeal).

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. However, the Rule continues to define several categories of statements which are not hearsay:

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if--
>
> > (1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving the person, ...

Rule 801(d)(1)(C), SCRE.

While South Carolina courts have not had many occasions to address Rule 801(d)(1)(C), the Rule is identical to the federal rule and many federal courts have addressed application of Rule 801(d)(1)(C), FRE. They routinely admit testimony, whether by the witness themselves or a third party such as a police officer, of a prior out-of-court identification. See e.g., United States v. Owens, 484 U.S. 554, 564 (1988) (Rule 801(d)(1)(C) exception applicable to evidence of witness's prior identification of defendant, even though by the time of trial, witness was unable to remember identification); United States v. Paredes-Rodriguez, 160 F.3d 49, 58 (1st Cir. 1998) (rejecting a claim of hearsay and impermissible bolstering because the out-of-court identification was properly admitted under Rule 801(d)(1)(C), FRE); United States v. Brink, 39 F.3d 419, 426 (3d Cir.1994) (admitting testimony by FBI agent and not the declarant regarding the declarants stated identification of the defendant); United States v. O'Malley, 796 F.2d 891, 898–99 (7th Cir.1986) (allowing FBI agent to testify regarding witness's prior identification of defendant after witness recanted at trial).

The testimony objected to in this case was not hearsay. The declarant, Simpson, clearly testified at trial and was subject to cross-examination. Her statement relayed by Investigator Tyler

was one of identification of Appellant—at least by the name she knew—obviously made after perceiving Appellant as her assailant. As a result, the testimony was not hearsay and no exception was necessary.

Even if an exception was necessary, it was properly admitted as an excited utterance. An excited utterance is defined as: "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2), SCRE.

> Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition.

State v. Stahlnecker, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010). The statement in this case, when examined in light of the circumstances described by Investigator Tyler and the victims, certainly qualified as an excited utterance.

First, the startling event would be the rape and attack by Appellant. Second, the statement—the identification of "Reedy All Boss" as Simpson's rapist and attacker—clearly related to the startling event. Next, the statement was made while under the stress of the event. Investigator Tyler testified she arrived right after the 911 call. People were gathered and hollering that the victims were in Apartment P3. Investigator Tyler went to P3 and found Simpson and Covington. When she arrived, Simpson was wrapped in a bedsheet and people were covering her wounds with towels. Investigator Tyler described Simpson: "She was bloody. Her face was bloody and swollen. Her eyes were, like, the whites of her eyes were red. She had blood dripping everywhere." (T.243; R.154). The circumstances described certainly indicate the statement was made while the declarant was still under the stress of excitement which would have been caused

by the startling event or condition. Accordingly, the totality of the circumstances support the finding by the trial court that if the statement was hearsay—which it is not—it would still be admissible as an excited utterance.

Finally, even if there could be any conceivable error with the admission of the statement, it would be entirely harmless in light of the extensive cumulative evidence in the record. "The admission of improper evidence is harmless where it is merely cumulative to other evidence." State v. Johnson, 298 S.C. 496, 499, 381 S.E.2d 732, 733 (1989); see also, State v. Schumpert, 312 S.C. 502, 507, 435 S.E.2d 859, 862 (1993) (any error in admission of evidence cumulative to other un-objected to evidence is harmless); State v. Blackburn, 271 S.C. 324, 247 S.E.2d 443 (1978) (stating that admission of improper evidence in harmless when it is cumulative to other, unobjected-to testimony). The jury knew Simpson identified "Reedy All Boss" as her assailant. She testified that was the name of the person from Facebook. She identified his Facebook page which was presented to the jury and would have allowed the jury the ability to determine for themselves whether "Reedy All Boss" was in fact Appellant. (T.136-137; R.51-52). Simpson also picked Appellant out of a photo lineup while in the hospital and identified him at trial. Covington also identified Appellant as her attacker and indicated she knew him as "Reedy All Boss." (T.206; R.121). In addition, Covington picked Appellant out of a photo lineup. (T.342; State's Exhibit 85; R.253; 499).

Additionally the admission of the statement could not have had any impact on the verdict beyond a reasonable doubt.

> Whether an error is harmless depends on the circumstances of the particular case. No definite rule of law governs this finding; rather, the materiality and prejudicial character of the error must be determined from its relationship to the entire case. Error is harmless when it could not reasonably have affected the result of the trial.

State v. Mitchell, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985) (internal quotation marks and citations omitted). "Generally, appellate courts will not set aside convictions due to insubstantial errors not affecting the result. Error is harmless beyond a reasonable doubt where it did not contribute to the verdict obtained." State v. Pagan, 369 S.C. 201, 212, 631 S.E.2d 262, 267 (2006); see also, State v. Watts, 321 S.C. 158, 467 S.E.2d 272 (Ct. App. 1996) (stating that error is harmless beyond a reasonable doubt if it does not contribute to the verdict). The single mention of the prior identification by Simpson, especially in light of the fact Appellant never contested the testimony that he was at the apartment and the other identifications made by both Simpson and Covington, could not have impacted the jury's verdict. See State v. Price, 368 S.C. 494, 499, 629 S.E.2d 363, 366 (2006) (finding the improper admission of hearsay evidence to be harmless where the hearsay evidence was impeached by the jury's exposure to the fact the evidence was not based on any first-hand knowledge).

Accordingly, the trial court did not err in admitting the testimony by Investigator Tyler and, even if admitted in error, it was entirely harmless.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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December 21, 2020

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SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Dillon County
Honorable Roger E. Henderson, Circuit Court Judge
Appellate Case No. 2019-001303

The State, Respondent,

vs.

Tyreek Dashawn Hayes, Appellant.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the Final Brief of Respondent filed December 21, 2020, complies with Rule 211(b), SCACR, and does not include, or partially redacts, personal data identifiers, Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, 407 S.C. 607, 607, 757 S.E.2d 421 (2014) (requiring redaction of social security numbers, names of minor children, financial account numbers, home addresses, and date of birth).

This 21st day of December, 2020.

WILLIAM M. BLITCH, JR.
Senior Assistant Deputy Attorney General
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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Dillon County

Roger E. Henderson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

TYREEK DASHAWN HAYES,

APPELLANT

APPELLATE CASE NO. 2019-001303

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the state's case?

STATEMENT OF THE CASE

On December 8, 2016, a Dillon County grand jury indicted Appellant for two counts of attempted murder (2016-GS-17-0875; -0879), kidnapping (2016-GS-17-877), possession of a weapon during the commission of a violent crime (2016-GS-17-0878), and criminal sexual conduct in the first degree (2016-GS-17-0876). R. 503-504; R. 506-507; R. 509-510; R. 512-513. The state, represented by Megan B. Burchstead and Joel Kozak from the Attorney General's Office, called the case to trial on July 23-26, 2019, before the Honorable Roger E. Henderson and a jury. R. 1. Matthew Swilley represented Appellant. R. 1.

At the conclusion of the presentation of evidence and argument, the judge instructed the jury on the law. However, his charge was confusing, at best. At one point, the judge instructed the jurors that "[a]n attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended." R. 466, ll. 6-8. He told the jurors that "[i]ntent means intending the result which actually occurs." R. 466, ll. 11-12. Then, when instructing on attempted murder, he informed the jurors that "[a] specific intent to kill [was] not an element of attempted murder." R. 468, ll. 18-19. Instead, all that was required was for the state to prove "a general intent to commit serious bodily injury." R. 468, ll. 18-20. Then, he reminded the jurors that "[i]ntent means intending the result which actually occurs." R. 468, ll. 20-22. Finally, he permitted the jurors to infer intent for purposes of attempted murder. R. 468, l. 22 – R. 469, l. 7.[1]

During deliberations, the jury asked numerous questions. R. 478, l. 18 – R. 482, l. 19. The final question posed by the jury was to ask what would happen if they were unable to agree on one of the charges, and the judge instructed them pursuant to Allen v. United States, 164 U.S.

[1] Trial counsel did not object to the instruction. R. 478, ll. 11-13. But see State v. King, 422 S.C. 47, 55-56, 810 S.E.2d 18, 22 (2017) (holding that attempted murder requires a specific intent to kill).

492 (1896). R. 481, l. 23 – R. 490, l. 25. Shortly thereafter, the jury returned with its verdicts, finding Appellant not guilty of criminal sexual conduct in the first degree, but guilty of kidnapping, two counts of attempted murder, and possession of a weapon during the commission of a violent crime. R. 492, ll. 2-17. Judge Henderson sentenced Appellant to thirty years for each county of attempted murder, to fifteen years for kidnapping, and to five years for the weapon. R. 496, l. 19 – R. 497, l. 12; R. 505; R. 508; R. 511; R. 514. He ordered all sentences to be served consecutively for a total of eighty years imprisonment. R. 496, l. 19 – R. 497, l. 12; R. 505; R. 508; R. 511; R. 514.

On August 2, 2019, Appellant served his notice of appeal. This brief follows.

STATEMENT OF FACTS

In August or September 2016, Appellant and Candace Simpson began a romantic relationship online. R. 19, ll. 17-19; R. 21, l. 25 – R. 22, l. 17; R. 388, ll. 20-21; R. 389, ll. 3-21; R. 391, l. 22 – R. 392, l. 9. On September 30, 2016, Simpson informed Appellant that she was going to a nightclub called Strikers. R. 392, ll. 15-22. Appellant went to the nightclub as well, and met up with Simpson. R. 393, ll. 21-24. When Strikers closed, he went to T. Lee's, an after-hours bar. R. 394, ll. 6-8. While there, he ran into Simpson again. R. 26, ll. 7-9; R. 28, ll. 2-5; R. 394, ll. 21-23. After spending some time together at the bar, Appellant and Simpson rode with Simpson's friend, Tonya Moore, to Simpson's home. R. 28, l. 7 – R. 29, l. 2; R. 394, l. 25 – R. 395, l. 3. Moore lived directly across from Simpson. R. 29, ll. 12-14; R. 395, ll. 16-21. Appellant asked Simpson if he could join her in her apartment, and Simpson readily agreed. R. 30, ll. 7-10; R. 395, ll. 18-20.

In the apartment, Appellant and Simpson talked until Simpson decided she wanted to take a shower. R. 31, ll. 1-4; R. 395, l. 25 – R. 396, l. 10. When Simpson got out of the shower, she returned to Appellant, sitting on his lap. R. 396, ll. 11-18. When Appellant kissed Simpson, she responded by kissing him back in a rough way and placing her arm around him. R. 396, l. 21 – R. 397, l. 5. Appellant and Simpson then went to the bedroom. R. 397, ll. 9-10. The two undressed, and Simpson asked Appellant if he had condom. R. 397, ll. 11-18. When Appellant indicated he did not, Simpson provided him with one from her closet. R. 397, ll. 18-21. After Appellant put on the condom, the two had intercourse. R. 397, ll. 21-25.

After the two had sex, a man entered the bedroom. R. 398, ll. 22-24. The man confronted Simpson about Appellant's presence in the bedroom. R. 399, ll. 21-24. Then, the man turned violent and threatened Appellant. R. 400, ll. 1-3. The man briefly left the bedroom.

R. 400, l. 3. Simpson followed the man, calling him "babe." R. 400, ll. 5-8. While Appellant was putting on his clothes so he could leave, he heard the man and Simpson arguing in the kitchen. R. 401, ll. 7-19. As he was walking to the door, he heard Simpson "gasping" and asking for his help. R. 401, ll. 21-24. He knew he could not leave her there with the violent and angry man. R. 401, l. 24 – R. 402, l. 1. Appellant kicked the man off of Simpson. R. 402, ll. 1-2. Just as Appellant was going to charge the man, he saw the man had a knife. R. 402, ll. 3-4. Appellant then jumped behind Simpson. R. 402, l. 5.

Wildly, the man swung the knife, mostly cutting Simpson, but injuring Appellant as well. R. 402, ll. 7-13. Suddenly, there was a knock at the door, and Simpson's sister, Ann Covington, and two children entered the small apartment. R. 402, ll. 20-25. When Covington demanded answers from the man about his conduct, the man grew angry with her. R. 403, ll. 1-9. Nevertheless, Covington pushed the man. R. 403, ll. 10-15. The man and Covington began fighting. R. 403, l. 23 – R. 404, l. 3. The man, still armed with the knife, cut Covington as well. R. 404, ll. 3-4. Eventually, Covington and the two children ran out the front door, which allowed Appellant to run out of the back patio door. R. 404, ll. 4-7.

Simpson claimed her evening with Appellant progressed differently, however. According to Simpson, when she got out of the shower, she agreed to sit beside Appellant on the sectional. R. 31, ll. 5-9. When Appellant "tried to start kissing" her, she refused. R. 31, ll. 9-11. She claimed she told him to go. R. 31, ll. 10-14. According to Simpson, Appellant refused to leave and pulled her into her bedroom. R. 31, l. 23 – R. 32, l. 3. She further claimed that she "tried to scream and hit the wall for [her] next door neighbor but he choked [her] instantly." R. 32, ll. 3-4. Simpson asserted that she "just asked him to stop … choking [her]," but she thought "it was obvious that he just wanted what he wanted." R. 33, ll. 2-3. Simpson asked Appellant to

use a condom, and Appellant agreed. R. 33, ll. 6-10. Other than Appellant penetrating her vagina with his penis, Simpson did not "remember too much" after that. R. 34, ll. 8-15. She only remembered waking up later in the morning. R. 34, ll. 14-15.

When she awoke, Appellant wanted to have sex again, but she did not. R. 35, ll. 11-14. She "wasn't in the mood for anything." R. 35, ll. 21-25. Appellant asked her for oral sex and she complied. R. 35, ll. 15-16. Oddly, Simpson claimed that the oral sex stopped because Appellant choked her again. R. 36, ll. 9-15. According to Simpson, Appellant was "worried about [her] telling." R. 36, ll. 14-17. Simpson passed out again, and when she woke her legs were so weak she could barely walk. R. 36, ll. 22-24. She told Appellant she needed to use the bathroom, and he assisted her into the bathroom. R. 36, l. 25 – R. 37, l. 4. Shortly after the two returned to her bed, Simpson's sister, Ann Covington, walked in. R. 37, ll. 18-22; R. 38, ll. 11-13. Covington believed she had walked in on a sexual encounter and excused herself from the bedroom as a result. R. 123, ll. 17-22. Simpson ran out of the room to see who had entered. R. 37, ll. 21-22. When she saw it was her sister, she "fell to [her] knees and [she] told her he raped [her]." R. 37, ll. 22-23. Covington contradicted Simpson on this key point. According to Covington, Simpson said, "he's tried to kill me." R. 111, ll. 6-7; R. 124, ll. 5-8. Hearing this, Appellant denied Simpson's accusation. R. 111, ll. 7-8.

Covington told Appellant to leave. R. 38, ll. 14-16. Simpson recalled Covington and Appellant "fussing." R. 38, l. 16. Simpson believed Appellant was punching Covington. R. 38, ll. 16-17. Simpson jumped on Appellant, which allowed Covington to run to a room with the children with whom she had arrived. R. 38, ll. 18-19; R. 40, ll. 4-6. Covington contradicted Simpson on this point as well. Covington indicated that she and the children left the apartment at this time; she denied locking herself into a room as Simpson insisted. R. 114, ll. 7-18; R. 125, ll.

13-15. When Simpson tried to run to the front door, Appellant tried to cut her neck, but she blocked him with her hands. R. 38, ll. 20-21. Simpson claimed Appellant dragged her to the kitchen, where he stabbed her. R. 38, ll. 20-22. According to Simpson, while Appellant was stabbing her, she heard the front door open. R. 41, ll. 7-11. When Appellant went to the front door in response to the sound, Simpson ran out the back door, which was open. R. 41, ll. 12-13. Simpson ran to her neighbor's house. R. 42, ll. 6-10.

ARGUMENT

The trial judge erred by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the state's case.

Standard of review

"The admission or exclusion of evidence is a matter addressed to the sound discretion of the trial court and its ruling will not be disturbed in the absence of a manifest abuse of discretion accompanied by probable prejudice." State v. Douglas, 369 S.C. 424, 429, 632 S.E.2d 845, 847–48 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." Id. at 429–30, 632 S.E.2d at 848.

Relevant facts

Lorie Tyler was a patrol officer with the Dillon Police Department when she responded to a 911 call involving Simpson and Covington. R. 152, l. 21 – R. 153, l. 20. Tyler explained that when she arrived, she spoke to Simpson and Covington. R. 154, ll. 12-13. The solicitor asked if Simpson said "who had done this to her" in reference to injuries that Tyler described observing on Simpson. R. 154, l. 25. When Tyler responded that Simpson had, defense counsel objected to hearsay. R. 155, ll. 1-2. The solicitor responded that the testimony fit within the "[e]xcited utterness" exception. R. 155, ll. 3-5. The judge agreed, noting it was "the victim herself." R. 155, l. 6. Thus, the judge overruled the objection. R. 155, l. 7. Tyler then told the jurors that Simpson claimed "Reedy All Boss" was the name her assailant used on Facebook. R. 155, ll. 8-9. Later, Tyler repeated that Simpson alleged "Reedy All Boss" assaulted her. R. 175, l. 23- R.

176, l. 1. Tyler informed the jurors that based upon Simpson's information, she searched Facebook for the name and found Appellant's page. R. 176, ll. 1-2.

Discussion

"Hearsay is not admissible." Rule 802, SCRE. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), SCRE. However, the Rules of Evidence provide multiple exceptions to the exclusion of hearsay. One of those exceptions allows for the admissibility of excited utterances. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" and may be admitted at trial as an exception to the hearsay rule. Rule 803(2), SCRE. "The rationale behind the excited utterance exception to the hearsay rule is that the startling event suspends the declarant's process of reflective thought and, consequently, reduces the likelihood of fabrication." State v. Davis, 371 S.C. 170, 178, 638 S.E.2d 57, 62 (2006) (citing State v. Dennis, 337 S.C. 275, 284, 523 S.E.2d 173, 177 (1999)).

The Supreme Court has identified three elements a trial court must consider when determining whether a statement has the spontaneous quality necessary for admission as an excited utterance: "(1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition." State v. Washington, 379 S.C. 120, 124, 665 S.E.2d 602, 604 (2008)). "[S]tatements which are not based on firsthand information, such as where the declarant was not an actual witness to the event, are not admissible under the excited utterance exception to the hearsay rule." State v. Davis, 371

S.C. 170, 179, 638 S.E.2d 57, 62 (2006) (citing State v. Hill, 331 S.C. 94, 99, 501 S.E.2d 122, 125 (1998)).

In State v. Burroughs, 328 S.C. 489, 496, 492 S.E.2d 408, 411 (Ct. App. 1997), "the trial court allowed the police officer who first took the victim's statement and a nurse who examined the victim in the emergency room to testify about the victim's statements to them describing the assault." This Court held that "the testimony was hearsay and amounted to impermissible bolstering of the victim's trial testimony." Id. This Court also noted that the statements did not amount to an excited utterance because there was "a great deal of time for reflection" before the victim made the statements to the police officer and nurse. Id. at 500, 492 S.E.2d at 413. In State v. Whisonant, 335 S.C. 148, 515 S.E.2d 768 (Ct. App. 1999), this Court held the admission of the victim's statements to her stepmother regarding details of the assault under the excited utterance exception to the hearsay rule was reversible error where a considerable time period had passed between the assault and the statement giving the victim time to reflect. This Court further held the stepmother's testimony was cumulative because it mirrored that of the victim and improperly bolstered the victim's story in the minds of the jury. Id. at 156, 515, S.E.2d at 772.

In State v. Davis, 371 S.C. 170, 178-81, 638 S.E.2d 57, 61-63 (2006), the Supreme Court found that the trial court committed reversible error in admitting the co-defendant's statements, as an excited utterance, that his brother had shot the victim because the victim had taken a swing at his brother. In addition to a lack of evidence that the co-defendant was under the stress or excitement of the shooting when he made the statement, the Davis Court found that the record did not support the conclusion that Hill witnessed the shooting. 371 S.C. at 180, 638 S.E.2d at 63. Thus, the Court ruled: "Because there is no evidence Hill actually saw Paul get shot, Hill's statement is not admissible under the excited utterance exception to the hearsay rule." Id.

The judge erred in permitting the solicitor to elicit hearsay testimony from the police officer regarding the identity of the alleged perpetrator. There was simply no evidence that Simpson was under the stress or excitement of a startling event. Importantly, the state asked no questions of Tyler regarding her perceptions of Simpson's mental state, which would have allowed the judge to determine if the statement from Simpson fit within the hearsay exception. Further, the state asked no questions of Simpson when she testified to allow a determination of whether she was under the influence of a startling event when she spoke to Tyler. Instead, the judge simply allowed the state to elicit the hearsay testimony – from a police officer – without any evidence in the record to support an exception to the rule against hearsay.

The entirety of the state's case depended upon the jury believing Simpson. While there was no question that Simpson was injured, the identity of the person who injured Simpson was highly disputed. In light of Simpson giving inconsistent statements regarding specific details, her inability to recall much of what transpired during the night in question, and her testimony conflicting with Covington's on significant aspects, the jury determined Simpson's credibility was questionable, at best, as shown by its verdict of not guilty on the criminal sexual conduct charge, which rested entirely upon Simpson's credibility. Allowing a police officer to inform the jury that Simpson allegedly blamed Appellant for her injuries bolstered Simpson's credibility as it lent the prestige of law enforcement to the accusation. Thus, the improper hearsay testimony was not harmless beyond a reasonable doubt as it helped the state buttress its chief witness's allegations.

CONCLUSION

Appellant respectfully requests this Court reverse his convictions and remand for a new trial based upon the trial judge's erroneous ruling, which permitted the introduction of improper and prejudicial hearsay testimony.

s/*Susan B. Hackett*
Susan B. Hackett
Appellate Defender

ATTORNEY FOR APPELLANT

This 4th day of January, 2021.

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."

January 4, 2021

s/*Susan B. Hackett*
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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.

Tyreek Dashawn Hayes, Appellant.

Appellate Case No. 2019-001303

Appeal From Dillon County
Roger E. Henderson, Circuit Court Judge,

Unpublished Opinion No. 2021-UP-378
Submitted October 1, 2021 – Filed November 3, 2021

AFFIRMED

Appellate Defender Susan Barber Hackett, of Columbia, for Appellant.

Attorney General Alan McCrory Wilson and Senior Assistant Attorney General William M. Blitch, Jr., both of Columbia, for Respondent.

PER CURIAM: Tyreek Dashawn Hayes appeals his convictions for possession of a weapon during the commission of a violent crime, kidnapping, and two counts of attempted murder. On appeal, Hayes argues the trial court erred in admitting hearsay under the excited utterance exception. The trial court did not abuse its

discretion because the record supports its finding that the statement was an excited utterance. Accordingly, we affirm pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) ("The admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion."); *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."); *State v. Banda*, 371 S.C. 245, 251, 639 S.E.2d 36, 39 (2006) ("[A]n appellate court is bound by the trial court's factual findings unless they are clearly erroneous."); *State v. Stahlnecker*, 386 S.C. 609, 623, 690 S.E.2d 565, 573 (2010) ("Three elements must be met for a statement to be an excited utterance: (1) the statement must relate to a startling event or condition; (2) the statement must have been made while the declarant was under the stress of excitement; and (3) the stress of excitement must be caused by the startling event or condition."); *State v. McHoney*, 344 S.C. 85, 94, 544 S.E.2d 30, 34 (2001) ("In determining whether a statement falls within the excited utterance exception, a court must consider the totality of the circumstances.").

