

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Certiorari to Horry County

Honorable Kristi F. Curtis, Circuit Court Judge

BRIAN KENDRICK SPEARS,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2023-001070

APPENDIX

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MR. SMITH - DIRECT EXAMINATION BY MS. ELDER

501

1 A YES, MA'AM.

2 Q A BREAKING AND ENTERING LARCENY, IS THAT
3 CORRECT?

4 A YEAH.

5 Q 2007, YOU'RE A CONVICTED FELON, RIGHT?

6 A YES, MA'AM.

7 Q YOU GOT CONVICTED AT THE STATE LEVEL OF A
8 FIREARM BY A FELON; IS THAT RIGHT?

9 A YES, MA'AM.

10 Q YOU ALSO HAD ANOTHER ALLUDING ARREST OR
11 RESISTING ARREST?

12 A YES, MA'AM.

13 Q AND THEN WHAT YOU'RE IN THERE FOR NOW; IS
14 THAT CORRECT?

15 A YES, MA'AM.

16 Q YOU ALSO HAVE A B&E AUTO CHARGE, LARCENY
17 CHARGE HERE IN HORRY COUNTY; IS THAT ALSO CORRECT?

18 A YES, MA'AM.

19 Q AND YOU WERE IN OUR DETENTION CENTER, J.
20 REUBEN LONG DETENTION CENTER BACK SOMETIME AGO?

21 A YES, MA'AM, LAST YEAR.

22 Q OKAY, AND WERE YOU A CELL WITH BRIAN
23 SPEARS?

24 A YES, MA'AM, I WAS.

25 Q AND DID YA'LL HAVE CONVERSATIONS TOGETHER?

MR. SMITH - DIRECT EXAMINATION BY MS. ELDER

502

1 A YEAH, WE HAD QUITE A FEW.

2 Q HOW LONG WERE YOU IN THERE WITH BRIAN
3 SPEARS?

4 A ALMOST THREE MONTHS.

5 Q AND DID HE GO BY A NAME, A NICKNAME?

6 A BOS.

7 Q HOW DID YOU COME TO GET INVOLVED IN THIS
8 CASE AT ALL?

9 A ACTUALLY I GOT TOOK TO THE HOSPITAL AND I
10 WAS REAL SICK AND GOT TOOK TO THE HOSPITAL AND I GIVE THE
11 OFFICER A NOTE WITH MY NAME ON IT AND TOLD HIM I NEEDED TO
12 TALK TO SOMEBODY ABOUT ---

13 Q TO A POLICE, INVESTIGATOR?

14 A TO AN INVESTIGATOR.

15 Q OKAY, AND DID YOU PUT ON THERE WHAT IN
16 REFERENCE YOU WANTED TO TALK TO HIM ABOUT?

17 A YEAH.

18 Q AND WHAT DID YOU SAY?

19 A A MURDER.

20 Q AND DID IN FACT SOMEBODY FROM MYRTLE BEACH
21 POLICE DEPARTMENT DETECTIVE HULL BACK HERE COME AND TALK TO
22 YOU?

23 A YES, MA'AM.

24 Q AND DID YOU ALSO TALK WITH ME?

25 A YES, MA'AM.

MR. SMITH - DIRECT EXAMINATION BY MS. ELDER

503

1 Q AND YOUR CHARGES HERE IN HORRY COUNTY ARE
2 STILL PENDING; IS THAT CORRECT?

3 A YES, MA'AM, THEY SURE ARE.

4 Q AND AFTER I SPOKE TO YOU DID I MAKE ANY
5 DEALS WITH YOU OR DID YOU GET ANYTHING IN RETURN FOR YOUR
6 TESTIMONY?

7 A NO, MA'AM.

8 Q DID YOU GET A BOND?

9 A YEAH, I GOT A PR BOND.

10 Q OKAY, AND WHEN YOU GOT A PR BOND I DID THAT
11 FOR YOU; IS THAT CORRECT?

12 A YES, MA'AM.

13 Q AND DID YOU GET RELEASED TO THE STREET?

14 A NO, MA'AM, I WENT TO NORTH CAROLINA TO THE
15 COUNTY JAIL IN NORTH CAROLINA, SAMPSON COUNTY.

16 Q SO WHEN YOU GOT A BOND HERE YOU GOT A BOND
17 TO GO UP TO THE DEPARTMENT OF CORRECTIONS IN NORTH
18 CAROLINA?

19 A YES, MA'AM, I'VE BEEN INCARCERATED THE
20 WHOLE TIME.

21 Q ALL RIGHT, SO YOU DIDN'T GET OUT ON THE
22 STREET?

23 A NO, MA'AM.

24 Q WHY DID YOU CONTACT POLICE TO BEGIN WITH?

25 A WELL THE MAIN THING IS I GOT, I GOT TWO

MR. SMITH - DIRECT EXAMINATION BY MS. ELDER

504

1 GRANDDAUGHTERS AND TWO GRANDSONS AND A DAUGHTER AND A SON
2 IN LAW THAT STAYS LESS THAN TEN MINUTES AWAY FROM WHERE
3 THIS GUY IS.

4 Q IN NORTH CAROLINA?

5 A YES, MA'AM, ROBESON COUNTY AND THEY GO TO
6 THE SAME SCHOOL THAT THEY HANG OUT AND, YOU KNOW, I JUST, I
7 JUST HAD TO TELL SOMEBODY, YOU KNOW.

8 Q AND WHAT WAS, WHAT WAS HE SAYING THAT
9 CAUSED YOU SO MUCH CONCERN?

10 A WELL IT'S JUST WHAT, YOU KNOW, ABOUT,
11 ABOUT, YOU KNOW, IT'S ALL DRUGS, MONEY, AND POWER, YOU KNOW
12 WHAT I'M SAYING. WHAT I'M SAYING IS IN THEIR LITTLE HOOD
13 THEY'RE ALWAYS FIGHTING AGAINST CROSS TOWN AND IT'S ALWAYS
14 SOME KIND OF WAR AND ALL THE PEOPLE THEY ROB AT THE STORE
15 OVER THERE THEY ---

16 Q WELL LET'S KEEP IT TO THIS CASE?

17 A OKAY.

18 Q ALL RIGHT, IN REFERENCE TO, WHAT WAS HE
19 TELLING YOU IN REFERENCE TO WHAT HE WAS IN JAIL FOR?

20 A HE SAID HE HAD A MURDER CHARGE AND HE HAD
21 THREE ATTEMPTED MURDER CHARGES.

22 Q AND THAT'S WHAT HE WAS IN J. REUBEN LONG
23 FOR?

24 A THAT'S WHAT HE SAID.

25 Q AND IN REFERENCE TO THAT DID HE TELL YOU

MR. SMITH - DIRECT EXAMINATION BY MS. ELDER

505

1 ANYTHING ABOUT HIS MURDER CHARGE?

2 A WELL I GOT MY MOTION OF DISCOVERY, GOT IT
3 IN A COUPLE OF WEEKS AFTER I WAS THERE, COME PRETTY QUICK,
4 AND I WAS GOING THROUGH MINE LOOKING AT MINE AND THAT NEXT
5 NIGHT HE BROUGHT, BROKE HIS OUT AND HE WAS GOING THROUGH
6 STUFF OF HIS AND HE SHOWED ME SOME PICTURES, YOU KNOW, OF
7 THE GUY THAT, THAT WAS MURDERED AND, AND, YOU KNOW, WE GOT
8 TO TALKING THEN, YOU KNOW.