AFFIRMED.[1]

HUFF, THOMAS, and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

The South Carolina Court of Appeals

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November 29, 2021

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REMITTITUR

Re: The State v. Tyreek D. Hayes
Lower Court Case No. 2016GS1700875, 2016GS1700877, 2016GS1700878
Appellate Case No. 2019-001303

Dear Clerk of Court:

The above referenced matter is hereby remitted to the lower court or tribunal. A copy of the judgment of this Court is enclosed.

Very truly yours,

CLERK

Enclosure
cc: Tyreek Dashawn Hayes, 00366300
Alan McCrory Wilson, Esquire
William M. Blitch, Jr., Esquire
Susan Barber Hackett, Esquire

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON)

Tyreek Dashawn Hayes)
Plaintiff(s)) CIVIL ACTION COVERSHEET

vs.) 2022-CP-17-506

State of South Carolina) Defendant(s)

FILED
GWEN T. HYATT
2021 DEC -6 A 11: 18
CLERK OF COURT
DILLON COUNTY

Submitted By: Tyreek Dashawn Hayes SC Bar #:
Address: 386 Redemption Way Telephone #:
McCormick, SC 29899 Fax #:
Other:
E-mail:

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (*Check all that apply*)

***If Action is Judgment/Settlement do not complete*

☐ **JURY TRIAL** demanded in complaint. ☐ **NON-JURY TRIAL** demanded in complaint.
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (*Check One Box Below*)

Contracts
- ☐ Constructions (100)
- ☐ Debt Collection (110)
- ☐ General (130)
- ☐ Breach of Contract (140)
- ☐ Fraud/Bad Faith (150)
- ☐ Failure to Deliver/ Warranty (160)
- ☐ Employment Discrim (170)
- ☐ Employment (180)
- ☐ Other (199)_____

Torts - Professional Malpractice
- ☐ Dental Malpractice (200)
- ☐ Legal Malpractice (210)
- ☐ Medical Malpractice (220)

Previous Notice of Intent Case # 20____-NI-_____-_____
- ☐ Notice/ File Med Mal (230)
- ☐ Other (299) _____

Torts – Personal Injury
- ☐ Conversion (310)
- ☐ Motor Vehicle Accident (320)
- ☐ Premises Liability (330)
- ☐ Products Liability (340)
- ☐ Personal Injury (350)
- ☐ Wrongful Death (360)
- ☐ Assault/Battery (370)
- ☐ Slander/Libel (380)
- ☐ Other (399) _____

Real Property
- ☐ Claim & Delivery (400)
- ☐ Condemnation (410)
- ☐ Foreclosure (420)
- ☐ Mechanic's Lien (430)
- ☐ Partition (440)
- ☐ Possession (450)
- ☐ Building Code Violation (460)
- ☐ Other (499) _____

Inmate Petitions
- ☑ PCR (500)
- ☐ Mandamus (520)
- ☐ Habeas Corpus (530)
- ☐ Other (599)

_____

Administrative Law/Relief
- ☐ Reinstate Drv. License (800)
- ☐ Judicial Review (810)
- ☐ Relief (820)
- ☐ Permanent Injunction (830)
- ☐ Forfeiture-Petition (840)
- ☐ Forfeiture—Consent Order (850)
- ☐ Other (899)

_____

Judgments/Settlements
- ☐ Death Settlement (700)
- ☐ Foreign Judgment (710)
- ☐ Magistrate's Judgment (720)
- ☐ Minor Settlement (730)
- ☐ Transcript Judgment (740)
- ☐ Lis Pendens (750)
- ☐ Transfer of Structured Settlement Payment Rights Application (760)
- ☐ Confession of Judgment (770)
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

_____

Appeals
- ☐ Arbitration (900)
- ☐ Magistrate-Civil (910)
- ☐ Magistrate-Criminal (920)
- ☐ Municipal (930)
- ☐ Probate Court (940)
- ☐ SCDOT (950)
- ☐ Worker's Comp (960)
- ☐ Zoning Board (970)
- ☐ Public Service Comm. (990)
- ☐ Employment Security Comm (991)
- ☐ Other (999)

_____

Special/Complex /Other
- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699) _____
- ☐ Sexual Predator (510)
- ☐ Permanent Restraining Order (680)
- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Pre-Suit Discovery (670)

Submitting Party Signature: _____ **Date:** _____

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FORM 5

STATE OF SOUTH CAROLINA)
FILED
County of DILLON GWEN T HYATT) IN THE COURT OF COMMON PLEAS
2021 DEC -6 A 11: 18
~~Tyreek Dashawn Hayes, #~~)
Full name and prison number (if any) of Applicant COURT
)
v.)
)
) APPLICATION FOR
)
State of South Carolina) POST-CONVICTION RELIEF
)
)
)

2022-CP-17-506

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention McCormick Correctional Inst., 386 Redemption Way, McCormick, SC 29899

2. Name and location of Court which imposed sentence Dillion County Court 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) 2014-GS-17-0875, 0877, 0878, 0879).

   (b) two attempt murders, Kidnapping, csc 1st degree and

Attached sheets

1. Ineffective assistance of counsel for failure to object or file motions that the Court charge the jury that attempt murder did not have a specific intent as an element of the crime.

MEMORANDUM OF LAW

First, the Applicant must prove that counsel's performances was deficient. Under this prong attorney performance is measured by it's reasonableness under professional norms Cherry 385 S.E.2d at 625, citing Strickland. Second, counsel's deficient performances must have prejudice the Applicant such that "there is a reasonable probability that but for counsel's unprofessional errors. the result of the proceeding would have been different. Cherry 386 S.E.2d at 625.

FILED
GWEN T HYATT
2021 DEC -6 A 11:18
CLERK OF COURT
CUMBERLAND COUNTY

FACTS

On page 585, lines 18 the judge said, A specific intent is not an element of attempted murder, but there must be a general intent to commit serious bodily injury.

Attempted murder would require the specific intent and specific intent means that the defendant consciously intended the completion of acts comprising the attempted offense quoting (Sutton) 532 S.E.2d at 285.

2. Ineffective assistance of counsel by his failure to object or

file a motion on jury instruction, "Inferred malice may also arise when the deed id done with a deadly weapon.:

A jury charge instructing that malice may be inferred from the use of a deadly weapon is no longer good law in South Carolina, where evidence is presented that would reduce, mitigate, excuse, or justify the homicide. State v. Burdette, 832 S.E.2d 575 (S.C. 2019) citing State v Belcher, 685 S.E.2d 802, 803-04 (2009). Regardless of the evidence presented at trial, the courts shall not instruct a jury that the element of malice may be inferred when the deed is done with a deadly weapon. Id.

The applicant preserved the right to amend his PCR at anytime in accordance with Love v. State, 834 S.E.2d 196 (S.C. 2019).

(c) Possession of a weapon during a commission of a crime

5. The date upon which sentence was imposed and the terms of the sentence:

(a) 7/26/2019, 30 yrs attempted murder, 15 yrs kidnapping

(b) consecutive and possession of a weapon,, 5 yrs.

(c)

6. Check whether a finding of guilty was made:

(a) after a plea of guilty

(b) after a plea of not guilty ✓

(c) 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:

(a) the name of each Court to which you appealed:

i. S.C. Court of Appeals

ii.

iii.

(b) the result in each such Court to which you appealed:

i.

ii.

iii.

(c) the date of each such result:

i.

ii.

iii.

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i.

ii.

iii.

9. If you answered "no" to (7), state your reasons for not so appealing:

(a) N/A

(b)

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) Ineffective assistance of counsel by his failure

(b) to object to the jury charge for attempted murder.

(c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

(a) The court charged specific intent is not an element

(b) of attempted murder and counsel did not object.

(c) See attached sheets

12. Prior to this application have you filed with respect to this conviction:

(a) any petition in a State Court under South Carolina Law? No

(b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? No

(c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? No

(d) any other petitions, motions or applications in this or any other Court? No

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(b) the name and location of the Court in which each was filed:

i. N/A

ii. _____

iii. _____

iv. _____

(c) the disposition thereof:

i. N/A

ii. _____

iii. _____

iv. _____

(d) the date of each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. N/A

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

No

_____

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. N/A

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. N/A

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) because counsel failed to object

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? yes

(b) your trial, if any? yes

(c) your sentencing? yes

(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

No

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. Matthew Swilley, Esquire

ii. _____

iii. _____

(b) the proceedings at which each such attorney represented you:

i. Trial and sentencing

ii. _____

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?

No

STATE OF SOUTH CAROLINA)
)
County of McCormick) VERIFICATION

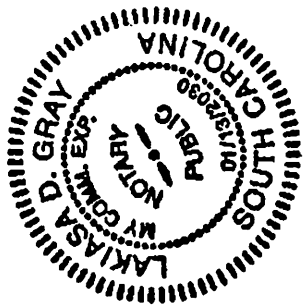
I, Tyreck Daishawn Hayes, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Tyreck D. Hayes

SWORN to and subscribed before me this 1st day of December, 2021.

Lakisha D. Gray (L.S.)
Notary Public

My Commission Expires: 01/13/30



APPLICATION TO PROCEED WITHOUT PAYMENT OF COSTS AND AFFIDAVIT IN SUPPORT THEREOF

I, Tyreek Da'Shawn Hayes, 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.

Applicant

SWORN or affirmed to and subscribed before me this 1st day of December, 2021.

Notary Public

My Commission Expires: 01/13/30

LAKIASA D. GRAY NOTARY PUBLIC MY COMM. EXP. 01/13/2030 SOUTH CAROLINA

STATE OF SOUTH CAROLINA COUNTY OF DILLON	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Tyreek Hayes, #366300, Applicant, v. State of South Carolina, Respondent.	Case No. 2022-CP-17-506 **RETURN AND MOTION FOR A MORE DEFINITE STATEMENT**

NOW COMES Respondent, moving for a more definite statement and making its return to the post-conviction relief (hereafter "PCR") application filed on December 6, 2021 by Tyreek Hayes (hereafter "Applicant"). Respondent respectfully offers the following in support of its return:

I. Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dillon County Clerk of Court. During its December 2016 term, the Dillon County Grand Jury indicted Applicant for two counts of attempted murder (2016-GS-17-0875 and -0879), kidnapping (2016-GS-17-0877), and possession of a weapon during the commission of a violent crime (2016-GS-17-0878).[1] Applicant was represented by Matthew Swilley, Esquire. Megan Bruchstead and Joel Kozak, Esquires, of the Fourth Circuit Solicitor's Office prosecuted the case. On July 23-26, 2019, Applicant proceeded to trial before the Honorable Roger E. Henderson, circuit court judge, and a jury. Applicant was found guilty of attempted murder, kidnapping, and possession of a weapon during the commission of a violent

[1] Applicant was also charged with first degree criminal sexual conduct, which he was found not guilty of at trial.

crime. He was found not guilty of first degree criminal sexual conduct. Judge Henderson sentenced him to thirty years for each count of attempted murder, fifteen for kidnapping and five for possession of a weapon, sentences running consecutively.

Applicant filed a timely notice of appeal on August 5, 2019, that was perfected by Susan B. Hackett, Esquire, through filing a brief raising the following issue:

> The trial judge erred by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the State's case.

Briefing concluded on January 4, 2021. The South Carolina Court of Appeals affirmed the conviction by unpublished opinion. *State v. Hayes*, 2021-UP-378 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 29, 2021.

II. Statement of Facts

Candace Simpson met Reedy Boss, or Reedy All Boss, on Facebook and began communicating with him. (T. 106-107). Boss was later identified as Applicant. On the evening of September 30 and into the morning of October 1, 2016, Simpson planned to head to a local club called Strikers with some friends and left her kids at her mom's house where her sister, Ann Covington also lived. (T. 106, 108-109). After going to Strikers, Simpson and a friend went to T Lees, another club. (T. 111-112). While at T Lees, Simpson saw Applicant. (T. 113).

Applicant asked for a ride home from T Lees because he lived in the apartment complex next to the one Simpson lived in. (T. 113). When they all got out of the car, Applicant asked about coming into Simpson's apartment. (T. 115). Simpson went to wash off the smoke and change her clothes. When she came back out, she originally sat in a recliner while Applicant sat

on her sectional. He asked her to come over by him, and when she did, he started trying to kiss her. Simpson told Applicant to leave, but he would not. (T. 116).

Instead, Applicant pulled Simpson into her bedroom. She tried to scream and bang on the wall to get the attention of her neighbor, but Applicant choked her immediately. He continued to drag her into the bedroom by the waist such that her feet were not touching the ground. (T. 117). She begged him to stop, but he refused. She begged him to wear a condom at least, they ended up on the floor getting a condom. Applicant then raped Simpson. (T. 118-119). Simpson passed out after Applicant began penetrating her with his penis. (T. 119).

When she woke up, it was daylight and Applicant was just standing there watching her. (T. 119-20). Appellant indicated he wanted to have sex again, but Simpson did not want sex. He asked her to do oral sex, and she agreed believing she would be choked if she did not perform oral sex. (T. 120). Ultimately, Applicant choked Simpson again. She begged him to stop, telling him she had children. Applicant said Simpson would tell and she kept begging for her life. She woke up again after the choking and could barely walk. (T. 120).

Someone came over, and Simpson saw that it was her sister. Simpson told Covington that Applicant raped her. Covington told him to leave, but instead he and Covington started "fussing" and Simpson believed Applicant was punching Covington, at the time not knowing he had a knife. (T.123-124). Simpson jumped on Applicant and Covington was able to get free. Simpson tried to run, but Applicant grabbed her. He then tried to cut her neck, but she was able to get her hands up. He dragged her into the kitchen and stabbed her. (T.123-125). Ultimately, Applicant went to the front door because he heard it open, and Simpson was able to escape out the sliding door in the back. (T. 126). Simpson had to bust through the screen to get out and away from

Applicant. She ran to her neighbor's house without clothes on and with multiple stab wounds. (T. 127).

Someone called 911 and an ambulance arrived to take Simpson to the hospital. (T. 128). After being treated and receiving stiches and staples, she was shown a photo lineup. She identified Applicant in the lineup. (T.129, 303, State's Exhibits 84 & 86). At trial, Simpson again identified Applicant as the person who raped her, choked her, wounded her and her sister with a knife, and held her against her will. (T. 137-138).

Covington testified that when she brought Simpson's son back, she walked in on what she thought was Simpson and someone having sex. After she backed out of the bedroom, she explained that Simpson came out and said the person was trying to kill her. Covington was not going to allow the person to go back in the room where Simpson was located, but he got on top of Covington. Covington thought he was hitting her, but instead he was stabbing her. (T. 197-198). She managed to escape when Simpson jumped on Applicant's back. Covington went next door and asked them to call 911. (T.199-200). She stated Simpson finally came around the building and to the neighbor's apartment. Simpson had no clothes on, and both Simpson and Covington were bleeding from the knife wounds inflicted by Applicant. (T. 203).

III. Current Action before the Court

In his *pro se* PCR application, Applicant alleges he is detained unlawfully for the following reasons (excerpts verbatim):

1. Ineffective assistance of counsel by his failure to object to the jury charge for attempted murder.
    a. The court charged specific intent is not an element of attempted murder and counsel did not object.

Attached to and incorporated herein are Applicant's Dillon County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, and

the current PCR application. Respondent reserves the right to amend this return upon receipt of additional relevant information.

IV. Argument

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). Effective assistance of counsel does not mean perfect or mistake-free representation. *See Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017) ("[A] defendant has a right to effective representation, not a right to an attorney who performs his duties 'mistake-free.'" (citation omitted)); *Burt v. Titlow*, 571 U.S. 12, 24 (2013) ("[T]he Sixth Amendment does not guarantee the right to perfect counsel; it promises only the right to effective assistance[.]"); *Yarborough v. Gentry*, 540 U.S. 1, 8 (2003) ("The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight."). Instead, it simply means assistance that was objectively reasonable under prevailing professional norms. *Strickland*, 466 U.S. at 687-688.

When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington.*

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing

professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690); *see Dunn v. Reeves*, 141 S. Ct. 2405, 2410 (2021) (noting counsel's strategic decisions are to be afforded "'strong presumption' of reasonableness that the defendant must overcome); *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (explaining a defendant must show defense counsel failed to act reasonably considering all the circumstances in order to overcome the presumption of adequate representation). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Importantly, "[t]he likelihood of a different result must be *substantial*, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Whether failure to object constitutes deficient performance generally hinges on whether or not a valid trial strategy was utilized. *See Thompson v. State*, 423 S.C. 235, 241, 814 S.E.2d 487, 490 (2018) (finding Counsel was deficient because the failure to object was not related to an otherwise valid trial strategy); *Stokes v. State*, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) (where "counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel").

Respondent contends this allegation lacks merit. Still, the ineffective assistance of counsel allegations probably raise questions of fact that the record does not conclusively refute. Accordingly, Respondent respectfully requests an evidentiary hearing to fully resolve this issue. *See Sharper v. State*, 279 S.C. 264, 265, 305 S.E.2d 247, 248 (1983) ("Where an application for post-conviction relief alleges specific instances of ineffective assistance of counsel which are not conclusively refuted by the record before the lower court, a question of fact is raised which can only be resolved by an evidentiary hearing.").

V. Motion for a More Definite Statement

Respondent moves for a more definite statement regarding Applicant's allegations. Applicant alleges that trial counsel was constitutionally ineffective. However, he does not explain exactly what Counsel did that constituted ineffective assistance of counsel. Applicant

fails to set forth with specificity any facts and circumstances upon which the claim is based. The Uniform Post-Conviction Procedure Act requires that applicants must "specifically set forth the grounds upon which the application is based." Section 17-27-50 of the Code of Laws of South Carolina (1976). In a PCR application, it is incumbent upon applicants to make at least a *prima facie* showing which would entitle him to relief before an evidentiary hearing will be scheduled and held. *Welch v. MacDougall*, 246 S.C. 258, 143 S.E.2d 455 (1965); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). The Supreme Court of South Carolina has provided that:

> [M]ere allegations of incompetency or ineffectiveness of counsel will not ordinarily suffice as grounds for a new trial under the Post-Conviction Procedure Act. The bare assertion by the appellant that he was deprived of counsel is insufficient.
>
> *Coardes v. State*, 262 S.C. 493, 497, 206 S.E.2d 264, 265 (1974).

Furthermore, Rule 8(a), SCRCP, requires all civil pleadings include "a short and plain statement of the facts showing that the pleader is entitled to relief." Respondent moves pursuant to Rule 12(e), SCRCP, to require Applicant to provide a more definite statement of his claims. Respondent moves to require Applicant to file an additional amended application well in advance of any evidentiary hearing concerning this matter. If Applicant fails to file a timely and responsive amended application setting forth specific allegations for relief, Respondent reserves the right to move to dismiss the allegation.

VI. Other Allegations Denied

Each and every other allegation in Applicant's PCR application not explicitly admitted, qualified, or explained in this return is hereby denied by the Respondent.

VII. Assertion of Rights to Notice of Amendments, Experts

Applicant should raise any claims he intends to raise at the PCR evidentiary hearing well in advance of the hearing. Here, Applicant's court-appointed attorney is the only individual

authorized to file amendments to this application, given his representative capacity, Rule 11(a), SCRCP and *pro se* filings will not be considered at the PCR hearing. *State v. Devore*, 416 S.C. 115, 123, 784 S.E.2d 690, 694 (Ct. App. 2016) (*Pro se* filing is a nullity where person was represented by counsel); *Miller v. State*, 388 S.C. 347, 697 S.E.2d 527 (2010) ("Since there is no right to 'hybrid representation' that is partially *pro se* and partially by counsel, substantive documents, with the exception of motions to relief counsel, filed *pro se* by a person represented by counsel are not to be accepted unless submitted by counsel.").

Respondent reserves the right to request that any amendments withheld until the last minute be stricken because of undue prejudice to Respondent or, in the alternative, continue the matter to permit adequate time to investigate and address the claims. *See Mangal v. State*, 421 S.C. 85, 805 S.E.2d 568 (2017) ("In most PCR cases . . . we have refused to excuse the pleading and issue-preservation requirements that apply in all civil cases."); *Love v. State*, 428 S.C. 231, 242, 834 S.E.2d 196, 201 (2019) ("When analyzing the substance of a proposed amendment and any prejudice the State might suffer, a PCR court should consider all relevant circumstances, including, but not limited to, the timing of the motion, the complexity of the new issue, the degree of surprise to the State, the need for and availability of necessary witnesses to defend against the claim, and whether the substance of the proposed amendment is readily apparent from the underlying plea or trial record."); *see also* Rules 15(a)-(b), SCRCP (explaining how to amend a pleading). Pursuant to Section 17-27-150 of the South Carolina Code of Laws, Applicant may not invoke formal discovery processes to issue subpoenas or otherwise obtain discovery materials unless the Court grants leave upon good cause shown. Furthermore, Respondent requests that all potential exhibits and materials used to produce potential expert witness testimony be sent to Respondent well in advance of the evidentiary hearing. Respondent

reserves the right to request a continuance and oppose witness testimony and exhibits withheld until the last minute resulting in undue prejudice to Respondent.

VIII. Conclusion

WHEREFORE, Respondent requests that the Court require Applicant to provide a more definite statement and then hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Senior Assistant Deputy Attorney General

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By: Chelsey F. Marto
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April 12, 2022

STATE OF SOUTH CAROLINA COUNTY OF DILLON	)	IN THE COURT OF COMMON PLEAS FOR THE SEVENTH JUDICIAL CIRCUIT
Tyreek Hayes, #366300	)	
Applicant,	)	Case No.: 2022-CP-17-506
v.	)	Certificate of Service by Mail
State of South Carolina	)	
Respondent,	)	

1. I am an employee of the Respondent in the above-captioned action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Return and Motion for a More Definite Statement in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Steven W. Fowler, Esquire
730 Main Street Unit # 237
North Myrtle Beach, SC 29582

DATED this 12th day of April, 2022.

Grayson Horton, Legal Assistant
For Respondent

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS
RECORD SUMMARY REPORT DATED 02/01/22 C0667

HAYES,TYREEK DASHAWN FBI # 640698ND3 SID# SC02036061 SCDC # 00366300
OFFENDER TYPE.: ADULT-STRAIGHT SENTENCE
INSTITUTION ..: MCCORMICK CORR INST DORM.....: F3B0152A
SECURITY/CUST.: 3 ADULT-STRAIGHT SENTENCE RACE....:B SEX...:M
CURR INCARC SENT...: 80 YRS 0 MOS 0 DYS PROJ MAXOUT DATE: 06/15/2085
CENTRAL MONITORING.: YES PROJ PAROLE DATE: 00/00/0000
SOCIAL SECURITY [redacted] EWC JOB..: GENERAL WORKER
EDUC PGM.: NO CURR EDUC PROGRAM
CURRENT PROGRAM..: NO CURRENT PROGRAM EWC LEVEL: 2F5 EEC LEVEL:
AGE...: 27 DATE OF BIRTH..: [redacted] ASSIGNMENT..: BLDING DETAIL BLDG.

PREVIOUS NUMBERS:
** NO PREVIOUS NUMBERS **

CURRENT OFFENSES	SENTENCE YRS	MOS	DYS	COUNTY	SENTENCE START	V/NV	CATEGORY
ATTEMPTED MURDER	30	0	0	DILLON	10/ 3/2016	V	4
FIREARMS PROVISION	5	0	0	DILLON	10/ 3/2016	N	3
KIDNAPPING	15	0	0	DILLON	10/ 3/2016	V	5
ATTEMPTED MURDER	30	0	0	DILLON	10/ 2/2016	V	4

PREVIOUS SCDC OFFENSES(COMPLETE)	SENTENCE YRS	MOS	DYS	COUNTY	SENTENCE START	V/NV	CATEGORY
ASSAULT & BATTERY 3RD	0	0	2	DILLON	11/29/2015	N	1
STRONG ARM ROBBERY	4	0	0	DILLON	11/28/2015	N	3

PRIOR COMMITMENTS OVER 90 DAYS:
MISSING PRIORS DATA
DETAINERS (HOLD,WANTED,NOTIFY):
PAROLE VIOLATION HOLD DPPPS/YOS CATEG: 1
NO DETAINERS
ESCAPES:
NO ESCAPE HISTORY
CRIMINAL CHARGES:
NO CRIMINAL CHARGES HISTORY
ASSAULTIVE DISCIPLINARIES:

7/ 6/17	STRIKING AN EMPLOYEE WIT	CONVICTED	MAJOR STAFF

NON-ASSAULTIVE DISCIPLINARIES:

10/18/21	OUT OF PLACE	PENDING	MAJOR
10/ 8/21	OUT OF PLACE	CONVICTED	ADMIN
9/ 8/21	POSS. OR/ATTEMPT TO POSS	CONVICTED	MAJOR
4/13/21	INTERFERING WITH COUNT	CONVICTED	ADMIN
3/ 4/20	REFUSING OR FAILING OBEY		OTHER
2/25/20	USE,POSS NARC,MARIJ,UNAU	NOT GUILTY	MAJOR
2/25/20	POSS. OR/ATTEMPT TO POSS	CONVICTED	MAJOR
2/25/20	POSSESSION OF CONTRABAND	CONVICTED	MAJOR
7/30/17	OUT OF PLACE	CONVICTED	ADMIN
6/23/17	OUT OF PLACE		OTHER

HISTORY OF MOVEMENTS:

7/23/21	MCCORMICK	INCARCERATED	ADMINISTRATIVE
7/23/21	KIRKLAND	INCARCERATED	MEDICAL
1/ 6/20	MCCORMICK	INCARCERATED	ADMINISTRATIVE
1/ 6/20	KIRKLAND	INCARCERATED	MEDICAL
10/10/19	MCCORMICK	INCARCERATED	ADMINISTRATIVE
7/30/19	KIRKLAND	INCARCERATED	NEW SENTENCE
9/15/17	DILLON CO	INTENSIVE SUPERVISIO	PAROLE BOARD ACTION
3/ 7/17	TURBEVILLE	INCARCERATED	ADMINISTRATIVE
1/18/17	KIRKLAND	INCARCERATED	YOA PAROLE VIOLATOR
10/ 4/16	DILLON CO	AUTH ABSENCE (AWL)	LOCKUP-FRM EPA,SF,PAR,PRB
10/ 4/16	UNK	DEAD TIME	WARRANT ISSUED

HAYES,TYREEK DASHAWN FBI # 640698ND3 SID# SC02036061 SCDC # 00366300 (CONTIN

1/28/16	TURBEVILLE	INCARCERATED	SHOCK INCARC/YOA BOOT
12/ 4/15	KIRKLAND	INCARCERATED	NEW ADMISSION

HISTORY OF EARNED WORK CREDIT ASSIGNMENTS:

JOB DESCRIPTION	START DATE	END DATE	TERMINATION REASON	JOB LVL
GENERAL WORKER	07/13/21	0/ 0/ 0		2F5
GENERAL WORKER	04/10/20	7/12/21	CUSTODY REVIEW	3F5
GENERAL WORKER	03/15/20	4/ 9/20	ASLT/DRUG/MAJOR DISC	2F5
GENERAL WORKER	02/18/20	3/ 4/20	PLACED IN ST/SP CUSTODY	2F5
GENERAL WORKER	11/04/19	2/17/20	POLICY CHANGE 2020	3F5
TEACHER ASSISTANT	07/14/17	9/15/17	RELEASED/PAROLED	3F5
TEACHER ASSISTANT	04/27/17	7/13/17	ASLT/DRUG/MAJOR DISC	2F5
WARDKEEPER	03/24/17	4/26/17	INMATE REQUEST	2F5
WARDKEEPER	03/09/17	3/23/17	MI ELIGIBLE FOR LEVEL 2	3F5

HISTORY OF EARNED EDUCATION CREDITS:

EEC DESCRIPTION	START DATE	END DATE	TERMINATION REASON
LVL 2 - FULL TIME(NO EWC)	02/01/16	4/28/16	RELEASED/PAROLED

********* END OF REPORT *********

STATE OF SOUTH CAROLINA	)	In The Court General Sessions
	)	Fourth Judicial Circuit
COUNTY OF DARLINGTON	)	2022-CP-17-00506
TYREEK HAYES,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	Transcript of Record
THE STATE,	)	
	)	
Defendant.	)	
	)	
	)	

Darlington, South Carolina
July 26, 2022

B E F O R E:

The Honorable J. Derham Cole

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

Mr. SteDayne C. Phillips, Esquire
Attorney for Plaintiff

Ms. Chelsey F. Marto, Esquire
Attorney for Defendant

Lisa S. Carter
Circuit Court Reporter

I N D E X

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EXHIBITS

NO.	DESCRIPTION	EV.

(WHEREUPON, NO EXHIBITS WERE INTRODUCED)

P-R-O-C-E-E-D-I-N-G-S

MS. MARTO: Your Honor, I do have a packet of the pleas.

THE COURT: Okay.

MS. MARTO: As well as a copy of the transcript. Good morning, Your Honor, May it please, the Court? We are here today in the case of Tyreek Hayes versus the State of South Carolina, docket number 2022-CP-17-00506. My name is Chelsey Marto and I represent the respondent, and Mr. Steven Fowler represents the applicant in this matter.

This is a Dillon County case being heard in Darlington County. He is presently confined in the South Carolina Department of Corrections. December, 2016, he was indicted for two counts of attempted murder, kidnapping, and possession of a weapon. He was represented by Mr. Matthew Swilley and Megan Burchstead and Joel Kozak of the South Carolina Attorney General's Office, prosecuted the case. July 23rd through 26th 2019, he proceeded to trial before the Honorable Roger E. Henderson and was found guilty of attempted murder, both counts; kidnapping, and possession of a weapon during the commission of a violent crime. He was also charged with criminal

sexual conduct but acquitted on that charge.

Judge Henderson sentenced him to 30 years for each court of attempted murder; 15 for kidnapping; and 5 for possession of a weapon; and all sentences ran consecutively. So he's sentenced to 80 years total.

This was appealed August 5, 2019. And that was perfected by Susan B. Hackett. Briefing concluded January 4, 2021. The South Carolina Court of Appeals affirmed the conviction. The remittitur was issued November 29, 2021. The Post-conviction relief application filed December 6, 2021, and the State's return was made April 12, 2022. With that I'll turn it over to Mr. Fowler.

THE COURT: All right. You're Tyreek Hayes? Are you Tyreek Hayes?

MR. HAYES: Yes, sir.

THE COURT: Mr. Fowler is your lawyer?

MR. HAYES: Yes, sir.

THE COURT: You heard Ms. Marto tell me that this case was actually tried and disposed of in Dillon County?

MR. HAYES: Yes, sir.

THE COURT: And we're in Darlington today just for convenience.

MR. HAYES: Yes, sir.

THE COURT: But you got a right to have it heard in Dillon County if you want it to be there in the courtroom just like this or you can have it heard today in Darlington County.

MR. HAYES: Yes, sir.

THE COURT: Are you wishing to have it heard today in Darlington?

MR. HAYES: Yes, sir.

THE COURT: Okay. Mr. Fowler?

MR. FOWLER: Your Honor, I'd like to call to the standard Mr. Tyreek Hayes?

THE COURT: Okay.

THE CLERK: Mr. Haynes, if you can come take the oath of the witness please. Raise your right hand please. You swear from the testimony you give this court be the truth, and nothing but the truth so help you God?

MR. HAYES: Yes, sir.

MR. FOWLER: May I began, Your Honor?

THE COURT: Yes, sir.

TYREEK HAYES, first being duly sworn, testified as follows:

Direct Examination by Mr. Fowler:

Q. Please state and spell your full name for the

court please?
A. Tyreek Hayes. That's with a capital T, y as in yellow, r as in rip, e as in ebony, another e as an ebony, and k, as an kangaroo, Tyreek. And Hayes, capital H as in Hayes, a as an apple, y as in yellow, e as an Easter, and s as in sister.
Q. And you understand you're under oath at this point, correct?
A. Yes, sir, I do.
Q. And you heard the judge talk about this is a Dillon County case but it's being heard in Darlington today, correct?
A. Yes, sir.
Q. and you are okay with it being heard in Darlington today, correct?
A. Yes, sir.
Q. Okay.
MR. FOWLER: And Your Honor, I might -- and Your Honor, -- Your Honor, might approach the witness several times, I hope that accepted by the court?
THE COURT: Sure. That's fine. Yeah.
MR. FOWLER: Yes, sir.
Q. Mr. Hayes, you and I have spoken by telephone about this matter, correct?
A. Yes, sir, we have.

Q. All right. And I given you some information about how PCR works and things like that, correct?
A. Yes, sir.
Q. And you're acceptable with going forward today, correct?
A. Yes, sir.
Q. You fill out an application for a PCR, is that correct?
A. Yes, sir, I have.
Q. All right.
MR. FOWLER: And I'm gonna approach the witness, Your Honor, somewhat liberally if it's okay with you.
Q. Does this appear to be your PCR application?
A. Yes, sir.
Q. Okay. Fantastic. And at the end of it is a verification and you're going under oath today, it's on Page 6 of the application, and that's your signature on verification, correct?
A. Yes, sir. That's correct.
Q. Fantastic.
THE COURT: Just a minute. Let me ask this, do I have a copy of the application in this packet?
MS. MARTO: You should, Your Honor.
THE COURT: All right. That's fine.
MS. MARTO: It should be the second file right

after the return.

THE COURT: Okay. Thank you.

MR. FOWLER: And Your Honor, I'd like bring to the court's attention that we'd like to take judicial notice of the application.

MS. MARTO: No objection to taking judicial notice of everything in the packet, Your Honor.

THE COURT: Yeah. It's all in the record.

MR. FOWLER: And that includes the transcript, correct?

MS. MARTO: Yes. Including the full transcript.

MR. FOWLER: Fantastic.

Q. Mr Hayes, do you have a copy of the application up there with you?

A. Yes, sir, I do.

Q. Do you see number 10 on the application?

A. Yes, sir, I do.

Q. It says, state concisely the grounds on which you base your allegation that you're being held in custody unlawfully, is that correct?

A. Yes, sir.

Q. And it says, ineffective assistance of counsel by his failure to object to the jury charge for attempted murder, is that correct?

A. Yes, sir.

Q. All right. And then, on number 11, it says, "State concisely in the same order of facts which support each of the grounds set out in number 10." And it states under there under A through C, "The court charge specific intent is not an element of attempted murder and counsel did not object." And it say, see attached sheets, is that correct?

A. Yes, sir.

Q. And you stand by those statements in 10 and 11 today, correct?

A. Yes, sir.

Q. Okay. Let's talk about that a little bit. In number 10, you State and we'll go through this and you and I've discussed some other items that will hopefully bring to the court's attention. It says, "Ineffective assistance of counsel by his failure to object to the jury charge for attempted murder." In your own words tell me a little bit about what that means to you?

A. By my counsel not objecting to the jury instructions of attempt murder. That's how counsel performance was deficiency. The judge confused the jury. He stated how my charges were confusing at best. By counsel not objecting to the wrong jury instructions of attempt murder that took a

possibility of me gettin' found not guilty. That's how counsel performance was deficiency. You know, counsel would have objected to the results, objected, the results would have been different.

Q. How -- okay -- how -- so let's just kind of parse that down a little bit. Your counsel failed, and this is on Page 8, ah, 583 to 586 of the transcript, is that correct?

A. Yes, sir.

Q. Okay. Fantastic. I'm not going to ask you to read all of these of items, but in terms of, I'm on Page 583 right now and I'm taking up to you through 586, is there a particular point in this transcript that you feel relates to number 10 on this, I'm showing you the transcript now. What line you feel starts off this discussion? It's 583 right there and that goes over 584 through 586, is there a particular line where you feel like the instruction started?

A. Yes, sir. On Page 583, Line 5 through Line 15, that's where it ends at on 583, and it goes along on Page 585, Line 18 ---

Q. Okay. Hold on! Let's -- let's -- let's slow a little bit. On 583 you're saying it starts at Line 5, is that correct?

A. Yes, sir.

Q. And through which line?
A. Ah, 15.
Q. Okay. So Lines 15, and then on Page 584 which I'm showing you now, which ones, which lines do you feel like are relevant there?
A. On Page 584?
Q. Yes, sir. Okay. Excuse me, 585. Let’s skip to 585, which lines do you feel are relevant on 585?
A. Line 18.
Q. Line 18? All right. And then it kind of goes down through the end of that page ---
A. Yes, sir. .
Q. --- to 586, where does it stop either on 585 or 586?
A. On 586?
Q. Yes, sir. What line would you say?
A. Um, 7.
Q. Line 7, okay. So fantastic. All right. Well, let's take a little more in depth and look at that. On Page 5, and if I'm incorrect on any of these please let me know, okay.
A. Yes, sir.
Q. You stated on Page 583, Lines 5 through 15, you know, I'm not gonna read it verbatim. Do you have a copy of the transcript with you?

A. Yes, sir.
Q. Okay. But it says, "An attempt is an effort to accomplish," and maybe I'll, we'll read a little bit, "an attempt is an effort to accomplish crime which does not exceed; an attempt includes a specific intent to do a particular criminal act along with the act falling short of the act intended. The State must show more than preparation than", excuse me, on Line 9, "show more than mere preparation and intent. There must be some over act committed in the effort to commit the crime. Intent means intending the result which actually occurs not accidentally or involuntarily. Intent may be shown by acts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent." So I've read Lines 5 through 13, are you following along in the transcript?
A. Yes, sir.
Q. Okay. So what does that mean to you -- and once again, we're not going to be to duplicate here, but what is 5 through 15? How does -- how does that prove your lawyers ineffective assistance of counsel?
A. When the judge break down an attempt -- when he break down an attempt he specifically say, an attempt includes a specific intent to do a particularly crime

at along with act falling short of the act intended.
Q. And you disagree?
A. They on the lines right there ---
Q. Go ahead.
A. Be on the lines right there.
Q. Okay. So you disagree with that, right?
A. Yes, sir, I do.
Q. All right. Why do you feel like that's incorrect?
A. Because when he -- because when he break down a "specific intent" he basically explains that a specific intent is not the element of attempt murder.
Q. And you feel that's incorrect?
A. Yes, sir. That is.
Q. Okay. Did -- what did you -- let's kind of turn it to your lawyers actions at this time, what did -- did your lawyer say anything to the judge or object, anything like that?
A. No, sir. He didn't. He did neither.
Q. Okay. Do you feel like he should have?
A. Yes, sir.
Q. Why do you feel like he should have?
A. Because he should -- he have -- he should have objected because when the judge instruct the jury and he break down the charges to the jury he, basically, say intent meaning intending the result which

actually occurs; not accidentally or involuntary. You know, so my counsel is supposed to have objected to that because that was improper jury instructions to the jury.

Q. Was there an opportunity for your attorney to object on that somehow on that court date?

A. Was there an opportunity ---

Q. Yeah. That he could have objected at that time or at some later time, correct?

A. He could have objected at that time.

Q. But he didn’t, did he?

A. No, sir, he didn’t.

Q. And you feel like that has caused some kind of -- you feel like that's a problem with this case, correct?

A. Yes, sir.

Q. Okay. What else about this section 5 through 15 that you think is relevant? Is there anything we're missing here on 5 through 15 on Page 583? If there's not that's fine, but I just wanted to give you that opportunity.

A. And also along it goes, it goes along to say the “State must show more more than mere preparation and intent”, and that didn't happen. The State never proved a general intent to commit seriously bodily

injuries.
Q. And why do you say that?
A. Because when -- because when he speak on intent, when he speak on a specific intent, he basically, says there must be a general intent to commit seriously bodily injuries. That right there.
(Whereupon, the applicant was showing his lawyer where it was located)
Q. Right. And your lawyer did not object to that either, did he?
A. Did not object to that either.
Q. Okay. And that -- you feel like that was prejudicial to you?
A. Yes, sir.
Q. Is there anything else on Page 583, Lines 5 through 15 that you feel is relevant that needs to be brought to the court's attention at this point?
A. No, sir.
Q. Okay. All right the next item that you mentioned was on Page -- Okay. And let's, let's do this just to be clear. And we're also referencing number 11, "State concisely in the same" -- well, "The court charged specific intent is not an element and attempted murder, counsel did not object." So that relates to your first testimony here on Page 583,

correct?
A. Yes, sir.
Q. Okay. And we're going to talk about 10 and 11 kind of together on this so there's not too much of a great distinction on. All right. Approaching the witness, Page, let's repeat this for the, just briefly, on Page 586, you said it was Lines 8 through 17 on Page 586 ---
THE COURT: He hasn't said that yet.
Q. Okay. You mentioned that Page 586 was irrelevant, correct?
A. Yes, sir. It just, basically, goes -- that's where it stop at.
Q. Okay.
A. It's, basically, where stops out on Page 583.
Q. All right. So we've got and I just want to be clear here, you started on Page 583 and you felt that that section that we just went over on 583 is irrelevant there, correct?
A. Yes, sir.
Q. Okay. And then you said it kind of jumps to Page 585, Line 8, beginning with Line 8, is that correct?
A. Yes, sir. That's correct.
Q. Okay. And it goes through page, through Page 586, Line 7, correct?

A. Yes, sir.
Q. Well, let's talk about that for just a moment in conjunction with your application. On Page 585 -- and is this the judge talking at this point?
A. Yes, sir.
Q. Okay. And he's also talking on Page 583, correct?
A. Yes, sir.
Q. All right. And that Judge Henderson, okay. Going back to 585 Page, excuse me, Line 18 and it talks about, and I'll be brief here, "the specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injury. Intent means intending the result which actually occurs not accidentally or involuntarily. Intent may be shown by facts and conduct of the defendant and other circumstances from which you may naturally and reasonably infer intent. Evidence of the character of the act, the character of the instrument used, the manner in which it was used, the purpose of the accomplished, and the resulting wounds or injuries may be considered in determining the intent with which, with which the act was committed. Intent may also be inferred when it is demonstrated that the defendant voluntarily and

willfully commits an act, the natural tendency of which is to destroy another life." So that's the, that's the relevant section on Pages 585 and 586 you're discussing, right?

A. Yes, sir.

Q. Okay. Well, tell me a little bit about that. If you could follow along in your transcript, why do you feel like that's relevant in this case today?

A. Because them are the jury instructions. Them are improper and jury instructions to the jury.

Q. Now, why do you say that improper jury instructions to the jury?

A. Because when he break down attempt murder he, basically, say attempt murder include a specific intent. And then we start speaking on a specific intent, he, basically, goes on to say in attempt murder is not an element of attempt murder. A specific intent is not an element of attempt murder. Them are improper jury instructions to a jury.

Q. And that's, that's important, correct?

A. Yes, sir.

Q. Why is it important those jury instructions that you quoted both, both in your testimony so fair?

A. Can you repeat that?

Q. Yeah. Let me repeat that. Why are these jury

instructions important?
A. Jury -- jury instructions are important to a jury because, because that's a possibility of me being found not guilty. So in order for a jury to receive the proper instructions they must, they must have the proper instructions to elaborate on my life.
Q. And you feel like your attorney did not do that?
A. No, sir. He did not.
Q. All right. And as with 583, our statements there, did he have the opportunity to object to what was said on Page 585 and 586?
A. Did he have the -- yes.
Q. He could -- he could have objected, is that correct?
A. Yes, sir. Yes, sir.
Q. But he did not?
A. But he did not.
Q. Okay. And you feel like that's a reason why you're been sent, you have been sentenced to where you are today, correct?
A. Yes, sir.
Q. What else about this section of the jury instructions that you feel is relevant, if anything?
A. Basically, the jury was playing the whole procedure of the case ---

Q. Okay.
A. —-- how I get found guilty. So the jury instructions is improper.
Q. All right. And you feel like that efficiency is placed on your attorney for not objecting, correct?
A. Yes, sir. Because if he would have objected the outcome would have been different.
Q. Okay. And you feel like -- okay. You're not a lawyer, are you?
A. No, sir.
Q. And you’re not experienced in the law?
A. No, sir.
Q. But you are familiar with this passage ---
A. Yes, sir.
Q. --- these passages, correct?
A. Yes, sir.
Q. And you feel what you've said so far is accurate, right?
A. Yes, sir.
Q. Okay. Is there anything else on Page 585 and 586 that you feel is relevant that needs to be brought to the court's attention today?
A. No, sir.
Q. All right. So in a nutshell, not once, but twice improper, improper jury instructions were given, is

that correct?
A. Yes, sir.
Q. And you lawyer didn't, just I'll be brief, your lawyer did not object?
A. No, sir.
Q. And you feel like that has been prejudicial to you, correct?
A. Yes, sir.
Q. And it was a deficiency in your lawyer's performance, correct?
A. Yes, sir.
Q. All right. Anything else about number 10 and 11 that you feel needs to be brought to the court's attention, you know, his failure to object to the jury charge for attempted murder and the court charged specific intent, it's not being an element of attempted murder and counsel did not object. Is there anything else on those two parts of your application you feel needs to be brought to the court's attention?
A. No, sir.
Q. Okay. All right.
A. Not -- not speaking on the jury instructions.
Q. Okay. All right. You and I spoke about some other issues that may be relevant, is that correct?

A. Yes, sir.
Q. All right. You and I spoke about counsel was inefficient due to something with the knives, is that correct?
A. Yes, sir.
Q. Okay.
MR. FOWLER: If I may have just a moment, Your Honor.
THE COURT: Is this an allegation contained in application?
MR. FOWLER: Just a moment, Your Honor.
THE COURT: And while you're looking has there been an amended application filed?
MS. MARTO: No, Your Honor.
MR. HAYES: No, sir.
MR. FOWLER: Not that I'm aware of.
MS. MARTO: It's being amended orally today, is my understanding.
THE COURT: You don't object?
MS. MARTO: No.
THE COURT: Okay. Proceed.
Q. All right.
MR. FOWLER: Just a moment please, Your Honor. Thank you.
Q. You mentioned in our previous conversations there

were some issues about knives in this matter, is that correct?

A. Yes, sir.

Q. All right. Let me draw your attention to Page 136 of the transcript. You've indicated to me that there may have been an issue with no proper chain of evidentiary custody and also no sled involvement or something along those lines. Tell me a little bit about what you're talking about?

A. There was knives that was gather -- well, there was one knife -- there was -- the first knife that was discovered it was at Elaine Manning's apartment, that knife, the investigative, lead investigator, he discovered that knife because that's the only evidence she had at the time. So he took that knife into evidence and after that, five, five days later, you know, you another knife and you had another, you had another knife and you had a knife handle discovered by other, other people rather than investigators.

Q. Okay.

A. Them knives was took into evidence and used against me. No knives were placed in front of the jury on my behalf.

Q. Against you?

A. Yes, sir.
Q. Okay. Is that reflected in the transcript anywhere on Page ---
A. Yes, sir.
Q. Okay. Where on Page 136 does that start and end?
A. It starts on 136, Line 5 through, 5 through 8.
Q. Okay. All right. Does it carry over anywhere on the Page 537 and 538?
A. No, sir.
Q. Okay. So you're referring to Page, Lines 5 through 8 on Page 136, snd what that says is, Ms. Burchstead, "if I may -- I think that's the proper pronunciation Ms. Burchstead, it says, "If I may approach again and show State's 2 and I believe this is entered without objection, Your Honor." And Mr. Swilley says, "No objection", and the court says, "All right." Concluding in Page, on Line 9 on Page 136. So do you feel like Mr. Swilley should have objected to that?
A. Yes, sir.
Q. Okay. And without being too duplicative, why do you feel like he should have objected, should've objected to that?
A. Because I feel like my counsel should've object to admissibility of the knives because the knives had

nothing to do with me. Even though the State have to prove they case beyond a reasonable doubt the knives were placed into evidence and jury -- and that gave, that gave a bad look to the jury on my behalf.