9 Q WHAT, WHAT DID HE SAY ABOUT THE GUY THAT
10 WAS MURDERED?

11 A WELL HE JUST, HE SAID THAT'S THE GUY HE
12 HAD, THAT THEY HAD HIM CHARGED FOR FOR MURDER AND HE GOT TO
13 TALKING ABOUT. HE SAID THAT HE WAS PLANNING ON ONCE HE GOT
14 OUT OF ALL THIS HE WAS PLANNING ON, YOU KNOW, PUTTING IT ON
15 THE FRONT OF SOME SHIRTS WHEN HE GOT BACK HOME HE WAS
16 GOING, YOU KNOW, PUT IT ON THE FRONT AND THE BACK OF SHIRTS
17 AROUND HIS HOOD WHERE EVERYBODY COULD WEAR THEM, YOU KNOW.

18 Q DID HE INDICATE TO YOU IF HE HAD BEEN
19 INVOLVED IN THIS GUY'S MURDER?

20 A WELL THE GUY THAT WAS MURDERED HE SAID
21 KILLED HIS BEST FRIEND A GUY NAMED ERIC, AND HE, HE WAS
22 PRETTY UPSET ABOUT IT AND HE, YOU KNOW, HE SAID THEY GOT A
23 CALL FROM, IT WAS BIKE WEEK SAID HE GOT A CALL AND SAID
24 THAT HIS BUDDIES WERE DOWN HERE AT BIKE WEEK AND CALLED HIM
25 AND TOLD HIM THAT THE GUY WAS THERE, THE GUY NAMED AARON

MR. SMITH - DIRECT EXAMINATION BY MS. ELDER

506

1 WAS HERE AT BIKE WEEK AND HE SAID THAT HIM AND THREE OTHER
2 GUYS LOADED UP AND COME DOWN TO MYRTLE BEACH.

3 Q WHAT DID THEY COME DOWN TO MYRTLE BEACH
4 FOR?

5 A THEY COME DOWN TO TAKE CARE OF THIS GUY
6 AARON.

7 Q AND WHEN YOU SAY TAKE CARE OF AARON WHAT
8 WAS HE TALKING ABOUT?

9 A WELL TALKING ABOUT KILLING HIM.

10 Q DID HE EVER TELL YOU ABOUT A WEAPON?

11 A HE SAID THAT, THAT THEY HAD GOT UP WITH THE
12 GUY AND THIS FELLOW WHO USED TO BE HIS PARTNER NAMED BIRD
13 SAID THAT HE WAS SUPPOSED TO TAKE CARE OF THE GUY AND HE
14 COULDN'T DO IT SO HE SAID HE RUN BACK TO THE CAR AND SAID
15 HE WAS PARKED AT THE K-MART PARKING LOT, SAID HE RUN BACK
16 TO HIS CAR AND GOT HIS GUN AND COME BACK; AND, YOU KNOW, HE
17 SAID THEY WAS GOING DOWN OCEAN BOULEVARD AND SAID THAT HE
18 WAS RUNNING THROUGH THE CROWD AND PASSED HIS BUDDIES AND
19 CAUGHT UP WITH THE GUY THAT THEY HAD BEEN ARGUING WITH, THE
20 GUY THAT KILLED HIS FRIEND; AND HE SAID HE DID WHAT THEY
21 CALL WETTING HIM UP, HE SAID HE WET HIM UP AND EVIDENTLY,
22 YOU KNOW, HE SHOT THREE OTHER PEOPLE AT THE TIME, YOU KNOW.

23 Q AND WHEN HE SAID I WET THEM UP WHAT DID YOU
24 TAKE THAT TO MEAN?

25 A WELL YOU'D HEAR IT IN JAIL ALL THE TIME IN

MR. SMITH - DIRECT EXAMINATION BY MS. ELDER

507

1 PRISON IT MEANS SHOOTING.

2 Q SHOOTING SOMEBODY?

3 A YEAH, AND THE GUN THEY CALL IT A RATCHET.

4 Q AND HE SAID HE DID THIS BECAUSE BIRD
5 WOULDN'T?

6 A YEAH.

7 Q WHAT DID HE THINK ABOUT BIRD, DID HE EVER
8 SAY ANYTHING ABOUT BIRD?

9 A DID HE EVER?

10 Q UH-HUH.

11 A YEAH, HE SAID HE WAS GOING TO KILL HIS
12 BROTHER, KILL BIRD, AND SAID HE WAS GOING TO KILL HIS
13 CHILDREN, SAID HE WAS GOING TO KILL ALL OF THEM, HIS WHOLE
14 FAMILY.

15 Q WHY IS THAT?

16 A BECAUSE HE GOT HIM IN THIS MESS HERE.

17 Q CAUSE HE SNITCHED?

18 A YEAH, HE SAID THERE WAS NO EVIDENCE, SAID
19 THEY HAD A LINEUP AND THE ONLY ONE THEY PICKED OUT WAS --

20 Q WELL LET'S NOT GO THERE, YOU, YOU SAW THE
21 PICTURE THAT HE HAD?

22 A YES, MA'AM.

23 Q IF YOU'LL TAKE A LOOK AT STATE'S EXHIBIT
24 13?

25 A THAT'S HIM.

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

508

1 Q THAT'S THE PICTURE HE SHOWED YOU?

2 A YEAH, HE HAD BIGGER PICTURES.

3 Q IS THAT THE GUY HE WAS TALKING ABOUT TAKING
4 CARE OF?

5 A YEAH, THAT'S THE GUY.

6 Q WETTING UP?

7 A YEAH, THAT'S THE GUY THAT KILLED HIS BEST
8 FRIEND ERIC.

9 Q AND THAT'S THE GUY HE SAID HE SHOT ON THE
10 BOULEVARD?

11 A YEAH.

12 MS. ELDER: ONE MOMENT, YOUR HONOR.

13 THAT'S ALL THE QUESTIONS I HAVE, YOUR HONOR.

14 THE COURT: MS. PRATT?

15 MS. PRATT: THANK YOU, YOUR HONOR.

16 CROSS EXAMINATION

17 BY MS. PRATT:

18 Q MR. SMITH, HOW OLD ARE YOU?

19 A HOW OLD, I'M 46.

20 Q FORTY-SIX YEARS OLD?

21 A YES, MA'AM.

22 Q AND PARDON ME FOR STATING THE OBVIOUS BUT
23 YOU'RE WHITE, RIGHT?

24 A YES, MA'AM.

25 Q OKAY, AND WHERE ARE YOU FROM?

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

509

1 A I'M FROM BLADEN COUNTY, NORTH CAROLINA.

2 Q BLADEN COUNTY, NORTH CAROLINA?

3 A YES, MA'AM.

4 Q OKAY, AND HOW FAR IS THAT FROM LUMBERTON?

5 A ABOUT 20 MINUTES.

6 Q OKAY, DO YOU, DO YOU HAVE ANY KIND OF
7 CONNECTION WITH BRIAN'S FAMILY? I MEAN DID YOU GROW UP
8 WITH HIS DADDY OR DO YOU KNOW ANY OF THESE PEOPLE?

9 A NO, THE ONLY WAY OF CONNECTION THAT ME AND
10 BRIAN HAD HE KNEW PEOPLE THAT I KNEW AND SEVERAL IN
11 LUMBERTON.

12 Q WHO WOULD THAT HAVE BEEN?

13 A A GUY THEY CALL DOUGHBOY AND A GUY THEY
14 CALL RED MAN.

15 Q PEOPLE YOU MET IN PRISON?

16 A NAH, PEOPLE I USED TO RUN WITH YEARS AGO.

17 Q OKAY.

18 A THEY'RE ALL IN PRISON NOW.

19 Q I WAS GOING TO SAY --

20 A YEAH, THEY'RE IN PRISON.

21 Q WELL, AND YOU'VE GOT A PRETTY EXTENSIVE
22 HISTORY, DON'T YOU?

23 A YES, MA'AM.

24 Q I MEAN YOUR, YOUR CRIMES GO ALL THE WAY
25 BACK TO 1995?

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

510

1 A YES, MA'AM.

2 Q YOU'VE BEEN PRETTY MUCH CONTINUOUSLY
3 INCARCERATED AND A LITTLE BIT OUT SINCE 1995, HAVEN'T YOU?

4 A I SPENT A TOTAL OF 15 MONTHS IN PRISON.

5 Q FIFTEEN MONTHS?

6 A FIFTEEN MONTHS IN PRISON.

7 Q FROM LONG AGO, THREE OF THEM WERE HERE,
8 RIGHT AND HOW LONG ARE YOU IN NOW?

9 A I'M TALKING ABOUT BEFORE THIS RIGHT HERE,
10 BEFORE I GOT LOCKED UP LAST MAY I SPENT 15 MONTHS IN
11 PENITENTIARY.

12 Q YOU'VE GOT A 1995 PUBLIC ASSISTANCE FRAUD
13 AND FOOD STAMP FRAUD, RIGHT?

14 A YES, MA'AM.

15 Q THAT MEANS YOU LIED ABOUT SOMETHING,
16 DOESN'T IT?

17 A NO, IT MEANS THAT SOMEBODY, SOMEBODY SAID
18 SOMETHING THAT, THAT WASN'T TRUE.

19 Q OKAY, AND YOU GOT A LARCENY IN '98?

20 A YES, MA'AM.

21 Q AND THEN IN 2004 YOU ALLUDED ARREST, YOU
22 RAN AWAY?

23

24 A YES, MA'AM.

25 Q AND THEN IN 2004 YOU, THEY MUST HAVE CAUGHT

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

511

1 YOU, YOU GOT A PROBATION VIOLATION, RIGHT?

2 A YES, MA'AM.

3 Q AND A FAILURE TO APPEAR ON ANOTHER FELONY?

4 A YES, MA'AM.

5 Q A CONSPIRACY TO COMMIT POSSESSION OF STOLEN
6 GOODS IN 2005, RIGHT?

7 A YES, MA'AM.

8 Q OKAY, AND THEN IT SEEMS LIKE YOU FOUND YOUR
9 NICHE, 2006 LARCENY OF A MOTOR VEHICLE, POSSESSION OF
10 STOLEN GOODS, RIGHT?

11 A YES, MA'AM.

12 Q 2006 B&E, THAT WOULD B&E AUTO OR HOUSE?

13 A IT WAS A SHED THEY SAID.

14 Q AND LARCENY AFTER BREAKING IN, RIGHT?

15 A YES, MA'AM.

16 Q AND YOU'RE TELLING ME THAT YOU NEVER DID
17 ANY TIME ON THESE EVEN WAITING FOR TRIAL?

18 A NO, MA'AM.

19 Q OKAY, FIREARM BY A FELON IN 2007, YOU KNOW
20 YOU'RE NOT SUPPOSED TO HAVE A FIREARM, RIGHT?

21 A THAT'S WHY I WENT TO PRISON.

22 Q ALLUDING ARREST IN '07 TIMES TWO?

23 A YEAH, WENT TO PRISON.

24 Q AND THEN YOU, AND YOU'VE BEEN BACK AND
25 FORTH IN AND OUT OF SOUTH CAROLINA WHILE YOU'VE BEEN UP IN

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

512

1 NORTH CAROLINA, RIGHT, BACK AND FORTH TO LIKE DILLON AND
2 CHESTERFIELD AND BACK UP THERE? HADN'T ALWAYS STAYED IN
3 NORTH CAROLINA?

4 A OH, YES, MA'AM.

5 Q OKAY, THEN YOU CAME DOWN HERE AND YOU WERE
6 CHARGED WITH B&E AUTO?

7 A YES, MA'AM.

8 Q AND RIGHT NOW ---

9 A ATTEMPTED.

10 Q --- YOU'RE SERVING ONE UP THERE ---

11 A ATTEMPTED B&E.

12 Q --- FOR ATTEMPTED B&E AUTO. HUH?

13 A ATTEMPTED B&E AUTO HERE IS WHAT THEY
14 CHARGED.

15 Q SO BASICALLY YOU'RE A THIEF?

16 A YOU CAN SAY WHAT YOU WANT.

17 Q I THINK YOUR RECORD SAYS IT, DOESN'T IT,
18 SIR? ALL RIGHT, AND YOU HAVE NO DIRECT CONNECTION WITH
19 BRIAN, IT'S NOT LIKE YOU WORKED WITH HIS FATHER OR YOU, YOU
20 KNOW, KNOW HIS MAMA OR ANYONE ELSE?

21 A NO, MA'AM.

22 Q BUT YOU THINK THAT YOU WOULD BE THE KIND OF
23 PERSON THAT HE WOULD CONFIDE IN?

24 A WELL BACK IN THE DAY I USED TO, YOU KNOW, I
25 USED TO HUSTLE A LOT OF DOPE BACK IN THE DAY AND I AIN'T

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

513

1 PROUD OF IT, AIN'T PROUD OF NOTHING I'VE DONE.

2 Q THE FACT IS YOU'RE A 46-YEAR-OLD WHITE GUY
3 AND HE'S SOMEBODY 23, BLACK, IN THE HOOD WRITING RAP MUSIC.
4 WHAT DO YOU POSSIBLY HAVE IN COMMON WITH HIM THAT HE WOULD
5 OPEN UP HIS HEART AND IN A MATTER OF A COUPLE OF WEEKS TELL
6 YOU, OH, YEAH, I KILLED A BOY?

7 A IT WASN'T A COUPLE OF WEEKS.

8 Q TOOK YOU A WHILE TO GET THIS INFORMATION
9 OUT OF HIM?

10 A WELL I DIDN'T, I DIDN'T ASK FOR NONE OF IT.

11 Q FACT IS, SIR ---

12 A BUT ---

13 MS. ELDER: YOUR HONOR, IF SHE CAN ALLOW HIM TO
14 ANSWER, YOUR HONOR.

15 THE COURT: YES, LET'S LET HIM, SLOW DOWN A
16 LITTLE BIT, OKAY.

17 MS. PRATT: (CONTINUING)

18 Q GO AHEAD.

19 THE COURT: ARE YOU DONE WITH THE ANSWER, MR.
20 SMITH?

21 A YES, SIR.

22 THE COURT: OKAY, ALL RIGHT.

23 MS. PRATT: (CONTINUING)

24 Q THE FACT IS THAT WHEN YOU CAME IN THE CELL
25 WITH BRIAN HE HAD HIS DISCOVERY, DIDN'T HE?

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

514

1 A YEAH, HE HAD IT THEN.

2 Q HE HAD A BIG OLD PACK OF DISCOVERY FROM
3 2007, DIDN'T HE?

4 A YES, MA'AM.

5 Q AND THERE WAS LOTS OF TIMES WHEN BRIAN OR
6 THE OTHER PEOPLE IN THE CELL WITH YOU WOULD LEAVE THE CELL,
7 CORRECT?

8 A YES, MA'AM.

9 Q THEY NEVER WERE ALLOWED TO TAKE THE
10 DISCOVERY WITH THEM, WERE THEY?

11 A NO, MA'AM.

12 Q SO WHEN BRIAN WAS OUT OF THE CELL AND YOU
13 WERE STILL IN THE CELL YOU HAD PLENTY OF OPPORTUNITY TO
14 LOOK AT HIS STUFF, DIDN'T YOU?