Q. So it's your contention that there were chain of custody issues, correct?

A. Yes, sir.

Q. And there was no sled involvement on those knives, correct?

A. Yes, sir.

Q. And yet it was entered into evidence without objection, correct?

A. That's correct.

Q. And you feel like that was prejudicial to you?

A. Yes, sir.

Q. And once again, why was it -- why was that specific section prejudicial to you?

A. It was prejudicial to me because that I had nothing to do with me. And the knife, one of the knives never went down to sled. It never got no forensic test done or anything.

Q. Okay. All right. Is there anyhing else about that that you feel is relevant to the court's attention?

A. If he would've object that would have, that would have took the possibility of me gettin' found not guilty as well.
Q. So, so far we've got the ineffective jury instructions and we've got the, the sled issues or chain of custody issues on Page 136. You and I've also discussed I believe on Page 224 collection of other knives in this matter, is that correct?
A. Yes, sir.
Q. Okay. I'm approaching with Pages 223 through 226, is there a relevant section in this, in these pages that you feel is important to bring to the court's attention?
A. It's once again on Page 224, Line 5 through 8, Line 5 through 8, and it goes on Line 9 through 12.
Q. So basically, 5 through 12 on Page 224, correct?
A. Yes, sir.
Q. And that, basically, says, it's says, at beginning of Line 4 -- who is Mr. Kojak, Mr. Kozak? Are you familiar with that name?
A. Yes, sir.
Q. Who was that?
A. He worked for the State and Attorney General Office.
Q. Okay. All right. So, basically, on Line 4, Page

224, it says, Mr. Kozak, "At this time I'd like to move State's Exhibit 5 into evidence." Mr. Swilley, "No objection. The court, "Okay. State Exhibit 5 admitted into evidence. (Wherefore, the photo has been marked and enter into evidence as State's Exhibit No. 5)." And then Mr. Kozak, "All right. Let's show this to the jury." Why do you feel like exhibit number, exhibit number 5 was other knives, is that correct?

A. Yes, sir.

Q. Okay. And what is your contention that, was the problem with, with those knives?

A. Them was got by -- them was got by other people other than the investigators, you know, and them knives were discovered five days later. And the investigators for Dillon County Police Department basically stated that they had searched the apartment upside down. They looked in that specific spot and there was no knives. But five days later, you know, we have knives coming to the police department.

Q. So do you feel like your lawyer should've of objected, should have objected to Exhibit Number 5 on Page 224?

A. Yes, sir.

Q. Okay. And you feel like that was prejudicial to

you?
A. Yes, sir.
Q. Okay. You and I spoke about other issues that may be relevant here. One is the body cam footage of the father. Based on your, without saying what he said directly, what's your understanding of what him as a potential witness or party or involved in this case could have been? Was there -- was there evidence of the father of the victim -- what's your understanding?
A. They was a video of the victim father and in the slight, slight minute he, basically, you know, basically, state what I'm stating. I came to the police department to give my testimony, you know, my facts and what happened. This man don't know noth'in about what's going on. And so, basically, when he get to the crime scene he, basically, state that ---
Q. It's your understanding , correct?
A. Yes, sir.
Q. Okay.
A. That I'm not a violent person. He, basically, state that and he also state that her boyfriend, he normally do things like this. He been doing these like this. Basically, stating what I had been stating all along.

Q. Okay. So it's your contention that that there was, the father of the victim said things that were perhaps positive to you about, about you, correct?
A. Yes, sir.
Q. And also that someone else perhaps may have committed the crime, is that your understanding?
A. Yes, sir.
Q. Okay. How was that potential evidence treated?
A. How was it a treated?
Q. Yeah. Yes, sir.
A. It won't really treated at all. He didn’t even get no look.
Q. Okay. Well, when you say “got no look”, did he entered that into evidence?
A. He didn't -- no, sir. It never got investigated.
Q. Okay. All right. Do yo feel like that was prejudicial to you?
A. Yes, sir.
Q. Okay. And that was a deficiency on your lawyers performance?
A. Yes, sir.
Q. Okay. Anything else about that that you feel like is irrelevant at this point?
A. I feel like my counsel, he should have been investigated because on the dispatch call, he

basically, calls the dispatch and states his name for the record. And he was asked, "Do you know he the victim?" He, basically -- yes, he know the victim, but he don't know who did what. So, basically, he never was investigated. He never was investigated. He should have gotten investigated because his name was mentioned and I also mentioned his name.

Q. Okay. Anything else about that that you feel is relevant here today?

A. No, sir.

Q. Okay. You mentioned that in the transcripts there was some discussion about your audio statement, is that, your audio and video statement given to the police department, is that correct?

A. That's correct.

Q. Okay. And I think that would be found on Page 566, correct?

A. Yes, sir. That's correct.

Q. All right. I'm presenting you Page 566 of the transcript, which areas of that that you feel is important to bring to the court's attention today?

A. Line 15 through 20.

Q. Okay. All right. So 15 through 20. Is there any other, any of the other pages -- it's, basically, on 566, is that correct?

A. Yes, sir.
Q. Okay. And Page 566, let's start with Line 13, "but here's what didn't happen on cross-examination never not once did Tyreek gave a recorded statement. Never not once was he, was he contradicted about what he said previously for what he said today because they would have done it. They do it for a living. They would've found it. Never not once was he contradicted from the prior statement. Never not once." Is that what you're referring to?
A. Yes, sir.
Q. Okay. Tell me what, in your opinion, that means to you for today's purposes?
A. Well, counsel basically, stating to the jury that that I did give a recorded statement. And that I was, basically, telling -- basically, telling them that I was truthful about my statement given to the jury. I also gave a recorded statement, audio/video footage. And I specifically told law enforcement detail of detail what transpired on this event. Basically, I told them what happened.
Q. Okay. Well, how is that a deficiency in your lawyers performance talking about your audio statement that was given previously before the trial?
A. Because counsel -- because counsel presented this

to the jury and he put an image in they head and he never showed them the facts. He should've had my audio/video on my defense. Show them the fact, basically, of what he speaking on. If he would have showed them that would have gave them an understanding of what he was speaking on.

Q. Okay. And you feel like that was prejudicial to you?

A. Yes, sir.

Q. And you feel like that was deficiency in your lawyers performance?

A. Yes, sir.

MR. FOWLER: Just a moment, Your Honor.

Q. Anything else about that that you feels is relevant?

A. No, sir.

Q. You and I discussed -- okay. Now, this is another topic in terms of Page 597, the jury wanting a copy of the -- well, maybe may be it's -- I think it's similar I think his will show, it's under the same category. You and I mentioned or you mentioned to me that that on Page 597, Lines 9 through 15, is that correct?

A. Yes, sir.

Q. Okay. Now, tell me a little bit about -- okay.

What this is, is "(Whereupon the jury entered, excuse me, whereupon the jury enters the courtroom at 12:18 pm). The court: All right. Madam, Foreperson, I have the questions that you have submitted for the court. The first one is that we would like to see/read his statement? Are you speaking about the statement that he made to law enforcement? Yes." And Line number 15. "All right", Ms. Faulk. "And then it goes into Line 16 and 17, at least, what does that say that -- read Lines 16 through 18 please.

A. "The court: Okay. All right. There is no way that you can see that. The reason being it was not introduced into evidence and it was made an exhibit or part of the record and since it's not put of the record, I can't let you, I can't let you see it. And the second statement is, all the transcript/interview from call?"

Q. So the jury asked for a copy of your statement, correct?

A. That's correct.

Q. And your lawyer brought up your statement previously before this page, is that correct?

A. That's correct.

Q. And they, the judge said that they could not have it, correct?

A. That’s correct.
Q. And that was because it was not entered into evidence, is that correct?
A. That's correct.
Q. All right. How does that relate to your lawyer's performance in this?
A. Well, if counsel would have presented the video so the jury can see what he was speaking on and facts that would have happen the difference. By I'm not doing that took the possibility of me being found not guilty. The jury deliberated. They wanted to see my statement that I made at the law enforcement because counsel spoke on it. He told them how, you know, I won’t, I was never contradicted, you know, everything add up, basically, what I’m saying.
Q. Okay. And you feel like that was prejudicial to you?
A Yes, sir.
Q. And do you feel like that was a deficiency in your lawyers performance?
A. Yes, sir.
MR. FOWLER: May I have just a moment, Your Honor.
Q. I Think we're going to just revert back to something that we had discussed. It’s in a different section. It’s about the lesser included charge.

It's a different part of the transcripts. You and I discussed several matters the other day, correct?
A. That’s correct.
Q. And you introduced, indicated that there was something on Page 532 that you feel is relevant maybe to 534?
A. Yes, sir.
Q. Okay. What would that be and what lines?
A. Lines 10, well, I’d go back and say 5 -- what Line 10 all the way to 534. ---
Q. Well, that’s 530. That’s 530. Okay. Well, so you're, basically, saying Page 532, 533, 534 and it ends there, correct?
A. Yes, sir.
Q. Okay. Do you have a copy of that transcript?
A. Yes, sir.
Q. And once, again, this is kind of going back, but it's in a different part of transcript. It's in regards to the -- and let me show you Page 532 again, what is this?
A. That's basically the judge breaking down the lesser inclusions (ph) of my charges to the jury.
Q. Okay. Now, is that different than what we talked about earlier at the beginning of your testimony?

A. Yes, sir. This is different.
Q. Okay. Well, tell me how -- how, and once again, referring the Page 532 through the end of 534, is that correct?
A. Yes, sir.
Q. Okay. Tell me a little bit about that in your own words?
A. Basically, the judge breaking down the lesser -- well, let me back up, my counsel also broke down the lesser inclusion (ph). The judge break down the lesser inclusion (ph) to give the jury a different view on my charges. When counsel broke down my charges to the jury that's, basically, that's -- if you break down charges to a jury that's, basically, like I may be guilty of the less than rather (ph) at the time, he giving them.
Q. Well, you tell me, I mean ---
A. Yeah.
Q. —-- so are you saying that this is your attorney talking to or who is this?
A. This is the judge talking.
Q. So this is the judge talking and he's talking about lesser included offenses, is that correct?
A. Yes, sir.
Q. Now, are you saying that there was something your

lawyer could have done to, to alleviate any problems in here? Explain to me -- explain to me the significant? I think you were talking in general about the lesser included offenses, correct?

A. Yes, sir.

Q. Okay. What did your lawyer do incorrectly in your opinion in this portion of the transcript?

A. He didn't -- he didn't ask the judge for the lesser inclusions (ph). Prosecution didn't prove a general intent so why not ask for a lesser inclusion (ph). If you asking for a direct verdict you can ask for the lesser inclusions (ph) as well. So that's what my counsel failed to do.

Q. So your lawyer failed to just repeat what you just said? Your lawyer failed to include lesser included charges?

A. Yes, sir.

Q. Okay. And this is, basically, in 532 to 534. Is there anything else about -- well, first of all, do you feel like your lawyer should, and I don't know if this was asked earlier, but do you feel like your lawyer should have included the lesser charges?

A. Yes.

Q. Do you feel like it was a deficiency on his part that he did not do that?

A. Correct.
Q. And you feel like that's one of the reasons why you were charged with such a long sentence?
A. Correct.
Q. Okay. Is there anything else on these pages of lesser included offenses that you feel like needs to be brought to the court's attention today?
A. No, sir. But on another note, it also goes back to like you speaking on intent, when the judge breaks down attempt murder, intent, you know.
Q. Right.
A. So he’s speaking on intent ---
Q. What do you -- what do you mean that if speak, when who's speaking on intent?
A. The judge.
Q. Okay. And you're lawyer didn’t object to anything like that?
A. No, sir.
Q. Okay. All right. And I didn't mean to interrupt you. You were saying the judge was talking about intent?
A. Yes, sir.
Q. Complete that thought.
A. Intent means to intending the results was actually occurring not accidentally or involuntary.

And then he also goes down to ---
Q. Here's 533 ---
A. Five, thirty-three?
Q. Yes, sir. Which lines are you referring to, if any?
A. Five, eighty-three.
Q. Well, now we've already discussed 583, correct?
A. Yeah. But....
Q. Well, how does -- how does this section relate To 583?
A. Um, I -- what it is ---
MR. FOWLER: If I may have just a moment, Your Honor. I apologize.
Q. Okay. We've got two sections of the transcript here, 583 which we've discussed at length earlier, and then Page 532 here. What are you saying the connection is between these two pages separated by about 50 pages?
A. When the -- when the judge break down like a specific intent, he, basically, goes on to say and this 585, Line 18, "A specific intent to kill is not an element of attempted murder, but there must be a general intent to commit serious bodily injuries.
Q. Okay. And we talked about that earlier, how does that relate to what were the new issues that we're

talking about on Page 532 in that area?
A. Because these the lesser ---
Q. Go ahead. Yes, please.
A. Oh, on 582 and 533 (ph), oh, the judge break down, he breaks down the lesser inclusions (ph) so, you know, he also stated that the State had to prove the general intent.
Q. Okay. So what -- how -- what are you saying that your lawyers deficiency was on this, if any?
A. My lawyer didn't ask the judge to go with the lesser inclusions (ph). He could have.
Q. But he didn't, did he?
A. But he didn't.
Q. All right. Another topic that we spoke about, you and I, is never subpoenaing key witnesses for the defense, is that correct?
A. Yes, sir.
Q. Okay. And you said there was a person, Elaine Manning?
A. Yes, sir.
Q. That should have been called as a witness?
A. Yes, sir.
Q. Who is Elaine Manning in your understanding?
A. Elaine -- Elaine Manning is, she the next-door neighbor.

Q. Okay.
A. She the one who first witnessed, witnessed the victim's -- she the first one that called 911.
Q. Okay. Why was she not called?
A. Counsel never called her.
Q. Who's counsel?
A. Never subpoenaed her.
Q. Who's counsel?
A. My attorney.
Q. Okay. Why did he not call her?
A. Why did he not call her?
Q. Why -- yeah, in your understanding, why did he not call Elaine Man, Elaine, is it Manning Mattson?
A. Manning.
Q. Manning. Okay. Why did he not call her, do you know?
A. Because she state next door, she didn't want to interfere with what the matter was going on.
Q. Okay. Could he subpoena her?
A. Yes, sir.
Q. And make her participate, correct?
A. Yes, sir.
Q. Okay. Let's look -- you mentioned Page 550, 550, Line 15, is that correct?
A. Yes, sir.

Q. Okay. And how far does it go down from Line 15?
A. Nineteen.
Q. Okay. So Lines 15 through 19 on Page 550, Okay, um so it says, there would have been -- now who is this speaking, is this the prosecution or your attorney on Line 15? It says, "We didn't hear from her," is that ---
A. Oh, that's my counsel speaking.
Q. Well, let's be clear about that. On Lines 15 through 19 who's -- who's speaking, that's your counsel?
A. Yes, sir.
Q. All right. So basically, it says on Line 17, "In case you didn't notice we didn't hear from Elaine Manning, the woman who actually call 911, we didn't hear from her." What's the significance of that?
A. Elaine Manning could have testified. Oh, counsel, basically, counsel describing to the jury that Elaine witnessed -- he, basically, explained that she isn't good help, but she don't want to be involved.
Q. Okay.
A. He, basically, goes on to tell you that Elaine Manning, you know, she's, she's the first one who witnessed the girl. She's the first one to call 911

and she never got subpoenaed to court.
Q. Okay. Did you discuss this with your lawyer?
A. Yes, sir.
Q. What did he say?
A. He said that Elaine, Elaine Manning didn't want to get involved, um, she also knew about certain things that the victim stated.
Q. Okay. All right. Anything else about Elaine manning that you feel needs to be brought to the court's attention?
A. No, sir.
Q. Okay. All right. Just a couple more items. You've mentioned to me about a 911 call, is that correct?
A. Yes, sir.
Q. Okay. And what's your understanding, and that would be around the time of the incident, is that correct?
A. Yes, sir.
Q. And why do you feel like that would be important?
A. The 9 -- the 911 call?
Q. Yes, sir.
A. The 911 call ---
Q. And when -- and when we're talking about the 911 call, you're talking about a call that who made to

911?
A. Yes, sir.
Q. Who made it?
A. The guy that I claim, James Smiley.
Q. Okay. All right. And tell me a little bit about that?
A. Um, he calls the 911 and he, basically, state that he was on crime scene. He stated that he was the crime scene. He stated that he knows the victim, um, things like that. And he never -- he never got investigated which he should have been investigated by counsel.
Q. Okay. Why was he never investigated by your counsel?
A. I don't know. Counsel never investigated him.
Q. Okay. What else about the James Smiley call that you feel is relevant here?
A. The 911 call was, basically, tampered with because they get deleted after a year. It stays on the record for a year and it gets deleted. That 911 call was never preserved.
Q. And your lawyer never brought that up to the court's attention?
A. He bought -- he bought it on like after the fact.
Q. Okay.

A. After he, he tried to investigate after two years later, the 911 call had been deleted.
Q. Okay. Anything else about that 911 call that you feel is relevant -- now -- well, let me say this, could your lawyer have done a better job in terms of getting that 911 call introduced into evidence?
A. Yes, sir.
Q. What could he have done?
A. The could have preserved it in the time limit. He could have went and got the 911 call in a timely manner. He could've also investigate -- he could've also went out and questioned the guy that called the dispatcher. He stated he was on a crime scene. He also stated that he new the victim. He also stated that he didn't know who told him to call the 911 call. He should have been investigated.
Q. And he didn't do that?
A. No, sir.
Q. Okay. You feel like that was a deficiency in his performance?
A. Yes, sir.
Q. Okay. Is there anything else about that 911 call with James Smiley that you feel needs to be brought to the court's attention?
A. No, sir.

Q. Okay. The last thing that you and I discussed is the possible issue was, impeachment of witnesses statements. And you mentioned in, we won't go into that too, specifically, but you mentioned that like on Page 125 Lines 10 through 11; Pages 126, Lines 9 through 12; Page 199, 8 through 13; and Page 210, Lines 13 through 15, were saying those were, and you can get as specific as the court will allow, but you're saying that there was conflicting testimony by certain persons?

A. Yes, sir.

Q. Tell me about that?

A. They was conflicting testimonies(ph). There's a point where the victim states during testimonies (ph) her sister ran in the room with the kids. Then also -- Ann also come behind her was and was questioned about it. And she states that she know who did those type of things. She also was questioned about did she jump on my back. She also stated there that she never did things like that.

Q. Was it the same person who gave conflicting testimony or other, several people who gave conflicting testimony?

A. Several.

Q. Okay. And did your lawyer bring to the court's

attention that potential conflicting testimony?
A. No, sir.
Q. Okay. You feel like he should have?
A. Yes, sir.
Q. You feel like that was a deficiency in his representation of you?
A. Yes, sir.
Q. And do you feel like -- and do you feel like that that's why you are where you are today or, at least, one part of it?
A. Yes, sir.
Q. Is there anything else, you and I've gone over several things that you brought to my attention in our, in our phone calls and discussions here today, is there anything else that you feel like needs to be brought to the court's attention or reemphasized?
A. Anything else?
Q. Well, I get -- let me rephrase that. Strike that please, I'm sorry. Your primary contention is that as it states in your application, and we've gone over thoroughly, in my opinion earlier today, at least, well as we could, that the ineffective assistance of counsel by his failure to object to the jury charge for attempted murder; and the court charged specific intent is not an element of the attempted murder and

counsel did not object, is that correct?
A. That’s correct.
Q. That's one of your primary ---
A. Yes, sir, it is.
Q. --- problems here today, correct?
A. Yes, sir.
Q. And all these other things are additional things that your counsel did or did not do, correct?
A. That’s correct.
Q. Is there anything else that you wish to bring to the court's attention on these matters?
A. No, sir.
MR. FOWLER: No further questions, judge.

Cross-Examination by Ms. Marto:

Q. Good morning, sir.
A. Good morning.
Q. So, I guess, in broad strokes, there were two competing narratives brought up at your trial, right?
A. Yes, sir.
Q. And what was the State's narrative? Do you recall just roughly?
A. The State narrative?
Q. Yeah. What was the timeline of everything that the State kind of laid out in just a minute?
MR. FOWLER: You know, Your Honor, I’d like to

object to that. That's a overly broad question that she's asking him to present the State's line of, line of presentation. First of all, it's overly broad, in my opinion. And second of all, she's asking him to do something that the State should be talking about not him.

MS. MARTO: Your Honor, I'm just trying to lay a little bit of background for a lot of the things that have already been raised.

THE COURT: You may proceed.

MS. MARTO: Thank you, Your Honor.

THE COURT: And Mr. Hayes, if you don't know the answer to the question that she's asking or you think it's not clear to you, just tell her you don't know the answer or ask her to make it clearer if you need to.

A. Can you make it clearer?

Q. Yes, sir. So, essentially, what the State said was you met with the first victim in this case, correct?

A. Yes.

Q. And what did they say happened from there?

A. What did they say happened?

Q. So you met at a club, correct?

A. Yes, ma'am.

Q. And the State said you went home with a girl, correct?
A. Correct.
Q. They stated that a rape occurred, correct?
A. Correct.
Q. And that she woke up on the next, the next morning on the floor, correct? And then her sister came in, correct??
A. Correct.

MR. FOWLER: Objection, Your Honor. This is items that can be found in the transcript. You know, she's asking him to lay the foundation for the State's prosecution against him, in my opinion. So we're here about counsel's performance, not about the actual background of the case. So, you know, our testimony today or his testimony was, basically, seven primary things about his lawyers lack of performance and that includes the jury charge. So I object to this line of questioning of her asking him what the State's case was against her in asking questions about that.

MS. MARTO: Your Honor, it's the State's contention that prejudiced -- analysis as fact specific and that we're to lay that background. We kind of need to bring out the pertinent parts of the

record and how they compete against each other and what was given to the jury during deliberations.

MR. FOWLER: And Your Honor, our contention is that she could put up witnesses that would be probably more specific to answering her questions. My client is here today on his application and the things that we brought to the court's attention previously, so once again I object.

THE COURT: Overruled. Go ahead.

MS. MARTO: Thank you, Your Honor.

Q. So the sister came in, correct, and they stated that that's when the fight occurred, correct?

A. That’s what they -- yes, ma’am.

Q. What did they say the weapon used was?

A. They said the weapon use was a knife.

Q. What type of knife, specifically?

A. A cut instrument and things like that.

Q. Was it like a steak knife ---

A. Yeah.

Q. --- that you would get in a set for kitchen use?

A. Yes.

Q. Okay. And now, in rough strokes, you disagreed with that, correct?

A. Correct.

Q. And you testified at your trial, correct, and you

stated that actually the first victim's boyfriend came in the apartment and caught in bed with his girlfriend, correct?

A. That's correct.

Q. They never mentioned him, correct?

A. They never mentioned him.

Q. Did their story -- was their story consistent with one another, both victims?

A. No, ma'am.

Q. What, specifically, was not consistent?

A. They stories about the beginning how, how it starts off, how it starts off -- they stories were different how it started off. Also they stories were different when they talk about, they talk about the things that I have done. They stories was inconsistent. When they, basically, like when I, when I said that Candace states that her sister runs into room with the kids. Candace come behind her, well, Ann, excuse me, come behind her and, basically, like that never happened. And also he goes along in the transcript. It also goes along when Candace states that her sister jumps on back to try to get me off of her and Ann, basically, testified that that's not true. She don't know nothin' about any of that so their stories conflict.