15 A NO, MA'AM.

16 Q OH, REALLY?

17 A NO, IT AIN'T LIKE THAT, YOU DON'T STAY OUT
18 THE CELL BUT A FEW MINUTES.

19 Q SO ISN'T IT TRUE THAT IN J. REUBEN LONG
20 THERE'S LIKE LOTS OF PEOPLE IN THE CELL?

21 A PEOPLE ALL OVER THE FLOORS.

22 Q SURE?

23 A YES, MA'AM.

24 Q PRETTY BAD AND IT'S NOT VERY GOOD
25 CONDITIONS, RIGHT?

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

515

1 A NO, IT'S NOT, NO, IT'S NOT AT ALL.

2 Q YOU LIKE SAMPSON COUNTY BETTER?

3 A NO, MA'AM, SURE DIDN'T.

4 Q BUT YET YOU GOT BONDED OUT AND WENT UP
5 THERE AS HELP FROM THE SOLICITOR, CORRECT?

6 A SHE DONE THAT.

7 Q BUT YOU NEEDED TO GO UP THERE AND DEAL WITH
8 WHAT YOU HAD UP THERE, RIGHT?

9 A NO, THAT WASN'T IT, I NEEDED TO TAKE CARE
10 OF WHAT I HAD TO TAKE CARE OF.

11 Q AND ISN'T IT TRUE THAT YOU EXPECT SOME HELP
12 OUT OF THIS?

13 A NO, MA'AM.

14 Q YOU DON'T EXPECT IT FOR COMING DOWN HERE
15 AND SAYING THIS THAT SHE MIGHT, OH, I DON'T KNOW, DISMISS
16 YOUR CHARGES DOWN HERE?

17 A NO, MA'AM.

18 Q CONSIDER YOUR COOPERATION?

19 A WE HADN'T TALKED ABOUT NO KIND OF DEAL
20 WHATSOEVER.

21 Q WHO'S YOUR ATTORNEY DOWN HERE?

22 A GILMORE.

23 Q OKAY, AND IT WAS YOU THAT CONTACTED THE
24 POLICE, RIGHT?

25 A YES, MA'AM.

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

516

1 Q AND YOU JUST SPOKE TO DETECTIVE HULL?

2 A YES, MA'AM.

3 Q BUT THERE WASN'T ANY TAPE MADE OF THAT
4 CONVERSATION, WAS THERE?

5 A THAT FIRST TIME I DON'T KNOW.

6 Q WELL HE DIDN'T SHOW YOU A TAPE RECORDER AND
7 PUT IT ON THE TABLE IN FRONT OF YOU, DID HE?

8 A I DON'T THINK SO THE FIRST TIME I'M NOT
9 SURE.

10 Q SO WE DON'T KNOW WHAT YOU TOLD HIM OR HE
11 TOLD YOU THE FIRST TIME OF ANY INDEPENDENT SIDE, DO WE?

12 NO, OKAY, DID HE TAPE SOMETHING THE SECOND TIME?

13 A I'M PRETTY SURE HE DID.

14 Q REALLY?

15 A I DON'T KNOW.

16 Q YOU THINK THERE'S A TAPE?

17 A I'M NOT SURE.

18 Q SO YOU HAD THREE MONTHS OF OPPORTUNITY
19 EVERY DAY CAUSE PEOPLE GET OUT AT LEAST AN HOUR EVERY DAY
20 TO GET AT BRIAN'S STUFF, DIDN'T YOU?

21 A NAH, I DIDN'T NEVER TOUCH HIS STUFF.

22 Q YOU NEVER TOUCHED HIS STUFF, YOU JUST
23 WOULDN'T DO THAT?

24 A NO, I SURE WOULDN'T.

25 Q BUT ONE DAY YOU WERE JUST SITTING AROUND

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

517

1 AND HE JUST SHOWED YOU SOME PICTURES FROM HIS DISCOVERY, IS
2 THAT WHAT YOU WANT THIS COURT TO BELIEVE?

3 A WELL I MEAN HE ACT LIKE HE JUST KILLED A 10
4 POINT BUCK OR SOMETHING, YOU KNOW WHAT I'M SAYING. I MEAN
5 THE ONLY REASON I WENT TO THE, TO TALK TO THE DETECTIVE
6 LIKE I SAID I GOT FOUR GRANDKIDS THAT STAY LESS THAN 10
7 MINUTES FROM HIM. THEY GO TO THE SAME STORE THAT THEY BE
8 OVER THERE HUSTLING AT.

9 Q BUT THEY WOULDN'T KNOW, HE WOULDN'T KNOW
10 WHO YOUR GRANDCHILDREN WERE?

11 A IT DON'T MAKE NO DIFFERENCE WHO THEY KNOW,
12 THEY DON'T REALLY CARE.

13 Q OKAY ---

14 A THEY DON'T CARE.

15 Q SO HE ACTUALLY GOT SO SPECIFIC AS TO TELL
16 YOU SOME DETAILS ABOUT THIS, IS THAT WHAT YOU'RE TRYING TO
17 SAY?

18 A YES, MA'AM.

19 Q HE TOLD YOU THOSE THINGS? YOU MUST HAVE
20 TALKED ABOUT OTHER THINGS BESIDES HIS DISCOVERY; IS THAT
21 RIGHT?

22 A WE TALKED ABOUT A LOT OF THINGS.

23 Q WHAT DO YOU KNOW ABOUT HIS FAMILY?

24 A I DON'T KNOW MUCH ABOUT HIM, I KNOW HE'S
25 GOT A BROTHER.

MR. SMITH - CROSS EXAMINATION BY MS. PRATT

518

1 Q YOU DON'T KNOW ANYTHING ABOUT ---

2 A NO.

3 Q DO YOU KNOW HE'S GOT CHILDREN?

4 A YEAH, I KNOW HE'S GOT A LITTLE GIRL AND HIS
5 DADDY'S A CARPENTER, HIS DADDY REBUILDS HOUSES AND STUFF.

6 Q OKAY, YOU KNOW ANYTHING ABOUT HIS MAMA?

7 A WORKS WITH HIS DAD SOME, YOU KNOW, IN THE
8 SUMMER AND STUFF.

9 Q AND YOU TOLD HIM ABOUT WORKING ON CELL
10 PHONES AND THAT KIND OF STUFF, RIGHT?

11 A YEAH, THAT'S WHAT I DO FOR A LIVING
12 TELEPHONE.

13 Q WHEN YOU'RE NOT STEALING, RIGHT? DID HE
14 TELL YOU WHO CALLED HIM AND SAID THAT AARON WAS DOWN THERE?

15 A HE NEVER SAID.

16 Q DID HE SAY IT WAS BIRD OR JUNE?

17 A HE DIDN'T SAY.

18 Q CAUSE THAT MIGHT HAVE BEEN VERIFIABLE BY
19 THE STATE, THEY MIGHT HAVE BEEN ABLE TO FIND OUT IF THERE
20 WAS A PHONE CALL, RIGHT, SO ---