Q. Do you recall if there was any disagreement over what Candace said when her sister entered the apartment or house?
A. Can you say it again?
Q. Do you recall if their statements were consistent when it says what she, Candace yelled when her sister entered, Ann, entered the place? Do you remember if that was consistent?
A. That wasn't consistent.
Q. What wasn't consistent about it?
A. What wasn’t consistent when Candace, Candace tell her sister that she’d been raped. Her sister denied her even saying that. Candace said she went to sister, dropped down to her knees, her sister, basically, states in her testimony that it didn’t happen like that. She, basically, describing it in a whole another way so they had two different....
Q. Did she say her sister yelled that you were trying to kill her?
MR. FOWLER: Objection, Your Honor, hearsay.
THE COURT: I assume that everything that you’re addressing is contained in this transcript?
MS. MARTO: Yes, Your Honor. I can move on.
THE COURT: You may proceed.
Q. Do you recall if they said two different things?

A. Ma'am?
Q. When -- I'm just gonna move on, sir. Now, you were acquitted of the criminal sexual conduct charge, correct?
A. Yes, ma'am.
Q. Do you recall if the jury deliberated over a brief period of time or whether they had issues that came out once they were sent to chamber?
A. I don't recall.
Q. Okay. But you stated that they came out and asked to see your statement, correct?
A. Yes, ma'am. Yes, ma'am.
Q. Do you recall if an Allen Charge was given on one charge?
A. Yes, ma'am.

MR. FOWLER: Your Honor, once again, and I don't mean to try the court to patience, but everything I think that she has mentioned in this cross-examination can be found within the four corners of the transcript. And the transcript has been judicially noticed by this court and she's continuing down this line of questioning. You know, we've presented our case. Things are in the transcript. And we would ask that this overly broad cross-examination be more specific if it's continuous

at all, Your Honor.

MS. MARTO: Your Honor, again, we would state that that was pertinent pertaining to the prejudice prong, but I'll gladly move on.

THE COURT: All right.

Q. Okay. So how -- do you recall how many weapons were used? Was it just one knife?

A. How many was discovered?

Q. No. How many they thought were used in the incident?

A. I guess, about two.

Q. Okay. And again, you stated that the victim's discovered their knife?

A. Yes.

Q. In the house?

A. Yes, ma'am.

Q. Was it detached from the handle, do you recall?

A. I think -- I think it was.

Q. So now is your issue concerning the lesser included's that they should not have been included or that they weren't explored more thoroughly?

A. They weren't explored more thoroughly.

Q. Okay. But you acknowledged that they were granted, correct?

A. No.

Q. Do you remember your attorney requesting them?
A. Oh, yes, ma'am. Yes, ma'am.
Q. Okay.
A. I'm sorry.
Q. And Ms. Elaine Manning she's not here today, correct?
A. No, ma'am.
Q. Have you ever talked to her?
A. No, ma'am.
Q. So you have no ideas as to whether or not she'd say anything that's favorable to your case, correct?
A. Only by what counsel tell me what she stated to him.
Q. So counsel talked to her?
A. Counsel talked to her.
Q. And you have no way of knowing whether the 911 call would have been favorable to you, correct?
A. I do know because I have the transcript.
Q. But the transcript reflects that it had been destroyed by the time of trial, correct?
A. Yes, sir.
Q. And you stated that your statement given to the police was consistent with what you testified to at trial, correct?
A. Yes, ma'am.

Q. And you acknowledge that the judge gave a general instruction as to specific intent is required for an attempted crime, correct?
A. Yes, ma'am.
Q. It's just when it got to attempted murder he stated it was not, correct?
A. Say it again? You said when he got to attempt murder?
Q. When he, the judge, started talking about attempted murder specifically ---
A. Yes, ma'am.
Q. He stated that specific intent was not an element?
A. Yes, ma'am.
Q. But when he was talking about a attempt crimes more generally he said it was, correct?
A. Yes, ma'am.
Q. Okay.
MS. MARTO: One moment, Your Honor.
Q. Now, did you say you wanted your attorney to hire an investigator?
A. Well, I had -- I had an investigator. I don't know what happened to him.
Q. Okay. But is there anything, specifically, you think that the investigator would have pulled out?

A. It's possible if he would've investigated.
Q. Okay. But you don't know anything, specifically, correct?
A. No.
MS. MARTO: No further question, Your Honor.
MR. FOWLER: May I? Thank you.

Redirect Examination by Mr. Fowler:

Q. You, basically, stand by your application number 10, 11, basically, about the ineffective assistance of counsel by failure to properly object to the jury charge and about the issues with specific intent, correct?
A. That's correct.
Q. And you're not overly familiar with, at this point, with things that she brought up, is that correct?
A. No, sir.
Q. Okay.
MR. FOWLER: Nothing further, Your Honor.
MS. MARTO: No further questions for this witness.
THE COURT: Okay. You may step down. Mr. Fowler, do you want to help him ---
MR. FOWLER: Yes, obviously, Your Honor.
THE COURT: --- Mr. Hayes?

MR. FOWLER: I apologize. Thank you. Just a moment, Your Honor. Thank you. Your Honor, that's our only witness for today.

THE COURT: Okay.

MS. MARTO: Your Honor, we'd call Mr. Matthew Swilley to the stand please.

THE CLERK: If you'd raise your right hand please. Do you swear from the testimony you give this court to be the truth, and nothing but the truth so help you God?

MR. SWILLEY: I do.

MATTHEW SWILLEY, first being duly sworn, testified as follows:

Direct Examination by Mr. Marto:

Q. Good morning, sir.

A. Good morning.

Q. Thank you for your patience. So you represented Mr. Hayes at his trial, correct?

A. That's right

Q. Okay. And when did you start taking over that case, do you recall?

A. I don't recall the exact time I took over Mr. Hayes's case. At the time, I had a part-time contract with the public defender's office. It wasn't a 60N(ph) appointment. I was a part-time

public defender and they got took that, I got that sometime in 2017 so it was probably in 2017. I think Mr. Hayes was charged in 2016.

Q. And do you recall how many times you, roughly, met with him?

A. I recall many times what now?

Q. You met with Mr. Hayes prior to trial?

A. Several.

Q. Okay. And like what substantively did y'all talk about during those meetings?

A. Mostly trial prep. Trying to gather evidence for the case. I guess, if the State have made any offers to Mr. Hayes, we discussed those, that type of thing.

Q. Okay. And in a few sentences kind of give us an overview of what the evidence in the case was?

A. Mr Hayes was accused of, I guess, sexual assault and attempted murder on a Ms. Candaice, I forget her last name, a lady name Candace over in the Maplewood Section of Dillon which is, I guess, is Section 8 housing as you get into the City of Dillon. Supposedly, they had been out in a nightclub and Mr. Hayes accompany her back to her house. She accused him of forcing himself sexually upon her and then choking her. And then at some point her sister came in to return her children and the allegations were

that Mr. Hayes commenced to assault the sister as well. I believe the sister, the two women went next door to Elaine Manning's house and that's when 911 was called. And subsequent, I believe Mr. Hayes was apprehended. He was interviewed, I think, Jason Turner of the Dillon County Police Department.

Q. Did you ---

A. And then he was arrested, thereafter.

Q. Did you talk to Elaine?

A. I did.

Q. And roughly, what are those conversations consist of?

A. So I had my investigator go out and meet with Ms. Manning. I think he met with her several times at her home in Maplewood too. And I, during the trial, I, myself, met with Ms. Manning with my investigator. Ms. Manning -- and I do think I did have her subpoenaed, but Ms. Manning based upon my observations suffered from some mental illness. And she ---

MR. FOWLER: Object -- objection, Your Honor. He's making a medical statement that he's not been qualified as an expert on that.

THE COURT: He's testifying about his impression of her as it relates to his decision as to whether or

not to call her as a witness is what I'm inferring from his testimony. But I'll let him clear that up if he needs to.

MR. FOWLER: Thank you, Your Honor.

A. The reason I didn't call on Ms. Manning based and our conversation with Ms. Manning she was at times incoherent, at times contradictory. and I did not believe at the point where I spoke to Ms. Manning during trial that I felt comfortable putting her on the witness stand and asking questions. I didn't know if that would have turned out favorably to us or unfavorably which she couldn't really get me, um, she couldn't really give me a consistent narrative of what occurred, other than that, you know, the two women ran into her apartment and then, you know, frantically. But other, other details would vary and I just -- I did not feel as though I should Ms. Manning on the stand, unfortunately.

Q. Okay.

A. I would've have liked to.

Q. Now, you requested lesser included instructions, correct?

A. I don't remember.

Q. Okay. Would you be surprised if you did?

A. I would not be surprised if I requested the

lesser included, no, I think always do.
Q. Okay. Now, do you recall the judge giving an instruction concerning the attempted murder?
A. I don't any recollection of that, but I know we did for being here today.
Q. Okay. And you didn't object to that, correct?
A. No. I did not object to the, the intent charge for attempted murder.
Q. Now, do you recall Mr. Hayes giving a police statement?
A. Giving a statement to Jason Turner?
Q. Yes, sir.
A. Yeah, I do.
Q. Okay. And did you enter that at trial?
A. Did I do what at trial?
Q. Did you enter that statement at trial?
A. No. I would have been unable to. I mean, it wasn't admissible because it was self-serving. I know that Ms. Burchstead had even told me before trial that she was gonna move to have excluded and I told her I wasn't going to enter it in. I didn't think we had the grounds for, unfortunately. Because it was, it was not inculpatory. It was exculpatory. And I think it probably would have been excluded under the hearsay rule, unfortunately. That's why I

always advise people not to talk to the police because it can't be used to help you at trial, it can only be used to hurt you.

Q. Do you recall the issue concerning the 911 call being destroyed?

A. Yes, I did. This is very peculiar. Unfortunately, it's not a typical that something like this happens in Dillon. I went, myself, personally to Dillon County E-911 after I had sent a subpoena for recording. I was able to get the CAD report, but the recording had been destroyed. I don't know I didn't really get an answer as to their policy. But the lady, the young lady who was working there made some comments about the case and about Mr. Hayes that she believed he had committed the crime for which he was charged which really ---

MR. FOWLER: Objection, Your Honor, hearsay.

THE COURT: Overruled. He's, as I understand it, he's expressing his reasoning for not following up or not being able to get the recording to introduce.

MR. FOWLER: Yes, sir.

A. After speaking with this lady and not being given a valid reason why the tape had not been, ah, the audio recording not preserved I had my suspicions. But the recording then -- the audio recording hadn't

been preserved. I think based upon my conversations with Ms. Burchstead, the State was equally perplexed and this young lady did, was subpoenaed at the trial by the State and it was very obvious that she did not want to be there.

Q. Do you recall cross-examining both Candice and Ann?

A. Vaguely. Yes.

Q. And what was your, I guess, approach when it came to cross-examination?

A. I remember, I think I was trying to impeach both women with, with their prior statements. I think they were, some were different at trial. I think they had said some things at trial that were inconsistent with what they had told law enforcement. Particularly, Candace's statement to Jason Turner, I think that was recorded on a body cam while she was in a hospital bed. And there was, I believe there's some inconsistencies. Also, as to the, I guess, I cross-examined her to try to reveal the consensual nature of their sexual encounter which I think was fairly obvious based on the circumstances.

Q. Do you recall if the sisters testimonies were consistent with one another?

A. I think they deviated somewhat. How much I don't

remember.
Q. Okay. Do you recall if you brought that up during cross-examination and closing?
A. I should have. I don’t recall, specifically.
Q. Okay. Do you recall the body camera footage of the victim's dad?
A. Yes.
Q. Okay. And you didn't move to have that admitted at trial, correct?
A. No. I did not.
Q. Okay. Do you think it would have been helpful?
A. Again, I don't know -- I know that there was the scene when they, when the police arrived and the body cam was recording a bunch of, I guess, excited utterances were being made. There was a gentleman who I think was later identified as Candace’s father who made an excited utterance or kind of a, he blurted out, I bet it was the boyfriend or something like that. And then there were some other excited utterances made by, I think, Candace as she was being taken away by EMS. But all together I don't, I mean, I didn't really think it had a whole, that had a whole lot of evidentiary value because it was kind of the father speculating that I didn't, I didn't feel like introducing that, it would’ve been, would’ve

have been helpful because of some of the other stuff in that video that showed Candace being taken out, you know, on a stretcher by EMS. And she made some statements that were not favorable to us. I didn't really feel like putting that before the jury would have been particularly helpful.

Q. Okay. And that would have been all included in one video, correct?

A. Yes. Or what were one, you know, that may have been bifurcated, but one stream from off of officer's body cam, yeah.

Q. Okay. Now, did you think that the chain of custody concerning the knife was incomplete?

A. I think because chain of custody really covers only fungible items, I didn't, I didn't feel as though that was going to -- and it hadn't been analyzed so I didn't really feel like I had any grounds to exclude on chain of custody. I don't -- I guess -- I guess I could have objected as to relevance since it wasn't ever, it wasn't never analyzed. But -- but I didn't really that the entry of that hurt our position that much.

Q. Do you recall how many knives were said to have been a part of the incident, itself?

A. How many knives what now?

Q. Were thought to be a part of the incident, itself?

A. I -- I don't recall that. I'm sorry.

Q. Okay. Do you recall several knives being, I guess, obtained and found throughout the course of the weeks following?

A. I think they're several knives that were taken into evidence. What was kind of odd again, was there was a knife blade found in a field days afterwards, I believe by somebody connected to Candace. And what was odd about that knife blade being found was that the handle was missing. And that -- and that knife set, you know, the handle was riveted onto the blade and it was kind of perplexed and why -- why would -- how and why would that handle be removed and then found in a field like that. That was very strange. I do remember that.

Q. Okay.

A. And I think I made, made a point of that in my closing if I recall, correctly.

MS. MARTO: One moment, Your Honor. No further questions.

MR. FOWLER: If I may, Your Honor?

Cross-Examination by Mr. Fowler:

Q. You mentioned that you had an invest -- well,

first of all were you here for Mr. Hayes's testimony today?

A. Partially. I stepped out for a moment.

Q. Okay. You mentioned that there was an investigator that you hire?

A. Right. Yes. I obtained funding for an investigator in the case.

Q. Okay. Did he or she testified at trial?

A. No.

Q. And why not?

A. I didn't really think that he had much to offer. Most of the things he did was going out to interview witnesses and kind of, you know, interview witnesses, building rapport so that he could get facts from certain people. And anything he would have done would have been, I guess, testimonial. He really could only have testified as to what people told him which would generally been inadmissible. I didn’t think there was really anything that he could testify to himself about anything that he did. He did serve subpoenas on people in transport with some of defense witnesses, if I recall correctly, to the court. And then we had one young lady who I think who had witness Candace at the nightclub, subsequent, very close to subsequent to the allegations. But he did

that kind of thing, basically, dealt with people and collected information verbally from people.
Q. Okay. But was that is exclusive role to just do verbal stuff or did he, or was he allowed to look at evidence and things along those lines?
A. I mean, he looked at the discovery, right. All of the discovery was shared with him and, you know, I mean, anything, you know, he could do to, to assist, he did. But really his role in the case was to, was to talk to people whom I probably could not talk to and get answers from.
Q. Did he ever have a conversation with Mr. Hayes?
A. Yes.
Q. Okay. When -- did he explain why he was no longer doing anything on the case or....
A. I don't think he ever explained that to Mr. Hayes. I mean, my investigator was working throughout the trial, I mean, he was going out finding people during the trial and even, you know, he kind of ran out of time, and he'd even found some more people who may or could have offered some, some help. I don't know. But that was, you know, after, unfortunately, I had to close. So he, he never stopped working during the case. I mean, it was -- I mean, he worked right up, pretty much to the very

end.
Q. But -- but even though, in your words, he worked till the very end, he never testified at trial, correct?
A. Right. He didn't testify.
Q. Okay. You mentioned that Manning could have been a helpful witness, is that correct?
A. I mean, it depends what day it was. I mean, Ms. Manning, she would -- the night I met with her, it was nighttime, and I met with her with my investigator during the trial, I think right at the State has rested. It was probably like, I mean, it was nighttime near her, her house, and some of the things she said were just wholly, I mean, she would contradict yourself almost within the same sentence. It was very unfortunate because I do think had she been, you know, I guess competent to testify or coherent, she may have been able to offer something favorably, but she just -- I don't -- again, I can't tell you what, specifically, was wrong with her psychologically, but she just, she displayed some very bizarre behavior.
Q. But she was the most -- she was one of the more favorable witnesses to Mr. Hayes, is that correct?
A. You know, she -- I don't -- I mean, to answer

that question, I don't know. I mean, she could have been, she could have been one of the more damning witnesses as far as if she would've said some of the things she told me. But really Ms. Manning, you know, she --she -- she was able to substantiate these women rushed into her house, you know, after being, I guess, what appeared to be assaulted and called 911. I mean, she could've -- she maybe could have offered some inconsistent statements that these women could have made if she, if she testified consistently. I don't know. So I don't know if she could have, been, if she would have been wholly favorable or not.

Q. In an earlier testimony you said, said that you don't remember if you included the lesser included instructions, is that correct?

A. I really can't remember off the top ---

Q. But you did not, did you?

A. I don't know.

Q. Okay. You were here for the earlier testimony of Mr. Hayes, correct?

A. Part of it.

Q. Okay. Well, you were here during the time - - you were sitting over in the jury box, correct?

A. Right.

Q. While he was talking about Pages 583 and that

area, correct?
A. Yes.
Q. Okay. And also earlier in, I believe, 532, something like that, and according to his testimony you did not, is that correct?
A. I think that's what he said. But I don't recall if I asked for the lesser included or not. I usually do in a trial.
Q. But the transcript is a pretty good evidence of what you did or did not do, is that correct?
A. I think it's probably the best evidence of what I did or didn't do.
Q. And it shows that you did not, is that correct?
A. I haven't seen the transcript.
Q. Okay. But you heard his test -- you were in the courtroom hearing his testimony on those issues, correct?
A. Yes.
Q. Okay. Also you testified that she did not object to the intent charged for attempted murder, is that correct?
A. Yeah. You know, the State -- the case the State of Rakeem King came out in 2017 where our Supreme Court said that, you know, there has to be specific intent for attempted murder. That's an element the

State has to prove.
Q. Well ---
A. ---- and that got by me. So I forgot to -- I forgot to actually bring that up and object that, that general intent jury charge that Judge Henderson read, I should have done that, but I failed to do that.
Q. Just few more questions in terms of the 911 call being destroyed, you did get a CAD or C-A-D detail on that, correct?
A. Yes.
Q. Did you make any attempts to enter that C-A-D detail into evidence during the trial?
A. No. I don't -- well, I don't believe so.
Q. Okay. Could you probably gotten somebody, some record keeper to verify that as to its authenticity at the trial?
A. I think the woman from 911 testified probably could have authenticated it and put it in.
Q. But you didn't do that, did you?
A. No. I didn't -- I didn't do that.
Q. All right.
A. I don't recall if it was helpful, if the CAD had been helpful or not.
Q. Okay. Earlier you mentioned that on direct that

the body cam of the dad was not admitted at trial, is that correct?
A. Yes. Okay. And you kind of said that if there was -- if it was a lingering type, you know, his excited utterances or discussions along with other issues that would have, you would have wanted to not include it, is that correct?
A. Yeah. There's somethings, I mean, he makes that, he makes that kind of excited utterance, I guess, you'd call it on the body camera about it being, "I bet it was the boyfriend" or something of that nature. And there were some other things that were said on camera, on body cam that probably were not, I'd say probably, that were not favorable to us.
Q. But if it was a -- if it was just the testimony of -- well, if it just the discussion on the body cam with the father by himself then would that have changed your mind about hearing in that excited utterance or statement into evidence?
A. Yeah, maybe. Really with the body cam with him saying that it's really kind of a speculation that he kind of speculated, "I bet it was the boyfriend." I think Candace dated, just to kind of clarify, Candace dated this guy or was with this guy named, his name was James Smiley, who'd based on the investigation

and some of the background information I obtained was a pretty rough character so to speak, that he had done some time in jail on some violent stuff, maybe drug related. So -- and I think that was the individual to whom Mr. Hayes had accused of actually assaulting Candace and Ann. But I don't think there was anything else on, on the body cam recording that would've substantiated that happening. It was just this gentleman saying, "I bet it was boyfriend." So I don't think in putting that in, I don't know If it would have been admissible -- I don't know if the judge would've let it in. But I don't know how much it would've helped us.

Q. Okay. You said the chain of custody as to you -- well, you said there were several knives, correct?

A. I think there were several knives that were taken into evidence by the Dillon Police along with, I guess, the knife blade that was turned in days later.

Q. And were any of those analyzed by sled or a evidentiary authority?

A. I want to say -- I can't recall. I know that I did, at some point I did get a DNA expert that I retained and I know that there was, I say know -- I think there was some, there was some kind of DNA that couldn't be attributed to someone that were were

trying to get and I was trying to get sled to perform what's called Y-STR DNA analysis which is like Y chromosome with short tandem repeat analysis is what my, my expert had told me to try to do, to try to further exclude Mr. Hayes or maybe it could, that they could somehow maybe run that through CODIS and get a hit from someone else. And I think that they did do that, but they couldn't -- it didn’t -- I don't think they were able to analyze -- they were able -- I don’t think they ever come up wisth like a DNA profile that they could perform Y-STR.

Q. Okay. You said you hired a DNA expert, is that correct?

A. I did. Dr. Brian Mayhan.

Q. Did he ever -- did the doctor ever testify at trial?

A. No. He was less than helpful.

Q. Okay. But there was no DNA evidence showing that Mr. Hayes's fingerprints, etc. were on any of the knives, is that correct?

A. I don't -- I don't recall. I don't think there's anything finger -- I don't think there's any fingerprint evidence at all. I think there was some DNA -- I did -- I do remember getting some DNA reports, would have been in my green trial notebook

and that's why I retained Dr. Mayhan.
Q. Okay. And you said you possibly could have objected to those knives on relevance, but you did not object to those knives as to relevance, correct?
A. No. I don't think, if I recall correctly, I was pretty confident the judge was gonna let that evidence in. So I didn't think that I really needed to make an objection about it.
MR. FOWLER: Can I have just a moment, Your Honor.
THE COURT: Yes.
MR. FOWLER: Thank you.
Q. Okay. So just to reiterate some of the things that were brought up just briefly that brought up on direct, you hired an investigator but he did not testify at trial, is that correct?
A. Correct.
Q. Manning was a potentially favorable witness to Mr. Hayes, but she did not testify at trial, correct?
A. Yes.
Q. And you stated initially that you don't remember that you did not include the lesser instruction, is that correct?
A. Yeah. I don't have any recollection as to whether I request the lesser included or not.
Q. But you also stated that the transcript is a good

indication of whether you did or not, is that correct?
A. It would be the best indicator whether I did or not.
Q. Okay. And also you stated that you provide no objection to the intent charged for attempted murder, is that correct?
A. That's correct. I should have done that.
Q. The 911 call even though, apparently, it may have been the audio was deleted, there was a C-A-D report and the question is, you did not get anybody to authenticate that C-A-D report that may have been helpful for Mr. Hayes, correct?
A. I don't know if it would have been helpful for Mr. Hayes, but, no, I did not entered it into evidence.
Q. Okay. But he indicated earlier that it could have been helpful, is that correct?
A. Mr. Hayes?
Q. Yes.
A. I didn't hear him say that.
Q. Okay. And also you stated that if the excited utterance or statement about the, from the dad, saying "I bet it was the boyfriend", if that was spliced off in an individual section of the video

that that would have been something potentially good to enter into evidence at the trial, correct?
A. I mean, it could have been.
Q. Okay. And also you stated that there were issues with the chain of custody of evidence, is that correct??
A. I don't know if -- I don’t recall if there were any issues with the chain or not.
Q. Okay. But you didn't object to anything being entered into the trial record, correct? You did -- you didn’t object to the chain of custody issues or evidentiary issues as to the knives, did you?
A. I don't recall doing that or not doing that.
Q. All right. And also you hired a DNA expert, but that DNA expert did not testify at trial, correct?
A. Correct.
Q. All right.