21 A HE DIDN'T SAY, HE SAYS I GOT A CALL.

22 Q BUT THAT MIGHT MESS UP YOUR STORY IF THEY
23 COULD PROVE THAT THAT PHONE CALL DIDN'T HAPPEN, RIGHT?

24 A I'M JUST TELLING YOU WHAT HE SAID, MA'AM.

25 Q HOW MANY TIMES HAVE YOU TESTIFIED?

MR. SMITH - REDIRECT EXAMINATION BY MS. ELDER

519

1 A ME?

2 Q UH-HUH?

3 A PROBABLY THREE OR FOUR TIMES. THE ONLY
4 TIME I EVER TESTIFIED IS ME AND MY WIFE DIVORCED.

5 MS. PRATT: I HAVE NOTHING FURTHER.

6 THE COURT: MS. ELDER?

7 MS. ELDER: JUST QUICKLY, YOUR HONOR.

8 REDIRECT EXAMINATION

9 BY MS. ELDER:

10 Q MR. SMITH, WHEN MR. HULL INTERVIEWED YOU
11 WERE YOU SCARED?

12 A SOME.

13 Q AND I BELIEVE YOU ACTUALLY ASKED HIM TO
14 STOP THE TAPE RECORDER AND NOT RECORD WHAT YOU WERE GOING
15 TO TELL HIM, CORRECT?

16 A YES, I DID.

17 Q IS THAT BECAUSE OF FEAR ---

18 MS. PRATT: OBJECTION, AS TO LEADING.

19 THE COURT: THAT WAS A LEADING QUESTION, JUST
20 ASK HIM WHY.

21 MS. ELDER: (CONTINUING)

22 Q WHY? WHY DID YOU NOT WANT YOUR
23 CONVERSATION TO BE TAPE RECORDED?

24 A WELL I DON'T WANT THAT KIND OF THREAT TO MY
25 FAMILY NONE WHATSOEVER. I'VE GOT SIX KIDS, I'VE GOT SOON

MR. SMITH - RECROSS EXAMINATION BY MS. PRATT

520

1 TO BE NINE GRANDKIDS.

2 Q HAD HE MADE THREATS?

3 A I'VE HEARD ALL KIND OF THREATS.

4 Q BY WHO?

5 A BY, BY BRIAN, NOT, NOT TOWARDS ME BUT
6 TOWARDS OTHER PEOPLE ABOUT OTHER PEOPLE.

7 Q CONNECTED TO THIS CASE?

8 A YEAH.

9 Q AND WHO IS THAT?

10 MS. PRATT: OBJECTION, YOUR HONOR.

11 MS. ELDER: SHE OPENED.

12 MS. PRATT: I DON'T THINK I OPENED UP ANYTHING
13 ABOUT ANY THREATS, YOUR HONOR.

14 THE COURT: WELL I DON'T KNOW THAT IT'S PROPER
15 FOR REDIRECT CAUSE IT'S NOT SOMETHING THAT SHE BROUGHT UP
16 ON CROSS.

17 MS. ELDER: I'LL WITHDRAW THAT QUESTION, YOUR
18 HONOR.

19 THE COURT: ALL RIGHT.

20 MS. ELDER: I HAVE NO FURTHER QUESTIONS, YOUR
21 HONOR.

22 THE COURT: ALL RIGHT, MS. PRATT, ANYTHING
23 FURTHER?

24 RECROSS EXAMINATION

25 BY MS. PRATT:

MR. SMITH - RECROSS EXAMINATION BY MS. PRATT

521

1 Q MR. SMITH, DIDN'T YOU KNOW THAT THEY WERE
2 GOING TO SEND YOU BACK UP TO NORTH CAROLINA?

3 A NO, I DIDN'T.

4 Q YOU DIDN'T KNOW THAT, THAT WOULDN'T BE THE
5 REASON?

6 A NO, A FEW DAYS LATER THEY COME TOLD ME TO
7 PACK MY STUFF UP. I DIDN'T KNOW WHERE I WAS GOING.

8 MS. PRATT: I HAVE NOTHING FURTHER, YOUR HONOR.

9 THE COURT: THANK YOU.

10 MS. ELDER: YOUR HONOR, I WOULD ASK THAT THIS
11 WITNESS BE EXCUSED. I HAVE HIM UNDER A NORTH CAROLINA
12 SUBPOENA.

13 THE COURT: YOU HAVE NO FURTHER USE FOR HIM, DO
14 YOU, MS. PRATT?

15 MS. PRATT: NO, YOUR HONOR.

16 THE COURT: ALL RIGHT, HE'S RELEASED FROM HIS
17 SUBPOENA. DOES THE STATE REST?

18 MS. ELDER: WE NEED TO APPROACH RIGHT QUICK,
19 YOUR HONOR.

20 THE COURT: ALL RIGHT.

21 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
22 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
23 OF THE JURY AND THE COURT REPORTER.)

24 MS. ELDER: THE STATE BASED ON ITS PRIOR RULING
25 WOULD CALL DETECTIVE HULL BACK TO THE STAND.

DETECTIVE HULL - DIRECT EXAMINATION BY MS. ELDER

522

1 THE COURT: ALL RIGHT, DETECTIVE HULL, YOU'RE
2 UNDER OATH.

3 DETECTIVE MICHAEL A. HULL

4 DIRECT EXAMINATION

5 BY MS. ELDER:

6 Q DETECTIVE HULL, JUST BRIEFLY, I HAD YOU ON
7 YOUR TESTIMONY REFER TO STATE'S EXHIBIT I.D. 13, IF YOU'LL
8 TAKE A LOOK AT THAT EXHIBIT; DO YOU RECALL THAT?

9 A YES, I DO.

10 Q AND I BELIEVE I ASKED YOU THAT YOU RECEIVED
11 THOSE DOCUMENTS AS A RESULT OF YOUR CONVERSATIONS OR
12 INVESTIGATIONS YOU CONTACTED THE AGENCY; IS THAT CORRECT?

13 A YES, YES.

14 Q AND WHAT AGENCY WAS THAT?

15 A NORTH CAROLINA DEPARTMENT OF CORRECTIONS.

16 Q AND DID YOU OBTAIN THOSE DOCUMENTS FROM
17 THEM?

18 A YES, THEY WERE FAXED TO ME.

19 Q AND ARE THOSE IN FACT THE COPIES THAT YOU
20 RECEIVED?

21 A YES.

22 Q AND ON THE FIRST PAGE WHAT IS THAT
23 DEPICTING?

24 A AUTOPSY PHOTOS OF AARON.

25 Q AND THE SECOND AND THIRD PAGE WHAT IS THAT,

DETECTIVE HULL - DIRECT EXAMINATION BY MS. ELDER

523

1 IS THAT CORRESPONDENCE?

2 A YES, IT IS.

3 Q AND WHO IS THAT SIGNED BY?

4 A IT IS SIGNED BY BOS.

5 Q AND WHO WAS IT ADDRESSED TO?

6 A TRILL, TRILL, I BELIEVE.

7 Q DO YOU KNOW HOW THEY GOT TO NORTH CAROLINA?

8 A DURING INTERVIEWS CALLED ABOUT LETTERS THAT
9 WERE SENT OUT.

10 Q AND WAS THIS A LETTER THAT NORTH CAROLINA
11 DEPARTMENT OF CORRECTIONS INTERCEPTED?

12 A YES.

13 MS. ELDER: YOUR HONOR, AT THIS TIME I'D LIKE TO
14 PUBLISH JUST A PORTION OF THIS PARTICULAR LETTER THAT I'VE
15 INDICATED.