MR. FOWLER: Your Honor, after consulting with my client I have nothing else, Your Honor.

MS. MARTO: Just a few more questions, Your Honor.

Redirect Examination by Ms. Marto:

Q. Sir, do you think the CAD report would have been helpful if you admitted it?
A. I don't know. I don't think -- I mean, I don't think it did anything to help us or hurt us any

further.
Q. Do you think that the State would have allowed you to splice out only the favorable parts of the bodycam?
MR. FOWLER: Objection, Your Honor. It calls for speculation on what he thinks the State would do.
THE COURT: Overruled.
A. I think they would have objected to me putting that in on probably numerous grounds.
Q. Okay. So at the time was it your professional judgment that if you were to enter the video the whole thing would be admitted?
A. I mean, I don't think I could have gotten the video in just because there were certain, there were certain hearsay that was, that was in it, in that video.
Q. Okay.
A. But I don't think -- I don't think I could have gotten -- I don't think -- I don't think that the judge would have let me enter in to this person exclaimed that "I bet was the boyfriend." I don't think -- I don't think Judge Henderson would have let that in. I don't think the State -- I think the State would have objected to that.
Q. And it's your testimony that you don't recall

requesting for lessors or that you didn't?
A. I have no -- I don’t have any recollection as whether I request the lesser included or not. It should be in the transcript if I did or didn’t.
Q. Yeah. I'm looking at Page -- it would be on 5, Page 522 starting with Line 23, and it says you said, “Judge, I don't -- I guess, I would request lesser includeds. I guess, I'm obligated to ABHAN and A&B first.” Would that be consistent? Would you rely upon the transcript in terms of that?
A. Ms. Marto, tell what line and page you’re at?
Q. It would be Page 522, Line 23.
A. Well, that’s -- I guess, I would request lesser included, I guess, I’m obligated to, ABHAN and A&B first, I guess. And I don’t know if there’s, “ready for your closing arguments” that's a -- I didn’t say that. That doesn't make any sense. I think, I said I don't know if they're ready for their closing arguments meaning the State.
Q. Page 20, 523 says, “Gonna be any consequences, but I probably ought to get it, get to request it.”
A. I said, I don't know if it's going to be of any consequence, but I probably ought to request it, yeah.
Q. Yeah. So based upon the transcript, you would

agree that you requested the lesser includeds?
A. It appears the judge asked ---
MR. FOWLER: Object -- Your Honor, I'd like to object to this line of questioning because this is new evidence that's been brought in. She could've provided this on her direct and I don't think it's the appropriate time for her to bring in this new evidence ---
THE COURT: Or she can do it in the argument. It's a part -- this is part of the record. Y'all get to argue what's in the record.
MR. FOWLER: Thank you, Your Honor.
THE COURT: Go ahead.
A. Line 3, states, "The Court: State's position with regard to any lesser included of an ABHAN and A&B first. And Ms. Burchstead response, I don't think we can really object to lesser includeds being presented if there's evidence that the jury fine those, probably, is in this case. I would simply ask that in a charge we make it clear that there's two counts of attempted murder and that they can find, you know, attempted murder or the lesser included on either. Judge Henderson response, Oh, yeah. Ms. Burchstead states, it doesn't have to be the same. The court say, I will. Ms. Burchstead, says, right. I'll do

that. Thanks, Judge."
Q. Okay.
A. So it looks like I requested it. They consented and he was gonna charged it.
Q. And again, do you recall as you testified on the cross, whether or not any DNA evidence was found or just on the knife?
A. I can't -- I really don't recall, Ms. Marto.
Q. Okay.
MS. MARTO: No further questions.
MR. FOWLER: After consulting with my client, Your Honor, no further questions.
THE COURT: Okay. Thank you. You may step down.
MR. SWILLEY: Your Honor, may I be released from my subpeona?
THE COURT: Any objection?
MS. MARTO: No, Your Honor.
MR. FOWLER: Is the State gonna call anymore witnesses?
MS. MARTO: No more witnesses, Your Honor.
MR. FOWLER: You're released.
THE COURT: You may be. Thank you.
MR. SWILLEY: Thank you.
THE COURT: All right. Anything else on behalf from the State?

MS. MARTO: No further witnesses, Your Honor.

THE COURT: All right. Mr. Fowler, anything else?

MR. FOWLER: Are we doing closing arguments, Your Honor, or....

THE COURT: If you -- if you want to.

MS. MARTO: If you want to.

THE COURT: But before you do that let me ask you this, I want to -- you might be able to save me a little bit of time. I'm trying to understand this issue about lesser included offenses. Mr. Fowler have alleged on behalf of your client or he's alleged and you've argued it that, or brought out evidence of it that the lesser included offenses were not requested by Mr. Swilley. As I understand it, the transcript reflects that lesser offenses were requested. So question to you, Mr. Fowler, is what lesser included offense do you think was available to the defendant at the time of trial that would have been charged or could have been charged based upon the evidence presented and the law related to it? What lesser included offense could or should the judge have been requested to charge or that the judge did or did not charge that should have been charged? Does that make sense?

MR. FOWLER: Just a moment, Your Honor. If I --

please.

THE COURT: Okay. But I think you're gonna know the answer to that question better than your client.

MR. FOWLER: I want to -- Your Honor, my understanding is that there were several lesser included possibilities ---

THE COURT: I need to know -- I need to know what you claim those are if it's gonna be used for any ineffective assistance of counsel?

MR. FOWLER: Well -- and Your Honor, I guess thing is this, you know, it shows from the -- from the attorney's own testimony he indicates that he did not ask for that ---

THE COURT: For what?

MR. FOWLER: —-- and also -- you know, I don't know the specific ones right now, the lesser included of attempted murder. But the point of the story is, Your Honor, I think that there are opportunities for lesser included charges and ---

THE COURT: Well, I know that's what you claim, but I'm saying you've got to tell me what those are so that can determine whether or not there was an error either on Mr. Swilley's part for not requesting some specific lesser included offense.

MR. FOWLER: Yes, sir. I think ---

THE COURT: That was not charged by the court.

MR. FOWLER: I think it could have been a lesser included offenses of assault battery the high and aggravated nature and assault battery in the first degree. Those could have been presented to the jury, Your Honor.

THE COURT: Okay. Are those the only two?

MR. FOWLER: Ah ---

THE COURT: Assault and Battery of a High and Aggravated Nature and Assault and Battery, first degree?

MR. FOWLER: Just a moment, Your Honor. If I -- if I may, Your Honor. Yes, sir, that's, correct.

THE COURT: And -- and neither of us were charged by the court?

MR. FOWLER: That's my understanding, Your Honor.

THE COURT: Okay.

MS. MARTO: Your Honor, concerning that one, specifically, I believe that Mr. Swilley just read out the transcript that both of those were the two that were requested. And so we would request, I guess, a directed verdict on that issue.

THE COURT: Well ---

THE COURT: Your Honor, I don’t believe that, that

was -- at the very end the, lines, excuse me, Pages 583 through 586, those are erroneous, in our opinion, jury charges. So I believe that that's a relevant here, Your Honor.

THE COURT: What were -- what were erroneous?

MR. FOWLER: Five, eighty-three, about the attempt, Lines 5 through 15.

THE COURT: No, no! No, no! We're not talking about that right now. My question was, what lesser included offenses based upon the evidence and the law, what lesser included offenses were available to be instructed that the court failed to instruct or the counsel failed to request to be instructed?

MR. FOWLER: And to be clear, Your Honor, assault and battery of a high and aggravated nature and assault battery in the first degree.

THE COURT: All right. And Ms. Marto just said that those were instructed. Do you agree with that?

MR. FOWLER: On what page was that?

MS. MARTO: Your Honor, the request from my understanding was on Page ---

THE COURT: I may have misstated. I don’t know if they were instructed or not, but she said that Mr. Swilley requested that those be instructed.

MS. MARTO: The request ---

THE COURT: What page was that?

MS. MARTO: The request was made on Pages 522 and 523, the actual instruction was given. Five, eighty-eight ---

MR. FOWLER: What pages and lines are you referring to again, please?

MS. MARTO: Okay. The request made on Page 523. My understanding is it starts with Line 23.

MR. FOWLER: And it continues to where?

MS. MARTO: And it continues, the request itself, 523, Line 2 and then the judge says that they would do it on Line 16 of that same page. And then the actual instruction was given Page 588 starting with Line 4 down through 589, Line 7.

THE COURT: All right. What I'm looking at on Page 523 is the court asked what of the State "what is the State's position with regards to any lesser included offenses of ABHAN and A&B, frist. And the State said they had no objection if there's evidence to support it. So it appears that Mr. Swilley did request ABHAN and A&B, first. Do you agree with that, Mr. Fowler?

MR. FOWLER: I do not agree with that, Your Honor, because if you read Page 522 to the top of 523 as to Swilley, "Judge, I don't, I guess I would

request lesser includeds. I guess I'm obligated to ABHAN and A&B, first, I guess and I don't know if there's going to be any consequence, but I probably ought to get to request it." That is about as -- it's very unclear in my opinion.

THE COURT: Well, it wasn't ---

MR. FOWLER: He does not ---

THE COURT: It wasn't unclear of Judge Henderson. He said what's the State's position with regards to the request?"

MR. FOWLER: Well, Judge Henderson also -- well, all I'm saying is that it's not very clear on the bottom of Page 522 and 523 to me because he's guessing and he probably ought to -- there was no specific request for those items by Swilley to the court. It was hemming and hawing of well, I guess, I'd better do it or I probably should. There was nothing specific on that, Your Honor.

THE COURT: All right. But the point is, the court thought he had requested it 'cause they asked to the State if they objected to it and the State said, no. and then Ms. Marto you say on 588, it was charged?

MS. MARTO: Yes, Your Honor.

THE COURT: Okay. Do you agree with that, Mr. Fowler?

MR. FOWLER: What line on Page 588 please?

THE COURT: Well, 588 and 589.

MS. MARTO: Starting with Line 4, sir.

MR. FOWLER: Your Honor, we -- let me speak with my client. Your Honor, it's our -- based on the totality of documents that I had been presented with it's my understanding that that the ABHAN, that the, excuse me, that those were not presented adequately and it's based on discussions with my client ---

THE COURT: You talking about by the court?

MR. FOWLER: Yes.

THE COURT: Well, that's a different issues. We're talking about ineffective assistance of counsel here.

MR. FOWLER: Well, the ineffective assistance of counsel goes to his attorney's lack of objection of item, Your Honor.

THE COURT: All right. So you're, you're amending your application to say that when it was instructed by the court that Mr. Swilley failed to object to the adequacy of it?

MR. FOWLER: Your Honor, my understanding is that as, you know, my understanding is based on what I've read, what documentation has been provided me is that Mr. Swilley did not adequately object or promote my

client's interests at that point and he's -- and he's ---

THE COURT: Object to, object to what? Object to what?

MR. FOWLER: Well, we can go by his own words, he said he doesn't remember if he included the lesser instructions or he thinks he always does, but he could not specify in the case.

THE COURT: Well, I know. But that's not objection. That's a failure to request. But my point is, you know and Ms. Marto knows and now I know he did request it 'cause the transcript reflects that.

MR. FOWLER: Well, I'm going on his testimony, Your Honor, and what he indicated earlier.

THE COURT: Are you telling me you're ignoring the transcript.

MR. FOWLER: I'm -- I'm going on what he indicated to me earlier and to the court.

THE COURT: Well, what he indicated to the court was is that and I think it was pursuant your question, what's in the transcript would be best evidence of what he did or didn't do so far as what happened in that court. Is that a fair statement?

MR. FOWLER: I was trying to, trying to get a

more definite answer from him, Your Honor.

THE COURT: Okay. All right. Anything else?

MR. FOWLER: No, sir.

THE COURT: Do y'all have any statements you want to present?

MR. FOWLER: No, sir.

MS. MARTO: Your Honor, just our primary argument concerning the attempted murder charge is that prejudice has not been established because in order to establish that a jury was, there was prejudice based upon improper jury instructions. The court must find the viewing of the charge and its entirety. There is a reasonable likelihood that it was implied in an improper way. And it's the Attorney General's Office's position that the prejudice prong has not been established because use of the knife, the fear of the women, and the resulting injuries. And so we would just request that we will concede deficiency for failure to object on that ground, but we would request that relief still be denied because prejudice has not been met.

THE COURT: Okay. Tell me again why prejudice has not been met?

MS. MARTO: Your Honor, it's the office's position that, um, that error in instruction was

harmless.

THE COURT: Okay. All right. Mr. Fowler, do you want to respond?

MR. FOWLER: Your Honor, the only thing I can do is go with what my client and the research that he and I have reviewed together and we continue to, to content that the error in any instructions was, was harmful, Your Honor. That's why we're here today to show the lack of deficiency, the deficiency in his, in his attorney's presentation. And also, Your Honor, we, we continue to show on number 10 and 11 that, and also there are various other items, Your Honor, that we presented to the court that showed the deficiency of the representation. And we've gone through those on our direct, cross-examination of Mr. Swilley and we asked for a verdict in our favor, Your Honor.

THE COURT: Okay. I'll -- I'll review it and issue a written order.

MS. MARTO: Thank you, Your Honor

MR. FOWLER: Thank you, Your Honor.

(CONCLUSION OF HEARING HELD ON JULY 26, 2022)

CERTIFICATE

I, the undersigned, Lisa S. Carter, do hereby certify that the foregoing is a true, accurate, and complete excerpt of transcript of record of all the proceedings had and evidence introduced in the hearing of the captioned cause, relative to appeal, in the Fourth Circuit for Darlington County, South Carolina, on the 26th day of July, 2022.

I do further certify that I am neither of kin, counsel, nor interest in any party hereto.

s/Lisa S. Carter

Lisa Carter

Circuit Court Reporter

July 31, 2023

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF DILLON)

FILED
GWEN T. HYATT
2023 APR -3 A 10:29
CLERK OF COURT
DILLON COUNTY

Tyreek Hayes, #366300,)
Applicant,) **ORDER**
v.) **GRANTING RELIEF IN PART, DENYING IN PART**
)
State of South Carolina,) Civil Action Case No.: ~~2022~~ 2021 CP-17-00506
Respondent.)

This matter comes before this Court by way of Applicant's post-conviction relief application filed December 6, 2021. Respondent made its return on April 12, 2022, requesting an evidentiary hearing be convened. An evidentiary hearing was held on July 26, 2022, at the Darlington County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Counsel Matthew S. Swilley, Esquire, also testified. After reviewing all records and evidence before this Court, this Court finds Applicant is entitled to relief based upon Counsel's failure to object to the jury instructions stating that specific intent is not an element of attempted murder. Relief is denied on all other grounds.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Dillon County Clerk of Court. Applicant was indicted by the Grand Jury for two counts of attempted murder (2016-GS-17-0875 and -0879), kidnapping (2016-GS-17-0877), and possession of a weapon during the commission of a violent crime (2016-GS-17-0878).[1] Applicant was represented by Matthew Swilley, Esq. Assistant Attorneys General Megan B. Burchstead and Joel A. Kozak prosecuted the case. On July 23-26, 2019, Applicant proceeded to trial before circuit judge Roger E. Henderson and a jury. Applicant was found guilty of attempted murder, kidnapping, and possession of a weapon during the commission of a violent crime. He was found not guilty of first degree criminal sexual conduct. Judge Henderson sentenced

[1] Applicant was also charged with first degree criminal sexual conduct, which he was found not guilty of at trial.

him to thirty years for each count of attempted murder, fifteen for kidnapping and five for possession of a weapon, sentences running consecutively.

Applicant filed a timely notice of appeal on August 5, 2019, that was perfected by Susan B. Hackett, Esquire, through filing a brief raising the following issue:

> The trial judge erred by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the State's case.

Briefing concluded on January 4, 2021. The South Carolina Court of Appeals affirmed the conviction by unpublished opinion. *State v. Hayes*, 2021-UP-378 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 29, 2021.

Summary of Relevant Facts

Candace Simpson met Reedy Boss, or Reedy All Boss, on Facebook and began communicating with him. (T. 106-07). Boss was later identified as Applicant. On the evening of September 30 and into the morning of October 1, 2016, Simpson planned to head to a local club called Strikers with some friends and left her kids at her mom's house where her sister, Ann Covington also lived. (T. 106, 108-09). After going to Strikers, Simpson and a friend went to T Lees, another club. (T. 111-12). While at T Lees, Simpson saw Applicant. (T. 113).

Applicant asked for a ride home from T Lees because he lived in the apartment complex next to the one Simpson lived in. (T. 113). When they all got out of the car, Applicant asked about coming into Simpson's apartment. (T. 115). Simpson went to wash off the smoke and change her clothes. When she came back out, she originally sat in a recliner while Applicant sat on her sectional. He asked her to come over by him, and when she did, he started trying to kiss her. Simpson told Applicant to leave, but he would not. (T. 116).

Instead, Applicant pulled Simpson into her bedroom. She tried to scream and bang on the wall to get the attention of her neighbor, but Applicant choked her immediately. He continued to drag her into the bedroom by the waist such that her feet were not touching the ground. (T. 117). She begged him to stop, but he refused. She begged him to wear a condom at least, they ended up on the floor getting a condom. Applicant then raped Simpson. (T. 118-119). Simpson passed out

after Applicant began penetrating her with his penis. (T. 119).

When she woke up, it was daylight and Applicant was just standing there watching her. (T. 119-20). Appellant indicated he wanted to have sex again, but Simpson did not want sex. He asked her to do oral sex, and she agreed believing she would be choked if she did not perform oral sex. (T. 120). Ultimately, Applicant choked Simpson again. She begged him to stop, telling him she had children. Applicant said Simpson would tell and she kept begging for her life. She woke up again after the choking and could barely walk. (T. 120).

Someone came over, and Simpson saw that it was her sister. Simpson told Covington that Applicant raped her. Covington told him to leave, but instead he and Covington started "fussing" and Simpson believed Applicant was punching Covington, at the time not knowing he had a knife. (T.123-24). Simpson jumped on Applicant and Covington was able to get free. Simpson tried to run, but Applicant grabbed her. He then tried to cut her neck, but she was able to get her hands up. He dragged her into the kitchen and stabbed her. (T.123-25). Ultimately, Applicant went to the front door because he heard it open, and Simpson was able to escape out the sliding door in the back. (T. 126). Simpson had to bust through the screen to get out and away from Applicant. She ran to her neighbor's house without clothes on and with multiple stab wounds. (T. 127).

Someone called 911 and an ambulance arrived to take Simpson to the hospital. (T. 128). After being treated and receiving stiches and staples, she was shown a photo lineup. She identified Applicant in the lineup. (T.129, 303, State's Exhibits 84 & 86). At trial, Simpson again identified Applicant as the person who raped her, choked her, wounded her and her sister with a knife, and held her against her will. (T. 137-138).

Covington testified that when she brought Simpson's son back, she walked in on what she thought was Simpson and someone having sex. After she backed out of the bedroom, she explained that Simpson came out and said the person was trying to kill her. Covington was not going to allow the person to go back in the room where Simpson was located, but he got on top of Covington. Covington thought he was hitting her, but instead he was stabbing her. (T. 197-98). She managed to escape when Simpson jumped on Applicant's back. Covington went next door and asked them to call 911. (T.199-200). She stated Simpson finally came around the building and to the neighbor's apartment. Simpson had no clothes on, and both Simpson and Covington were bleeding from the knife wounds inflicted by Applicant. (T. 203).

Current Action Before this Court

In his current PCR application, Applicant alleges he is being held in custody unlawfully because of ineffective assistance of counsel in that:

1. Ineffective assistance of counsel by his failure to object to the jury charge for attempted murder.
    a. The court charged specific intent is not an element of attempted murder and counsel did not object.

At the PCR hearing, Applicant proceeded forward on the following allegations:

1. Ineffective assistance of counsel.
    a. Failure to object to jury charge re: specific intent.
    b. Failure to object to admission of knife.
    c. Failure to enter body camera footage.
    d. For telling the jury he never gave a statement.
    e. Failure to enter Applicant's police statement.
    f. Failure to request lesser-included instructions.
    g. Failure to call witness Elaine Manning.
    h. Failure to procure and play 911 call.
    i. Failure to properly impeach the victims during cross-examination.
    j. Failure to call the private investigator to testify.
    k. Failure to enter CAD report.
    l. Failure to present third-party guilt defense.
    m. Failure to call DNA expert to testify.

All other allegations raised in his initial application and amendments are deemed waived and abandoned and, accordingly, will not be addressed in this order.

Summary of the Testimony

Applicant Testimony

Applicant claimed Counsel was ineffective for failure to object to the erroneous jury instructions stating that specific intent is not an element of attempted murder. He stated that Counsel should have objected to the Court saying one only needs to prove general intent to commit great bodily injury to find Applicant guilty of attempted murder. He stated that if the correct jury instructions were given, he may have been found not guilty.

He stated that one knife was discovered at the apartment, which the lead investigator discovered and brought into evidence. He stated that two other knives were also discovered by people other than the investigator. He stated that the knives were placed into evidence and used against him at trial. He stated that Counsel should have objected to the knives because they were

unrelated to the incident but were used against him at trial anyway. He stated that there was not a proper chain of custody over the knives and no SLED involvement in their handling. He stated that he thought Counsel objecting may have resulted in an acquittal. He stated that the knives were discovered five days after the officers searched every inch of the apartment.

He stated that there was video footage from the victims' father, stating that he thought one of the victim's boyfriends was to blame. He stated that this was helpful to his case but was never entered at trial.

He stated Counsel was ineffective for telling the jury he never gave the police a recorded statement. He stated he told the police detail by detail about what happened. He stated Counsel told the jury that he never tried to tell his story. He stated Counsel should have showed audio and video, of him, about what happened. He stated that, during deliberations, the jury requested a copy of his police narrative. He stated that they could not show the jury his statement because it was never entered into evidence. He stated that if the jury saw his statement, it would have changed the outcome at trial.

He stated that Counsel never asked the Court to charge the jury on lesser-included instructions. He stated that Elaine Manning, the next-door neighbor, was not called to testify at trial. He stated she was the first person to see the victims after the incident and called 911. He stated Counsel did not call this witness because she did not want to be involved in the criminal matter. He stated Counsel addressed her absence at trial during closing argument, but never called her to testify. He stated he talked to Counsel about this issue, but Counsel said she did not want to be involved and knew about certain things that the victims told her.

He stated that James Smiley called 911. He said Smiley stated he was on scene and knew the victim. He stated Counsel never investigated this witness. He stated that the call was deleted a year after it was placed. Applicant claimed this constituted tampering. He stated Counsel should have preserved this call in a timely matter and could have investigated the guy that placed the call.

He testified that there were conflicting testimonies presented at trial. He stated that one of the victims stated that her sister ran into the room with her kids, but also stated she came up behind her. She stated that the other victim denied this happened. She stated that one of the victims was questioned about jumping on the bed, but she denied this. He stated that several witnesses denied this happened.

On cross-examination, he stated that there were two competing narratives brought up at

trial: the State's theory and the defense's theory. He stated that he met one of the victims at the club, a rape occurred that night, and the victim's sister arrived at the house. He stated that the weapon used during the crime was a steak knife. He stated that his story was that the victim's boyfriend caught him in bed with her, but this was never mentioned at trial.