16 THE COURT: ALL RIGHT, AND WE'VE HAD DISCUSSIONS
17 ABOUT IT, YOU MAY GO AHEAD.

18 MS. PRATT: WITH MY OBJECTION NOTED, YOUR HONOR.

19 THE COURT: YES, IT'S NOTED.

20 MS. ELDER: AND, YOUR HONOR, IF I COULD MARK IN
21 PEN THE AREAS THAT MR. HULL CAN READ?

22 YOUR HONOR, BEFORE I DO THAT I'LL, I THINK WE'RE
23 GOING TO HANDLE THIS LIKE WE HANDLED THE OTHER REDACTION IF
24 WE'D MAKE THIS A COURT'S EXHIBIT 3?

25 THE COURT: RIGHT.

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

524

1 (WHEREUPON, COURT'S EXHIBIT NUMBER 3 MARKED FOR
2 IDENTIFICATION.)

3 THE COURT: ALL RIGHT.

4 MS. ELDER: (CONTINUING)

5 Q DETECTIVE HULL, CAN YOU READ TO THE JURY
6 FROM THAT JUST THE HIGHLIGHTED PORTIONS OF THAT LETTER,
7 PLEASE?

8 A "YO, BRA, BIRD'S STATEMENT IS 41 PAGES. I
9 CAN'T MAIL IT BUT I AM SENDING AARON'S DEAD ASS. WHEN YOU
10 GET OUT IF I'M STILL IN MY CURRENT PLACE, COME WITH GRANDMA
11 BELL AND I'LL SIGN THE STATEMENT OUT TO YOU, BUT GET A
12 SHIRT MADE WITH AARON ON IT THAT SAY NIGGER'S DEAD ASS
13 NAKED WITH CHAINS IN THEIR NECK

14 MS. ELDER: NO OTHER QUESTIONS, YOUR HONOR.

15 THE COURT: ALL RIGHT, ANY QUESTIONS?

16 MS. PRATT: YES, SIR.

17 THE COURT: ALL RIGHT.

CROSS EXAMINATION

18
19 **BY MS. PRATT:**

20 Q DETECTIVE HULL, YOU DON'T KNOW FROM THAT
21 LETTER WHEN IT WAS ACTUALLY WRITTEN, RIGHT?

22 A NO.

23 Q YOU DON'T KNOW IF IT LAID AROUND BRIAN'S
24 CELL BEFORE IT GOT MAILED, DO YOU?

25 A NO, I DO NOT.

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

525

1 Q AND YOU DON'T KNOW IF MR. SMITH HAD A
2 CHANCE TO READ THAT LETTER BEFORE IT GOT MAILED, DO YOU?

3 A NO, I DO NOT.

4 MS. PRATT: THANK YOU, NOTHING FURTHER.

5 THE COURT: ALL RIGHT, THAT'S IT, RIGHT.

6 MS. ELDER: YES, SIR, YOUR HONOR.

7 THE COURT: ALL RIGHT.

8 MS. ELDER: WE WOULD ASK THAT INVESTIGATOR HULL
9 STEP DOWN.

10 THE COURT: YES, SIR. ALL RIGHT, NOW DOES THE
11 STATE REST?

12 MS. ELDER: YOUR HONOR, THE STATE OF SOUTH
13 CAROLINA WOULD REST AT THIS TIME.

14 THE COURT: VERY WELL, LADIES AND GENTLEMEN OF
15 THE JURY, THANK YOU FOR BEING PATIENT WITH US. BY THE
16 STATE RESTING I HAD PLANNED ON DOING THIS IN THE MORNING
17 BUT I THINK I'M GOING TO KEEP THESE LAWYERS HERE TONIGHT
18 AND WE'RE GOING TO DO THE MOTION WORK BUT BY YOUR STAYING
19 YOU'VE SAVED US A LOT OF TIME CAUSE OTHERWISE WE'D HAVE HAD
20 TO TAKE UP SEVERAL WITNESSES IN THE MORNING AND THEN WE
21 WOULD HAVE HAD TO DO THE MOTIONS AND THERE WOULD HAVE BEEN
22 A BIG HOLD OVER, SO I APPRECIATE YOUR PATIENCE WITH US AND
23 YOUR ATTENTION.

24 MR. ROPP, WOULD YOU TAKE THIS JURY OUT. AGAIN
25 DON'T READ ANY NEWSPAPER REPORTS OR ANYTHING LIKE THAT

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

526

1 ABOUT IT OR GET ON THE INTERNET, DON'T DISCUSS IT WITH
2 ANYBODY. TAKE THEM TO THEIR JURY ROOM AND LET THEM OUT.

3 (WHEREUPON, THE JURY WAS EXCUSED FOR THE EVENING
4 AT 6:08 P.M.)

5 THE COURT: ALL RIGHT, LET'S HAVE ANY MOTIONS
6 THAT WE'RE GOING TO INTERPOSE AT THIS TIME, MS. PRATT,
7 CAUSE I WANT TO BE ABLE TO GO RIGHT INTO THE TESTIMONY IN
8 THE MORNING.

9 MS. PRATT: I UNDERSTAND, YOUR HONOR, AND I
10 REALIZE THAT YOU'RE ASKING ME TO DO THIS NOW. MY
11 PREFERENCE WOULD BE TO COME BACK EVEN AT 8:00 IN THE
12 MORNING AND DO IT BECAUSE THERE'S A LOT OF TESTIMONY THAT
13 HAPPENED TODAY THAT I THINK NEEDS TO BE CONSIDERED IN MY
14 MOTION FOR DIRECTED VERDICT.

15 THE COURT: WELL I'LL TELL YOU WHAT, DO YOU HAVE
16 ANY, ANY MOTIONS, MS. ELDER, I WOULD THINK NOT?

17 MS. ELDER: NO, SIR.

18 THE COURT: NOTHING FROM THE STATE, ALL RIGHT,
19 MS. PRATT, I'M GOING TO LET YOU BE HERE AT 9:00, AT 9:00 WE
20 DO THE MOTIONS OR I CONSIDER THEM WAIVED, OKAY.

21 MS. PRATT: ABSOLUTELY, YOUR HONOR, THANK YOU,
22 SIR.

23 THE COURT: ALL RIGHT, BYE, BYE.

24 MS. ELDER: THANK YOU, YOUR HONOR.

25 (WHEREUPON, COURT WAS ADJOURNED FOR THE EVENING

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

527

1 AT 6:15 P.M. AND RESUMES ON MAY 13, 2010 AT 9:00 A.M.)

2 THE COURT: EVERYONE IS IN THE COURTROOM AND ALL
3 THE ATTORNEYS ARE PRESENT, THE STATE HAS RESTED, ALL RIGHT,
4 MS. PRATT?