He stated that the victims' stories were inconsistent. He stated that both victims described the first victim's mention of being raped was different. He stated he was acquitted of the criminal sexual conduct offense. He stated he did not recall how long the jury deliberated for or if an Allen charge was given. He stated that two knives were found. He stated that one of the knives was found in the home. He stated that a knife was found, detached from the handle.

He stated that he thought the lesser-included offenses and correlating charges should have been explored more thoroughly. He stated that Counsel requested lesser-included offense jury charges. He stated that Elaine Manning was not present in the courtroom to testify at the PCR hearing. He stated he never talked to her and had no way of determining if she was favorable to him, beyond what Counsel said. He stated that Counsel spoke to her prior to trial.

He stated that the 911 tape was destroyed before trial. He stated that his police statement was consistent with what he said happened that night. He stated that the Court did not charge that attempted murder is a specific intent crime. He stated he had an investigator on the case but was unsure what happened to him.

Counsel Testimony

Counsel testified that he represented Applicant, probably starting sometime in 2017. He stated he met with him several times before trial. He stated that they discussed trial preparation, investigation into the evidence in the case, and potential plea offers. He stated that Applicant was accused of sexual assault and attempted murder. He stated that he met one of the victims in a night club. He stated he was accused of sexually assaulting and choosing her. He stated that this victim's sister came to visit with the children, and he allegedly tried to attack her too. He was later arrested after Elaine called 911.

He stated he contacted Elaine and met with her. He stated he thought he had her subpoenaed but, based on his observations, he thought she had a mental illness. He stated that her statements were not coherent or consistent. He stated he did not want to put her on the stand because he was unsure if she would be helpful or hurtful to the defense.

He stated that he could not remember if he asked for lesser-included instructions to be

charged, but would not be surprised if he did, as that is his general practice. He stated he recalled the judge giving jury instructions. He stated he forgot to object to the judge charging that specific intent is not an element of attempted murder.

He stated that he recalled Applicant giving a police statement. He said this statement was inadmissible and self-serving. He stated it was exculpatory but would be excluded because it was hearsay. He stated that he tells his clients not to talk to the police because it will be used against them.

Counsel testified that he was told the 911 call recording was destroyed and he did not get an answer as to the policy backing the destruction. He stated that the lady he contacted told him she thought Applicant committed the crime. He stated he was suspicious because he was never given a solid reason why the call was destroyed but stated that the prosecutors were also perplexed. He stated that the State subpoenaed her at trial, but she did not want to be there.

He stated that he vaguely recalled cross-examining the two victims. He stated that his strategy in cross-examination was to impeach their credibility by highlighting inconsistencies in what they said. He stated that Candace was on body camera while in the hospital. He stated he used this footage to impeach her credibility. He stated that he tried to reveal the consensual nature of their sexual encounter, which was "obvious." He stated that he thought the victims' stories were deviant from one another but could not recall. He stated he did not recall if he brought this out in cross-examination.

He stated that he remembered the body camera footage featuring the victims' father. He stated he did not enter this into evidence. He stated that excited utterances were made, and that the victims' father blamed the victim's boyfriend. He also said there were excited utterances made by Candace as she was taken away by EMS. He stated that he did not think it would be worth admitting because the father's statements were speculative. He stated that Candace made some statements unfavorable to the defense in the video, which he did not think would be worth admitting.

He stated that he did not think they could exclude the knife on the grounds of incomplete chain of custody. He stated that the chain of custody covers fungible items and did not think it was analyzed. He stated that he thought he could have objected on relevance grounds but did not think it would impact the outcome at trial. He stated he did not recall how many knives were entered. He stated a knife blade was found in a field nearby that was connected to Candace. He stated that

the handle was missing, which he thought was strange.

On cross-examination, Counsel stated that he recruited an investigator, but he did not testify at trial. He stated that the investigator mostly just interviewed witnesses and gained rapport. He stated that anything he would have testified to would have been testimonial, as it was based on what others told him. He stated that the investigator issued some subpoenas, including a lady that was close to Candace. He stated that the investigator also looked at evidence and talked to Applicant. He stated he did not think the scope of the investigator's role was explained to Applicant because he ran out of time. He stated that the investigator never stopped working on the case and found more people that could be helpful to the case, but it was too late.

He stated that he did not call Elaine to testify because she was inconsistent in her telling of what happened, and he questioned her competency. He stated that she may have been helpful or unhelpful, depending on the day. He stated she could substantiate the victims' narratives by testifying that they ran to her house after the assault and called 911.

He stated he did not recall requesting lesser-included instructions, but stated he usually does. Counsel stated he should have objected to the charge that specific intent is not an element of attempted murder. He stated that he did not enter the CAD report into trial and could not remember if it was helpful or not. He stated that he did not enter the body camera footage of the victims' father because there were unfavorable statements made in the video. He stated that the man the victims' father blamed in the video was James Smiley, who spent time in jail because of committing violent crimes. He stated this was the man Applicant accused of assaulting the victims. He stated that he did not think there was anything to support this speculation. He stated that he was unsure if the judge would have let it into evidence or if it would have helped the defense.

He stated that several knives were taken into evidence by the Dillon police, along with a blade that was turned in days later. He stated that he could not recall if SLED analyzed the knives. He stated that he had a DNA expert look at the knives. He stated that there was DNA on the knives that could not be attributed to Applicant. He stated that tried to run additional tests to exclude Applicant but the person running the test could not come up with a DNA profile. He stated that the DNA expert did not testify at trial because he was less than helpful. He stated that no fingerprints were collected. He stated he could not recall if there were DNA profiles. He stated he did not object to admission of the knives because he was confident the judge would enter then anyway. He stated that he thought the video could have been spliced to only enter the favorable

statements. He stated he did not recall if there were chain of custody issues or whether he objected to its entry. He stated he hired a DNA expert that did not testify at trial.

On re-direct, he stated that he thought that the CAD report could hurt them. He stated he did not think the State would allow him to enter a spliced video. He stated that he thought the video in its entirety would not be admitted because of hearsay. Counsel acknowledged that he requested lesser-included offense charges based upon review of the transcript and the instructions were given by the judge.

Findings of Fact and Conclusions of Law

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. Before this Court are the Dillion County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, direct appeal records, and this PCR action's records. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusion of law as required by South Carolina Code Annotated Section 17-27-80 (2003).

Ineffective Assistance of Counsel

In a PCR action, the applicant bears the burden of proving allegations contained in the application. *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant asserts ineffective assistance of counsel as a ground for relief, the applicant must show "counsel's conduct so undermined the proper functioning of the adversarial process that [it] cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Butler*, 286 S.C. at 442, 334 S.E.2d at 814. Ineffective assistance of counsel is governed by the Sixth Amendment, as explained by the United States Supreme Court in *Strickland v. Washington*.

Pursuant to the first prong of the *Strickland* analysis, the applicant must prove defense counsel's performance was deficient. *Id.* at 686; *Cherry v. State*, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). To show deficiency, the applicant must prove by a preponderance of the evidence that counsel's actions fell outside of the zone of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. S*ee also* Rule 71.1(e), SCRCP ("The applicant has the burden of establishing his entitlement to relief by a preponderance of the evidence."). Reasonableness is

determined by the "variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant," and the scope of the reasonableness inquiry is limited to facts counsel had available at the time of representation. *Id.* at 689. "Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (citing *Strickland*, 466 U.S. at 690). Judicial scrutiny of counsel's performance remains highly deferential towards defense counsel with a strong presumption that counsel acted competently, because competent representation may be executed in virtually "countless" ways. *Strickland,* 466 U.S. at 688-89.

Second, counsel's deficient performance must have prejudiced the applicant so that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The court makes this determination based upon the totality of the evidence. *Id.* at 695. Realistically, this matters "'only in the rarest case'" because "[t]he likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111-12 (2011) (quoting *Strickland*, 466 U.S. at 697).

The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696. A court need not first determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies; if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *Id.* at 696-97.

Specific Intent

Applicant claims Counsel was ineffective for failure to object to the Judge charging the jury that specific intent is not an element of attempted murder. When analyzing the prejudicial effect of erroneous jury instructions, the Supreme Court has "often applied harmless-error analysis to cases involving improper instructions." *Neder v. United States*, 527 U.S. 1, 9 (1999); *see United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000) ("[W]e join our sister circuits in holding that . . . [erroneous jury instructions are] subject to harmless error analysis."). Whether or not the error was harmless is a fact-intensive inquiry. *State v. Jeffries*, 316 S.C. 13, 22, 446 S.E.2d 427, 432

(1994) ("We must review the facts the jury heard and weigh those facts against the erroneous jury charge to determine what effect, if any, it had on the verdict.") (citations omitted). When considering whether an error with respect to a jury instruction was harmless, appellate courts must "determine beyond a reasonable doubt that the error complained of did not contribute to the verdict." *State v. Kerr*, 330 S.C. 132, 144, 498 S.E.2d 212, 218 (Ct. App. 1998). This is determined based on all of the evidence presented to the jury. *State v. Gibson*, 416 S.C 260, 265, 786 S.E.2d 122, 124 (2016); *Plyler v. State*, 309 S.C. 408, 424 S.E.2d 477 (1992).

Courts may find an erroneous instruction harmless if it "conclude[s] beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17. In cases where the defendant has contested the omitted element, we ask "whether the record contains evidence that could rationally lead to a contrary finding with respect to that omitted element. If not, then the error was harmless." *United State v. Ramos-Cruz*, 667 F.3d 487, 496 (4th Cir. 2012).

In this case, the jury instructions were erroneous because the judge stated that Applicant could be found guilty of attempted murder if he showed only a general intent to commit serious bodily injury. (T. 585). However, attempted murder is a specific-intent crime, which requires that "the defendant consciously intended the completion of acts comprising the [attempted] offense." *State v. King*, 422 S.C. 47, 57, 810 S.E.2d 18, 23 (2017) (quoting *State v. Sutton*, 340 S.C. 393, 397, 532 S.E.2d 283, 285 (2000)). "Attempted murder can be committed only when the accused's acts are accompanied by *express malice*, malice in fact." *Id.* at 56, 810 S.E.2d at 22 (quoting *Keys v. State*, 104 Nev. 736, 740, 766 P.2d 270, 273 (1988)). "Express malice is the 'deliberate intention unlawfully' to kill a human." *Id.*

Here, the trial court provided erroneous jury instructions when addressing attempted murder. The instruction provided here was almost identical to what was found to be an error in *King*. Counsel was clearly deficient for failure to object to erroneous jury instructions. Counsel did not provide any strategic reason for why he did not object.

This was also prejudicial to Applicant. The Court found fit to charge the jury on the lesser-included offenses of assault and battery of a high and aggravated nature and first-degree assault and battery. The jury charge in this case negated the requirement of any proof of an essential element of the charge against Applicant. Given the facts of the case, this error cannot be seen as harmless. Thus, this Court grants post-conviction relief and Applicant's convictions for attempted

murder are reversed and remanded to the Court of General Sessions for a new trial.

Objection to Knife

Applicant claims Counsel was ineffective for failure to object to the knife. Counsel credibly testified that he thought that the knife would be entered and that it did not affect the outcome at trial in anyway. Accordingly, relief is denied on this ground.

Body Camera Footage

Applicant claims Counsel was ineffective for failure to enter body camera footage featuring the victims' father. Counsel said he did not enter it because it was inadmissible hearsay and contained statements harmful to the defense. He also testified that he did not think he could enter a statement spliced in an explicitly favorable way. This is a reasonable strategic reason for not entering it and Counsel is not deficient as a result. Further, because it is not admissible or particularly helpful, no prejudice is found. Accordingly, relief is denied.

Telling Jury Defendant Never Gave Statement

Applicant claims Counsel told the jury he never gave a police statement and that this statement constitutes ineffective assistance of counsel. Counsel informed the jury that he did, in fact, give a recorded statement. There was nothing unreasonable in mentioning this in closing, as it was seemingly used in a way to inform the jury of Applicant's intent to explain what happened to law enforcement. The jury was seemingly taken with this narrative, given their request to see the police statement. Counsel was not deficient in using this strategy. Additionally, this statement did not impact the outcome at trial. Accordingly, relief is denied on this ground.

Failure to Enter Statement to Police

Applicant claims that Counsel was ineffective for failure to enter his police statement at trial. Counsel credibly testified that this statement was not admissible because it was a self-serving statement. This Court concurs and finds this rationale reasonable. If Counsel moved to enter the statement, the State's objection would have been sustained. Accordingly, relief is denied.

Elaine Manning

Applicant claims Counsel was ineffective for failure to call Elaine Manning. At a minimum, counsel must interview potential witnesses and make independent investigations regarding the facts and circumstances of the case. *Ard. v. Catoe*, 372 S.C. 318, 642 S.E.2d 590 (2007). To show counsel was ineffective by failing to call a witness, the witness(es) must be produced at the PCR evidentiary hearing or their testimony must otherwise be presented, consistent

with the rules of evidence. *Glover v. State,* 318 S.C. 496, 498-99, 458 S.E.2d 538, 540 (1995). Mere speculation regarding the witness's testimony is insufficient to establish prejudice. *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993).

"In most PCR cases in which the applicant seeks relief for trial counsel's failure to call witnesses, the PCR court's analysis—and the analysis by the appellate court—is focused on the strategic considerations of counsel in balancing the potential benefits of calling a particular witness against the identifiable risks." *Buckson v. State,* 423 S.C. 313, 320, 815 S.E.2d 436, 440 (2018).

Counsel's performance is not deficient if he decided not to present a witness as a tactical and strategic move, nor if the witness was unlikely to appear or present testimony that could have made a difference at trial. *See e.g. Smith v. State,* 404 S.C. 493, 502, 745 S.E.2d 378, 383 (2012) (finding that counsel was not deemed ineffective when petitioner failed to introduce any evidence that established prejudice to the petitioner); *Edwards v. State,* 392 S.C. 449, 457-58, 710 S.E.2d 60, 65 (2011) (stating that counsel was not ineffective because the witness could not withstand cross-examination due to his prior vacillation and the cumulative nature of his testimony and he knew the petitioner's statement to the police would be entirely consistent with the supposed witness's statement at trial); *Glover,* 318 S.C. 496, 498, 458 S.E.2d 538, 540 (1995) (finding that counsel was in deficient by failing to call all alibi witnesses when two witnesses who testified did not establish the alibi).

Further, prejudice will generally be found if the testimony was significant and favorable enough to the Applicant so that the trial proceedings results may have been different because of the testimony. *See e.g. Lounds v. State*, 380 S.C. 454, 670 S.E.2d 646 (2008) (finding that counsel was deficient by failing to call witnesses, for no other reason than lack of preparation, that may corroborated with the defendant or bolstered his credibility so that the findings at trial could have been favorable to the defendant); *Thomas v. State,* 308 S.C. 123, 417 S.E.2d 531 (1992) (finding that uncalled witness' testimony would have cast doubt on the sole witness' identification of the petitioner and, thus, would have made a difference at trial).

Counsel credibly testified that he thought Ms. Manning had mental health or competency issues and acknowledged her narrative of what occurred changed dramatically. He stated that because of this issue, he thought Manning would be unhelpful or potentially harmful to the defense. This is a reasonable decision and Counsel is not deficient as a result. Further, Applicant has failed to meet his burden of proof by failing to call Ms. Manning to testify. Accordingly, relief is denied

on this ground.

Lesser-Included Offense Instructions

Applicant claims Counsel was ineffective for failure to request that the judge charge the jury on the lesser-included offenses of ABHAN and first-degree assault and battery. Counsel requested these charges be presented to the jury. (T. 522-23). The State did not object. (T. 523). These charges were given by the judge. (T. 588-89). Accordingly, this claim is without merit and relief is denied on this ground.

911 Call

Applicant claims Counsel was ineffective for failure to procure and play the 911 call. Counsel credibly testified that the 911 call was destroyed when he attempted to procure it. Counsel is not deficient for failure to procure a destroyed tape. Regarding prejudice, Applicant candidly testified that he had no way of knowing whether the tape would be helpful. Because there is no way of telling whether the tape is helpful, prejudice cannot be established. Accordingly, relief is denied.

Impeach Victims

Applicant claims Counsel was ineffective for failure to properly impeach the victims based upon their inconsistent statements. This Court finds Counsel credible in his assertion that that was the focus of his cross-examinations. This is also backed by the trial transcript. This Court has been presented with no evidence or specific lines of questioning Counsel needed to go down to be reasonable. This Court also finds that Applicant has presented this Court with no lines of questioning that, had Counsel explored them, would have changed the results of the proceedings. Accordingly, relief is denied on this ground.

Private Investigator

Applicant claims Counsel was ineffective for failure to call the private investigator to testify. Counsel credibly testified that the investigator's proffered testimony was testimonial in nature and would be based primarily on what he was told by other people. Counsel is not expected to call individuals that cannot testify in accordance with the rules of evidence. Additionally, because the proffered testimony is not before the Court, Applicant has not met his burden of proof in establishing prejudice. Accordingly, relief is denied on this ground.

CAD Report

Applicant claims Counsel was ineffective for failure to enter the CAD report. Counsel

credibly testified that this report could be harmful to the defense. This is a reasonable reason for not entering the evidence. Further, upon review of the CAD report, this Court finds that there is nothing in the report where, if it was presented to the jury, it would change the results at trial. Accordingly, relief is denied on this ground.

Third-Party Guilt

Applicant claims Counsel was ineffective for failure to assert a third-party guilt defense. Whether failure to assert a defense constitutes deficient performance ultimately hinges on whether failure to explore the decision was a strategic decision. *Strickland,* 466 U.S. at 680. If there is only one line of defense, counsel must conduct a "reasonably substantial investigation" into that line of defense. *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1252). However, if there are several lines of defense, counsel may still be effective even if every single line is not explored. *Id.* "[W]hen counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial." *Id.* at 681 *Id.* (quoting *Washington v. Strickland*, 693 F.2d at 1255). Further, "[w]hen counsel focuses on some issues to the exclusion of others, there is a strong presumption that he [or she] did so for tactical reasons rather than through sheer neglect." *Yarborough*, 540 U.S. at 5 (citing *Strickland*, 466 U.S. at 690).

Regarding failure to alert the Applicant of a defense specifically, Counsel will not be found ineffective if there was inadequate evidence to support the defense, if the defense did not exist at the time of trial, or another avenue of defense existed. *See McCray v. State*, 317 S.C. 557, 455 S.E.2d 686 (1995) (stating that failure to state an entrapment defense was not ineffective when the applicant denied any wrongdoing); *Arnette v. State,* 306 S.C. 556, 413 S.E.2d 803 (1992) (stating that failing to inform of a defense was not ineffective when there was no evidence at trial that supported the defense); *Robinson v. State*, 308 S.C. 361, 417 S.E.2d 361, 417 S.E.2d 88 (1992) (stating that Counsel was not ineffective when failing to state a defense that was not recognized by the Court until six years later and was just recently acknowledged by the scientific community).

This Court has been shown no evidence substantiated in something other than Applicant's unsupported word and mere speculation that the victim's boyfriend committed the crime. Counsel is not deficient for failure to assert a baseless defense. This Court declines to find prejudice because of the lack of evidence to support the defense and its plausibility of being supported at trial. Accordingly, relief is denied on this ground.

DNA Expert

Applicant claims Counsel was ineffective for failure to call the DNA expert to testify at trial. Counsel credibly testified that the expert was unable to generate any exculpatory results and could not have helped at trial as a result. Failing to call an unhelpful witness is not a deficiency. This Court finds Applicant failed to meet his burden of proving prejudice on this allegation, given his failure to call this person as a witness. Accordingly, relief is denied on this ground.

Conclusion

Based on all the foregoing, this Court finds Applicant is entitled to relief based upon Counsel's failure to object to the jury instructions stating that specific intent is not an element of attempted murder. Relief is denied on all other grounds raised. The parties have thirty days in which to file an appeal from this order.

IT IS THEREFORE ORDERED:

1. The PCR application be granted as it pertains to the attempted murder charges;
2. The PCR application be denied concerning the remaining offenses; and
3. Applicant's attempted murder convictions be vacated and the matter remanded to General Sessions court for a new trial.

AND IT IS SO ORDERED this **28th** day of **MARCH**, 2023.

J. DERHAM COLE, Presiding Judge
The Fourth Judicial Circuit Court

Spartanburg, South Carolina.

State of South Carolina
The Circuit Court of the Seventh Judicial Circuit

J. Derham Cole
Judge

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MEMORANDUM

To: The Honorable Gwen Hyatt

From: Sue Pardue on behalf of Judge Derham Cole

Subject: 2022-CP-17-00506/Tyreek Hayes

Date: March 29, 2023

Please clock, file and disburse to appropriate parties. Thank you!

FILED
GWEN T HYATT
2023 APR -3 A 10:29
CLERK OF COURT
DILLON COUNTY

STATE OF SOUTH CAROLINA COUNTY OF DILLON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Tyreek Hayes, SCDC # 366300	)	Case No.: 2021-CP-17-00506
Applicant,	)	**RESPONDENT'S MOTION TO RECONSIDER, ALTER, OR AMEND THE COURT'S ORDER AND GRANT OF POST-CONVICTION RELIEF AND A NEW TRIAL PURSUANT TO RULE 59(e), SCRCP**
v.	)	
State of South Carolina,	)	
Respondent.	)	

This matter comes before this Court by way of Applicant Tyreek Hayes's application for post-conviction relief following his conviction by a jury of his peers for two counts of attempted murder, kidnapping, and possession of a weapon during a crime of violence. Following his unsuccessful attempt to obtain a reversal of his convictions on direct appeal, Applicant sought post-conviction relief by filing a *pro se* application asserting he was entitled to a new trial based on ineffective assistance of counsel. Thereafter, Steven Fowler, Esquire, was appointed to represent Applicant. Respondent, the State of South Carolina, made its return to the application and requested an evidentiary hearing to resolve the claims as set forth in his *pro se* application.

Following an evidentiary hearing convened July 26, 2022, this Court granted relief, finding Applicant had met his burden of establishing that trial counsel was constitutionally ineffective for failing to object to the trial court's jury instruction stating that specific intent is not an element of attempted murder; this Court denied relief on all other grounds. This Court issued a written order granting relief in part and denying relief in part memorializing these findings in compliance with S. C. Code Ann. § 17-27-80 that was filed on April 3, 2023.

Respondent received written notice of the order granting relief on April 4, 2023, when the order was sent to Respondent by the Dillon County Clerk of Court.

Respondent now makes the following motion pursuant to Rule 59(e), SCRCP, asking this Court to reconsider its amended order granting Applicant post-conviction relief and grant of a new trial in the court of general sessions.

I. PROCEDURAL HISTORY

During its December 2016 term, the Dillon County Grand Jury indicted Applicant for two counts of attempted murder (2016-GS-17-0875 and -0879), kidnapping (2016-GS-17-0877), first-degree criminal sexual conduct (2016-GS-14-0876), and possession of a weapon during the commission of a violent crime (2016-GS-17-0878). Applicant was represented by Matthew Swilley, Esquire. Assistant Attorneys General Megan Burchstead and Joel Kozak of the South Carolina Attorney General's Office prosecuted the case. On July 23, 2019, Applicant proceeded to jury trial before the Honorable Roger E. Henderson, circuit court judge. On July 26, 2019, the jury convicted Applicant of attempted murder, kidnapping, and possession of a weapon during the commission of a violent crime and acquitted Applicant of first-degree criminal sexual conduct. Judge Henderson sentenced him to thirty years for each count of attempted murder, fifteen for kidnapping and five for possession of a weapon, sentences running consecutively, for an aggregate sentence of eighty years.

Applicant filed a timely notice of appeal and was represented on appeal by Appellate Defender Susan B. Hackett of the South Carolina Commission on Indigent Defense-Office of Appellate Defense, who filed a brief raising the following issue:

> The trial judge erred by allowing the state to present hearsay testimony from a police officer that the complaining witness identified Appellant as her assailant where the state failed to satisfy the requirements of the excited utterance exception, which it invoked in order to admit the improper testimony, and credibility of the complaining witness was essential to proving the State's case.

The South Carolina Court of Appeals affirmed the conviction by unpublished opinion. *State v.*

Hayes, 2021-UP-378 (S.C. Ct. App. filed Nov. 3, 2021). The remittitur was issued on November 29, 2021.

II. SUMMARY OF EVIDENCE PRESENTED AT TRIAL

Candace Simpson met Reedy Boss, or Reedy All Boss, on Facebook and began communicating with him. (T. 106-107). Boss was later identified as Applicant. On the evening of September 30th and into the morning of October 1st of 2016, Simpson planned to head to a local club called Strikers with some friends and left her kids at her mom's house where her sister, Ann Covington also lived. (T. 106, 108-109). After going to Strikers, Simpson and a friend went to T Lees, another club. (T. 111-112). While at T Lees, Simpson saw Applicant. (T. 113).

Applicant asked for a ride home from T Lees because he lived in the apartment complex next to the one Simpson lived in. (T. 113). When they all got out of the car, Applicant asked about coming into Simpson's apartment. (T. 115). Simpson went to wash off the smoke and change her clothes. When she came back out, she originally sat in a recliner while Applicant sat on her sectional. He asked her to come over by him, and when she did, he started trying to kiss her. Simpson told Applicant to leave, but he would not. (T. 116).

Instead, Applicant pulled Simpson into her bedroom. She tried to scream and bang on the wall to get the attention of her neighbor, but Applicant choked her immediately. He continued to drag her into the bedroom by the waist such that her feet were not touching the ground. (T. 117). She begged him to stop, but he refused. She begged him to wear a condom at least, they ended up on the floor getting a condom. Applicant then raped Simpson. (T. 118-119). Simpson passed out after Applicant began penetrating her with his penis. (T. 119).

When she woke up, it was daylight and Applicant was just standing there watching her. (T. 119-20). Appellant indicated he wanted to have sex again, but Simpson did not want sex. He

asked her to do oral sex, and she agreed believing she would be choked if she did not perform oral sex. (T. 120). Ultimately, Applicant choked Simpson again. She begged him to stop, telling him she had children. Applicant said Simpson would tell and she kept begging for her life. She woke up again after the choking and could barely walk. (T. 120).

Someone came over, and Simpson saw that it was her sister. Simpson told Covington that Applicant raped her. Covington told him to leave, but instead he and Covington started "fussing" and Simpson believed Applicant was punching Covington, at the time not knowing he had a knife. (T.123-124). Simpson jumped on Applicant and Covington was able to get free. Simpson tried to run, but Applicant grabbed her. He then tried to cut her neck, but she was able to get her hands up. He dragged her into the kitchen and stabbed her. (T.123-125). Ultimately, Applicant went to the front door because he heard it open, and Simpson was able to escape out the sliding door in the back. (T. 126). Simpson had to bust through the screen to get out and away from Applicant. She ran to her neighbor's house without clothes on and with multiple stab wounds. (T. 127).

Someone called 911 and an ambulance arrived to take Simpson to the hospital. (T. 128). After being treated and receiving stiches and staples, she was shown a photo lineup. She identified Applicant in the lineup. (T.129, 303, State's Exhibits 84 & 86). At trial, Simpson again identified Applicant as the person who raped her, choked her, wounded her and her sister with a knife, and held her against her will. (T. 137-138).

Covington testified that when she brought Simpson's son back, she walked in on what she thought was Simpson and someone having sex. After she backed out of the bedroom, she explained that Simpson came out and said the person was trying to kill her. Covington was not going to allow the person to go back in the room where Simpson was located, but he got on top of Covington. Covington thought he was hitting her, but instead he was stabbing her. (T. 197-198). She managed

to escape when Simpson jumped on Applicant's back. Covington went next door and asked them to call 911. (T.199-200). She stated Simpson finally came around the building and to the neighbor's apartment. Simpson had no clothes on, and both Simpson and Covington were bleeding from the knife wounds inflicted by Applicant. (T. 203).

III. CURRENT PROCEEDINGS

On December 6, 2021, Applicant filed a *pro se* application for post-conviction relief, initiating this current action, alleging that counsel was ineffective for failing to object to the trial court's jury instruction that specific intent was not an element of attempted murder. Steven Fowler, Esquire, was then appointed to represent him in this action. Respondent filed a return to the application and requested an evidentiary hearing.

An evidentiary hearing on this action was convened July 26, 2022, before the Honorable J. Derham Cole, circuit court judge. Applicant was present at the hearing alongside counsel Fowler. The State was represented by Assistant Attorney General Chelsey Marto of the South Carolina Attorney General's Office. While no formal amendments were filed, Applicant proceeded forward at the evidentiary hearing on a number of additional claims of ineffective assistance of counsel, including:

a. Failure to object to jury charge re: specific intent.
b. Failure to object to admission of knife.
c. Failure to enter body camera footage.
d. For telling the jury he never gave a statement.
e. Failure to enter Applicant's police statement.
f. Failure to request lesser-included instructions.
g. Failure to call witness Elaine Manning.
h. Failure to procure and play 911 call.
i. Failure to properly impeach the victims during cross-examination.
j. Failure to call the private investigator to testify.
k. Failure to enter CAD report.
l. Failure to present third-party guilt defense.
m. Failure to call DNA expert to testify.

At the hearing, Applicant testified on his own behalf and Respondent presented testimony from trial counsel Swilley. At the conclusion of the hearing, this Court took the matter under advisement.

On September 13, 2022, this Court issued a Form 4 granting post-conviction relief:

> In his instruction to the jury on the crime of Attempted Murder, the trial judge instructed the jury, in the relevant part, that; "An attempt is an effort to accomplish a crime which does not succeed. An attempt includes a specific intent to do a particular criminal act along with an act falling short of the act intended." "Intent means intending the result which actually occurs; not accidentally or involuntary." "As to the charge of Attempted Murder, in order to prove this crime, the State must prove the defendant attempted to kill another person with malice aforethought, either express or implied." "A specific intent to kill is not an element of Attempted Murder, but there must be a general intent to commit serious bodily injury." The trial Court also charged the jury on the lesser-included offenses of Assault and Battery of a High and Aggravated Nature and Assault and Battery in the First Degree. The instruction provided as to the Attempted Murder charge was almost identical to that which was found to be error in State v. King, 422 S.C. 47 (2017). The Court's instruction that "a specific intent to kill is not an element of attempted murder" is clear error. In considering the evidence contained in the record of this case, this Court cannot find the error to be harmless beyond a reasonable doubt.
>
> While this Court has doubts that the instruction provided did not contribute to the guilty verdict as to the crime of Attempted Murder, this Court also finds beyond a reasonable doubt that the instruction did not prejudice the defendant as to his convictions for Kidnapping and Possession of a Weapon during the Commission of a Violent Crime as the instruction error did not affect the result and the jury's verdicts as to those charges.
>
> Based upon the record of the case, the evidence presented at the evidentiary hearing held in this matter, the argument of the parties, and consideration of the applicable statutory and case law, this court finds that the applicant has established deficient performance on the part of trial counsel by failing to object to the instruction given regarding the crime of Attempted Murder and that the defendant was prejudiced as a result of that deficient performance *Strickland v. Washington*, 466 US 668 (1984) and *Cherry v. State*, 300 SC 115 (1989).
>
> Applicant's request for **POST-CONVICTION** relief should be and **IS** therefore **GRANTED**. Applicant's **CONVICTIONS** for the crimes of **ATTEMPTED MURDER** are **REVERSED** and **REMANDED** to the Court of General Sessions for a new trial.

Counsel for Applicant and Respondent are instructed to consult and prepare and submit a joint proposed order for the Court's consideration.

Pursuant to these instructions, a collaborative order was submitted to the Court based on the ruling set forth in this Court's Form 4. This order was filed on April 3, 2023, and sent to Respondent by the Dillon County Clerk of Court's office on April 4, 2023.

Respondent now makes the following motion to reconsider, alter, or amend this order granting post-conviction relief pursuant to Rule 59(e), SCRCP.

IV. ARGUMENT IN SUPPORT OF RECONSIDERATION

In its order, this Court grants Applicant post-conviction relief as to a sole issue—that trial counsel was constitutionally ineffective for failing to object to the trial court's instruction to the jury that attempted murder required general intent. This Court determined—rightfully so—that the trial court's instruction was erroneous in light of State v. King, 422 S.C. 47, 810 S.E.2d 18 (2017), holding that attempted murder is a specific intent crime that requires that the defendant consciously intended to commit the act of murder with express malice. This Court further concluded that trial counsel was deficient for failing to object to this instruction. Respondent does not take issue with either of these findings.

This Court then finds that Applicant has established the requisite prejudice necessary for relief:

> This was also prejudicial to Applicant. The Court found fit to charge the jury on the lesser-included offenses of assault and battery of a high and aggravated nature and first-degree assault and battery. The jury charge in this case negated the requirement of any proof of an essential element of the charge against Applicant. Given the facts of the case, this error cannot be seen as harmless. Thus, this Court grants post-conviction relief and Applicant's convictions for attempted murder are reversed and remanded to the Court of General Sessions for a new trial.

(Order Granting Relief in Part, Denying in Part p. 11-12).

Respectfully, Respondent submits that this Court has applied an incorrect standard for determining prejudice and overlooked the copious evidence in the record establishing Applicant's express malice and intent to kill which thereby renders any possible harm from this erroneous jury instruction non-prejudicial in light of the standard this Court must employ as set forth by Strickland and its progeny.

Respondent respectfully notes this Court's findings and conclusions are not supported by the record or case law and urges this Court to reconsider its grant of post-conviction relief and a new trial to Applicant.

Initially, Respondent notes this Court's determination that Applicant met his burden of establishing trial counsel was constitutionally ineffective does not comport with the recognized standard of review for granting relief in post-conviction relief matters, which requires an applicant to meet a heavy burden of establishing ***both*** that his counsel performed in a manner that no competent attorney would have performed and that there is a reasonable probability that the applicant would not have been convicted but for counsel's error or omission. Respondent respectfully urges this Court to reconsider its ruling in light of the established standard for granting post-conviction relief, with specific emphasis on the prejudice prong.

Applicant, like all those seeking post-conviction relief, bears the burden of proving his allegations by a preponderance of the evidence. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985); Rule 71.1(e), SCRCP. This Court, like any post-conviction relief court, must then apply the two-part test outlined in Strickland v. Washington, 466 U.S. 668 (1984), to determine whether counsel's conduct "was so ineffective as to require reversal" of the applicant's conviction. 466 U.S. at 687. To obtain relief, a post-conviction relief applicant must prove (1) counsel's performance fell below an objective standard of reasonableness, and (2) the applicant sustained

prejudice as a result of counsel's deficient performance. Id. at 687–88; Cherry v. State, 300 S.C. 115, 117–18, 386 S.E.2d 624, 625 (1989). Failure to make the required showing of either deficient performance or sufficient prejudice defeats am ineffectiveness claim. Strickland, 466 U.S. at 700; see also Bell v. Cone, 535 U.S. 685, 695 (2002) (explaining that "[w]ithout proof of both deficient performance and prejudice to the defense, . . . it could not be said that the sentence or conviction resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable" (citation and internal quotation marks omitted)).

The first prong—constitutional deficiency—is "necessarily linked to the practice and expectations of the legal community." Padilla v. Kentucky, 559 U.S. 356, 366 (2010). An applicant making a claim of ineffective assistance "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." Strickland, 466 U.S. at 690. The reviewing post-conviction relief court must then "determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance" demanded of attorneys in criminal cases. Id.

Because of the difficulties inherent in making such an evaluation, this Court must indulge in a "strong presumption that counsel's conduct falls within the wide range of reasonably professional assistance." Butler, 286 S.C. at 445, 334 S.E.2d at 816. "The burden of rebutting this presumption 'rests squarely on the defendant,' and '[i]t should go without saying that the absence of evidence cannot overcome [i]t.' " Dunn v. Reeves, 594 U.S. ___, 141 S. Ct. 2405, 2410 (2021) (alteration in original) (quoting Burt v. Titlow, 571 U.S. 12, 22–23 (2013)). In fact, "even if there is reason to think that counsel's conduct 'was far from exemplary,' a court still may not grant relief if '[t]he record does not reveal' that counsel took an approach that no competent lawyer would have chosen." Id. (alteration in original) (quoting Titlow, 571 U.S. at 23–24).

The second, or "prejudice" prong of Strickland is rooted in the very purpose of the Sixth Amendment guarantee of counsel—to ensure a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Id. at 691–92. In order to prove prejudice, an applicant must demonstrate counsel's deficient performance prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117–18, 386 S.E.2d at 625. A reasonable probability is a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; see id. at 695 (explaining that, where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"). Importantly, "[t]he likelihood of a different result must be ***substantial***, not just conceivable." Richter, 562 U.S. at 112 (emphasis added); see Strickland, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

In determining prejudice, this Court must consider the totality of the evidence before the jury. Id. at 695. It is not sufficient "to show [counsel's] errors had some conceivable effect" on the outcome of the proceeding—counsel's errors must be "so serious as to deprive the defendant of a fair trial." Id. at 687. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Id. at 691.

The Strickland standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. 466 U.S. at 689–90; see also Weaver v. Massachusetts, __ U.S. __, 137 S.Ct. 1899, 1912 (2017) (quoting Premo v. Moore, 562 U.S. 115, 112 (2011) ("For this reason, the rules governing

ineffective-assistance claims "must be applied with scrupulous care.")). The applicant's burden of proving both Strickland components is heavy in light of the strong presumption that counsel's conduct fell within the range of reasonable professional legal assistance. 466 U.S. at 690. Representation is constitutionally ineffective only if counsel's conduct "so undermined the proper functioning of the adversarial process" that the defendant was denied a fair proceeding. Id. at 686; see Nix v. Whiteside, 475 U.S. 157, 175 (1986) (noting that under Strickland, the "benchmark" of the right to counsel is the "fairness of the adversary proceeding"); cf. United States v. Morrow, 977 F.2d 222, 229 (6th Cir. 1992) ("[T]he threshold issue is not whether [the applicant's] attorney was inadequate; rather, it is whether he was so manifestly ineffective that defeat was snatched from the hands of probable victory.").

With this standard in mind, Respondent respectfully asserts that Applicant is unable to meet this high burden placed upon him because he cannot establish the requisite prejudice necessary for this Court to grant relief as there is abundant evidence in the record of Applicant's specific intent to kill the victims and express malice. Accordingly, any error from the trial court's erroneous jury instruction cannot be prejudicial in the context of the Strickland standard necessary for this Court to grant relief.

Upon a consideration of the jury instruction given compared to the record before this Court, it cannot be reasonably concluded that confidence in the outcome of the trial is undermined due to overwhelming evidence of malice and intent. Strickland v. Washington, 466 U.S. at 694 (on the prejudice prong, "the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt"); Smalls v. State, 422 S.C. 174, 188, 810 S.E.2d 836, 843 (2018) ("the PCR court should consider the specific impact counsel's error had on the outcome of the trial" as well as "the strength of the State's case in light of all the

evidence presented to the jury"); see generally, Jackson v. State, 355 S.C. 568, 573, 586 S.E.2d 562, 564 (2003) (Our confidence in the outcome of Jackson's trial is not undermined by his failure to receive a self-defense charge [due to an error by counsel].").

Moreover, both the Court of Appeals and Supreme Court analyzed the effect of the erroneous general intent jury instruction for attempted murder in its King opinions. See State v. King, 422 S.C. 47, 64, 810 S.E.2d 18, 27 (2017) ("Further, we agree that this error cannot be deemed harmless.") and State v. King, 412 S.C. 403, 417, 772 S.E.2d 189, 196 (Ct. App. 2015) ("Therefore, we find Officer Butler's inadmissible testimony as to the number of shots King fired affected the jury's verdict on attempted murder, and we cannot say that either the admission of the evidence or the erroneous jury charge are harmless beyond a reasonable doubt."), aff'd as modified, 422 S.C. 47, 810 S.E.2d 18 (2017), and overruled on other grounds by State v. Burdette, 427 S.C. 490, 832 S.E.2d 575 (2019).

Similarly, in State v. Middleton, the Supreme Court reiterated that errors with respect to jury instructions related to attempted murder are subject to a harmless error analysis:

> When considering whether an error with respect to a jury instruction was harmless, we must determine beyond a reasonable doubt that the error complained of did not contribute to the verdict. In making a harmless error analysis, our inquiry is not what the verdict would have been had the jury been given the correct charge, but whether the erroneous charge contributed to the verdict rendered. Thus, whether or not the error was harmless is a fact-intensive inquiry.

State v. Middleton, 407 S.C. 312, 317, 755 S.E.2d 432, 435 (2014) (internal citations and quotations omitted).

In the present case, it is clear the erroneous jury instruction did not contribute to the verdict rendered based on the overwhelming evidence of malice and intent to kill. At trial, the State presented more than ample evidence that malice existed in Applicant's actions. The totality of the record demonstrates Applicant viciously attacked two women with a knife with such force that he

caused serious and life-altering injuries and he specifically focused on the neck region of both victims, which can only establish an intent to cause life-threatening injuries or death. Candance Simpson testified that Applicant choked her, attacked her with the knife and tried to cut her neck before she fell to the floor, and thereafter, he repeatedly stabbed her. (Tr. 116-118, 124-25). Candance testified that Applicant continued to attack her with the knife as she attempted to escape, with him dragging her back inside the apartment and trying to cut her throat straight across. (Tr. 125-26, 178-79). She testified that Applicant cut her in the chest, face, neck, legs, and hands, causing permanent damage to her body. (Tr. 189). Candace's sister, Ann Covington, was also stabbed by Applicant with the knife, causing injury to her neck and arm. (Tr. 199, 201, 204-05). The photographs and medical testimony presented at trial supported the sisters' testimony regarding the severity of this brutal attack that focused on the necks of both women, including what was described as "deep" and "through and through" stab wounds demonstrating the level of force and the intent Applicant had during his attack. (Tr. 258-264, 298-305). Applicant's actions of plunging a knife into someone's arm with the accompanying degree of force to cut all the way through can only rationally support a conclusion that he was intending to kill his victim, particularly when coupled with the numerous wounds to the necks of both victims. See Middleton, 407 S.C. at 319, 755 S.E.2d at 436 ("In the instant case, the evidence adduced at trial demonstrates that, notwithstanding the failure to charge the lesser-included offense, the only conclusion established by the evidence is that Appellant was guilty of attempted murder, given the facts that Appellant deliberately drove up to the passenger window and shot into the vehicle at least five times, and Stephens testified that the only reason he and Mack were not injured is because he had the wherewithal to jump into the driver's seat and run Appellant off the road. In our view, there is no other way to construe the evidence in this case but that Appellant was attempting to kill

Stephens and Mack. See S.C. Code Ann. § 16–3–29 ("A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder."). Therefore, we hold any error in failing to charge the lesser-included offense harmless because the erroneous instruction did not contribute to the verdict beyond a reasonable doubt."). The record clearly and unequivocally establishes that Applicant had a specific intent to kill his victims, thereby negating any possible prejudice that could flow from the erroneous jury instruction.

Furthermore, Applicant's defense at trial was not that he lacked an intent to kill the victims but rather, that a third party had committed the crime, thereby further negating any possible prejudice from this erroneous jury instruction. Respondent respectfully urges this Court to reconsider its finding that Applicant established there is a reasonable probability that he would not have been convicted but for trial counsel's failure to object to the erroneous jury instruction.

There is no conceivable way the result of Applicant's trial would have been different but for counsel's failure to object to this jury instruction. Respondent moves this Court to reverse its decision and deny post-conviction relief where Applicant failed to meet his burden as set forth in Strickland v. Washington, 466 U.S. 668 (1984), and its progeny.

V. CONCLUSION

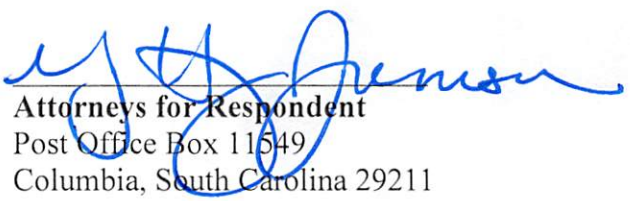
Based on all the foregoing, Respondent respectfully requests this Court reconsider its grant of post-conviction relief, as Applicant failed to meet his heavy burden of establishing that there is a reasonable probability the outcome of the trial would have been different but for counsel's failure to object to the trial court's instruction on attempted murder.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
Chief Deputy Attorney General

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Senior Assistant Deputy Attorney General

By: 

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Post Office Box 11549
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April 13, 2023

STATE OF SOUTH CAROLINA COUNTY OF DILLON	)	IN THE COURT OF COMMON PLEAS FOR THE FOURTH JUDICIAL CIRCUIT
Tyreek Hayes, #366300 Applicant,	)	Case No. 2021-CP-17-00506
vs	)	CERTIFICATE OF SERVICE BY MAIL
State of South Carolina, Respondent,	)	

1. I am counsel of record for Respondent in the above-captioned post-conviction relief action.

2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.

3. I have this day served a copy of the Respondent's Motion to Reconsider, Alter, or Amend the Court's Amended Order and Grant of Post-Conviction Relief and a New Trial Pursuant to Rule 59(e), SCRCP in the above-captioned matter on the following person by electronic mail and depositing same in the United States mail, postage prepaid:

The Honorable J. Derham Cole
Presiding Judge
Post Office Box 1744
Spartanburg, SC 29304

Steve W. Fowler, Esquire
Fowler Law Firm
730 Main Street Unit # 237
North Myrtle Beach, SC 29582

DATED this the 13th day of April 2023.

Megan Harrigan Jameson
Counsel for Respondent

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF **DILLON**
IN THE COURT OF COMMON PLEAS

Tyreek **HAYES**, SCDCID #366300
Applicant,

JUDGMENT IN A CIVIL CASE - PCR

CASE NO. **2022-CP-17-00506**

The **STATE** of South Carolina,
Respondent,

CHECK ONE:

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☒ **S. C. Code Ann. 17-27-80**.

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other .

IT IS ORDERED AND ADJUDGED: ☐ See formal order to follow; ☒ Statement of Judgment by the Court:

This matter originally came before this court for hearing on an application for post-conviction relief filed pursuant to *South Carolina Code Annotated Section 17-27-20*. The matter was heard and an order issued denying in part and granting in part the request for post-conviction relief. The respondent filed a motion pursuant to Rule 59(e), SCRCP, to "reconsider, alter, or amend" the judgment entered by the Court.

Having considered the matter carefully, this Court finds there is no reason to alter or amend its previous ruling in this matter.

The respondent's **MOTION** should be and **IS** therefore **DENIED**.

Dated at Spartanburg, South Carolina, this **2nd** day of **JUNE**, **2023**.

PRESIDING JUDGE, J. DERHAM COLE

This judgment was entered on the day of _____, **2023**, and a copy mailed first class this day of _____, **2023** to attorneys of record or to parties (when appearing pro se) as follows:

STEVEN W. FOWLER, Esq.
730 Main Street, Unit 237
North Myrtle Beach, South Carolina 29582

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ATTORNEY FOR THE RESPONDENT

GWEN T. HYATT, CLERK OF COURT