5 MS. PRATT: GOOD MORNING, YOUR HONOR.

6 THE COURT: GOOD MORNING.

7 MS. PRATT: YOUR HONOR, AT THIS TIME I WOULD
8 MAKE A MOTION FOR A DIRECTED VERDICT AS TO ALL COUNTS. I
9 AM AWARE, OF COURSE, THAT, THAT A DIRECTED VERDICT THE
10 EVIDENCE HAS TO VIEWED IN THE LIGHT MOST FAVORABLE TO THE
11 STATE.

12 AT THIS POINT I WOULD ALSO BE RENEWING ALL THE
13 MOTIONS THAT I MADE UP TO THIS POINT IN THE TRIAL
14 ESPECIALLY AS TO EVIDENCE WHICH TENDS TO INDICATE ILL WILL
15 OR MALICE ON THE PART OF MY CLIENT. THOSE WOULD BE THE
16 STATEMENT OF DANYELL HAMMONDS, ANY INFORMATION ABOUT THE
17 WALMART SHOOTING, THE RAPS, AND THE LETTER FROM MY CLIENT
18 WITH THE PICTURES TO A MAN NAMED TRILL.

19 IN RENEWING THOSE MOTIONS I'D STATE AGAIN FOR MY,
20 FOR THE COURT MY CONCERNS ABOUT WHY THEY WERE ADMITTED AND
21 MY OBJECTION TO THEM.

22 THE COURT: YES, MA'AM.

23 MS. PRATT: HOWEVER I, I'D LIKE TO POINT OUT THE
24 FOLLOWING, FIRST OF ALL IN REGARDS TO MURDER IT IS MY
25 OPINION AND I ASK THE COURT TO CONSIDER THE FOLLOWING.

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

528

1 THERE WAS ABSOLUTELY NO FORENSIC EVIDENCE THAT
2 LINKED MY CLIENT TO THIS CRIME. THE EVIDENCE OF MY
3 CLIENT'S INVOLVEMENT CAME FROM A CODEFENDANT WITH A
4 SIGNIFICANT AND A JAILHOUSE INFORMANT.

5 I WOULD ASK THE COURT TO CREATE A NEW STANDARD
6 REGARDING THIS TYPE OF TESTIMONY, THAT THERE BE MORE OF AN
7 INDICIA OF RELIABILITY WHEN THIS KIND OF TESTIMONY IS
8 OFFERED.

9 I BELIEVE VERY FIRMLY, YOUR HONOR, THAT IT'S
10 NECESSARY IN THIS STATE THAT WE NOT RELY ON PEOPLE WHO HAVE
11 THAT KIND OF A STRONG REASON TO TELL AN UNTRUTH.

12 I WOULD ALSO POINT OUT TO THE COURT THAT THERE IS
13 ABSOLUTELY WITHOUT THE EVIDENCE THAT WE, THAT I'M OBJECTING
14 TO THERE WOULD BE NO MALICE AFORETHOUGHT AND THE CASE OF
15 STATE V. BELCHER MEANS THAT MALICE NO LONGER CAN BE
16 INFERRED ONLY BECAUSE OF THE USE OF A WEAPON AND,
17 THEREFORE, I WOULD BELIEVE THAT THERE IS NO, WITHOUT THAT
18 EVIDENCE THAT MAYBE, I BELIEVE, MAY NOT HAVE BEEN PROPERLY
19 ADMITTED ---

20 THE COURT: AND I THINK BELCHER ---

21 MS. PRATT: --- THERE WOULD BE NO MALICE.

22 THE COURT: AND I THINK BELCHER ALLOWS THAT SORT
23 OF TESTIMONY IF, ONLY IF IT EXCLUDES IT IN CASES WHERE
24 THERE IS SOME MITIGATION CONCERNING THE, THE SHOOTING OR
25 POSSIBLY SOME DOUBT AS TO WHETHER OR NOT IT WOULD BE A

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

529

1 LESSER INCLUDED.

2 MS. PRATT: WELL AND PERHAPS BELCHER IS REALLY
3 SAYING IF THE ONLY EVIDENCE THAT INDICATES MALICE IS THE
4 USE OF A DEADLY WEAPON THEN MAYBE WE DON'T HAVE MURDER.

5 THE COURT: PERHAPS, YES, SIR.

6 MS. PRATT: I WOULD ALSO ARGUE, YOUR HONOR, AS
7 TO THE THREE COUNTS OF ASSAULT AND BATTERY WITH INTENT TO
8 KILL AS THE COURT KNOWS ASSAULT AND BATTERY WITH INTENT TO
9 KILL IS DEFINED AS THE UNLAWFUL ACT OF VIOLENT INJURY TO
10 THE PERSON OF ANOTHER WITH MALICE EXPRESSED OR IMPLIED.

11 I BELIEVE THAT BELCHER MAKES SOME CHANGES TO
12 ABWIK AS WELL, YOUR HONOR, ALTHOUGH I'M NOT SURE HOW THAT
13 IS GOING TO PLAY OUT IN THE COURTS BUT I THINK IT'S TIME
14 AND IT NEEDS TO HAVE SOMETHING HAPPEN WITH IT.

15 THE EVIDENCE THAT IS IN THE RECORD WE DID
16 STIPULATE AS TO INJURIES IN REGARDS TO KRYSTAL FOWLER,
17 HOWEVER AS TO THE OTHER TWO VICTIMS THE ONLY EVIDENCE IS
18 THE TESTIMONY OF A POLICE OFFICER THAT THERE WAS AN INJURY.

19 IN LIGHT OF BELCHER I WOULD BE ARGUING THAT THE
20 IMPLIED MALICE DUE TO THE USE OF A GUN IN THIS CRIME SHOULD
21 NOT BE CONSIDERED AND, THEREFORE, IF THE COURT HAD NOT
22 ADMITTED THE ITEMS THAT I'VE REFERENCED THERE WOULD BE NO
23 EVIDENCE AT ALL OF AN ABWIK. FOR THAT REASON, YOUR HONOR,
24 I RESPECTFULLY REQUEST A DIRECTED VERDICT ON ALL COUNTS.

25 THE COURT: ALL RIGHT, MS. ELDER?

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

530

1 MS. ELDER: YOUR HONOR, I THINK THERE'S MORE
2 THAN SUFFICIENCY IN THE RECORD TO SHOW OR TO SUPPORT THE
3 CHARGE OF MURDER AND ABWIK. OF COURSE WE WILL BE
4 REQUESTING THE CHARGE, AND I ASSUME THE JUDGE IS GOING TO
5 GIVE IT ANYWAY, A TRANSFERRED INTENT ON ABWIK WHICH I THINK
6 IS OBVIOUSLY VERY APPROPRIATE IN CIRCUMSTANCES AND I THINK
7 IF YOU LOOK AT THAT OBVIOUSLY THE MALICE CAN BE TRANSFERRED
8 BECAUSE THERE WAS OBVIOUS VERY CLEAR EVIDENCE TO ME THAT
9 THERE WAS INTENT TO KILL AARON HAMMONDS THAT NIGHT.

10 THE COURT: ALL RIGHT, MS. PRATT, I WOULD
11 RESPECTFULLY DENY YOUR MOTION AS TO THE ADMISSIBILITY OF
12 THE EVIDENCE AND LIKEWISE YOUR MOTION AS TO A DIRECTED
13 VERDICT. I THINK THE EVIDENCE OF AT LEAST THE CODEFENDANT
14 AND THE OTHER INMATE AND THE OTHER EVIDENCE THAT THE STATE
15 HAS PRESENTED AS WELL WOULD GO TO MALICE AND INTENT AND I
16 BELIEVE THAT THERE IS SUFFICIENT EVIDENCE TO TAKE THIS TO
17 THE JURY BUT I WOULD RESPECTFULLY DENY YOUR MOTION, OKAY.

18 ALL RIGHT, NOW ANYTHING FURTHER, MS. PRATT?

19 MS. PRATT: YOUR HONOR, I HAVE A FEW WITNESSES
20 AND THEN I NEED TO HAVE A MOMENT TO DISCUSS WITH MY CLIENT
21 WHETHER HE NEEDS TO TESTIFY. I WILL NEED TO HAVE A
22 CONFERENCE WITH THE SOLICITOR AND YOU ABOUT WHAT CRIMES IN
23 HIS PAST ARE GOING TO BE ALLOWED TO BE ADMITTED AT SOME
24 POINT.

25 THE COURT: AND I'LL ALLOW YOU TO DO THAT BUT

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

531

1 FOR OUR PURPOSES RIGHT HERE SINCE WE HAVE THE JURY OUT I'D
2 LIKE TO GO AHEAD AND GIVE YOUR CLIENT MY INSTRUCTION TO HIM
3 CONCERNING HIS RIGHT TO TESTIFY, ALL RIGHT.

4 MS. PRATT: YES, YOUR HONOR.

5 THE COURT: ALL RIGHT, MR. SPEARS, IF YOU'D
6 STAND.

7 **EXAMINATION OF DEFENDANT SPEARS REGARDING RIGHTS**

8 THE COURT: MR. SPEARS AT THIS TIME I'M GOING TO
9 EXPLAIN TO YOU CERTAIN OF YOUR RIGHTS AND IF YOU DON'T
10 UNDERSTAND ANYTHING THAT I SAY PLEASE LET ME KNOW BECAUSE
11 IT'S VERY IMPORTANT.

12 IF YOU WANT ME TO EXPLAIN ANYTHING IN A MORE
13 DETAILED MANNER I'LL CERTAINLY DO SO, DO YOU UNDERSTAND
14 THAT?

15 DEFENDANT SPEARS: YES, SIR.

16 THE COURT: ALL RIGHT, SIR, NOW WE'VE REACHED
17 THE STAGE IN THE TRIAL WHERE YOU MAY PRESENT YOUR DEFENSE.

18 YOU HAVE THE RIGHT TO CLAIM THE PROTECTIONS GIVEN
19 TO YOU BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE
20 UNITED STATES AND THIS AMENDMENT SAYS IN PART NO PERSON
21 SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS
22 AGAINST HIMSELF.

23 THIS MEANS THAT YOU CANNOT BE REQUIRED TO TESTIFY
24 IN THIS CASE. YOU HAVE THE RIGHT TO TESTIFY ON YOUR OWN
25 BEHALF. I WANT YOU, THAT BE VERY CLEAR, YOU DO HAVE THAT

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

532

1 RIGHT, HOWEVER NO ONE CAN MAKE YOU TESTIFY AND THIS IS A
2 PERSONAL RIGHT THAT NO ONE CAN WAIVE EXCEPT YOU. YOUR
3 ATTORNEY CAN'T DO IT; THE STATE CAN'T DO IT; I CAN'T DO IT.
4 YOU ARE THE ONLY PERSON WHO CAN WAIVE YOUR RIGHT TO TESTIFY
5 IN THIS TRIAL; DO YOU UNDERSTAND THAT?

6 DEFENDANT SPEARS: YES, SIR.

7 THE COURT: ALL RIGHT, SIR, IF YOU DECIDE TO
8 TESTIFY I WANT YOU TO BE AWARE OF THE FACT THAT YOU WILL BE
9 SUBJECT TO THE SAME RULES THAT GOVERN OTHER WITNESSES AND
10 YOU MAY BE EXAMINED AND CROSS EXAMINED ON ANY RELEVANT
11 ISSUE IN THIS CASE.

12 IN ADDITION IF YOU HAVE ANY CONVICTIONS INVOLVING
13 DISHONESTY OR FALSE STATEMENTS OR FOR CRIMES PUNISHABLE BY
14 IMPRISONMENT FOR MORE THAN ONE YEAR AND THIS COURT
15 DETERMINES THAT THE PROBATIVE VALUE OF ADMITTING THIS
16 EVIDENCE OUTWEIGHS ITS PREJUDICIAL AFFECT TO YOU THE
17 SOLICITOR WILL BE ABLE TO INTRODUCE YOUR RECORD TO ATTACK
18 YOUR CREDIBILITY; DO YOU UNDERSTAND WHAT I'VE SAID BY THAT?

19 DEFENDANT SPEARS: YES, SIR.

20 THE COURT: OKAY, IF YOU DECIDE TO TESTIFY THIS
21 DECISION ON YOUR PART MUST BE FREELY AND VOLUNTARILY AND
22 INTELLIGENTLY MADE WITH KNOWLEDGE OF THE PROTECTIONS GIVEN
23 TO YOU BY THE FIFTH AMENDMENT AND THE CONSEQUENCES OF YOUR
24 DECISION TO TESTIFY; DO YOU UNDERSTAND THAT?

25 DEFENDANT SPEARS: YES, SIR.

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

533

1 THE COURT: ALL RIGHT, SIR, IF YOU DECIDE NOT TO
2 TESTIFY I WILL INSTRUCT THE JURORS AT THE END OF THIS CASE
3 THAT THEY CANNOT GIVE THE FACT THAT YOU DECIDED NOT TO
4 TESTIFY ANY CONSIDERATION WHATSOEVER DURING THEIR
5 DELIBERATION IN THIS CASE AND THAT THERE IS TO BE
6 ABSOLUTELY NO PREJUDICE TO YOU BECAUSE YOU DID NOT TESTIFY.
7 IT IS LEFT ENTIRELY UP TO YOU WHETHER OR NOT YOU TESTIFY.

8 NOW YOU CAN TALK WITH YOUR ATTORNEY AND YOUR
9 FAMILY AND FRIENDS OR ANYONE ELSE BUT THE FINAL DECISION
10 WILL BE LEFT ENTIRELY UP TO YOU. NOW HAVE YOU UNDERSTOOD
11 EVERYTHING THAT I'VE TOLD YOU?

12 DEFENDANT SPEARS: YES, SIR.

13 THE COURT: OKAY, DO YOU HAVE ANY QUESTIONS
14 ABOUT WHAT I'VE TOLD YOU? DO YOU NEED TO ASK ME ABOUT
15 THAT?

16 DEFENDANT SPEARS: NO, SIR.

17 THE COURT: OKAY, NOW HAVE YOU DISCUSSED YOUR
18 RIGHT TO TESTIFY WITH YOUR ATTORNEY?

19 DEFENDANT SPEARS: SOMEWHAT, YES, SIR.

20 THE COURT: OKAY, NOW I WANT YOU TO KNOW THAT
21 YOUR ATTORNEY IS GOING TO TELL ME AS THIS CASE PROGRESSES
22 AND I'LL ASK YOU TO TELL ME WHETHER OR NOT YOU WISH TO
23 TESTIFY AND I WANT TO GIVE YOU ALL THE OPPORTUNITY YOU NEED
24 OR THE TIME YOU NEED TO DISCUSS THAT WITH YOUR ATTORNEY.

25 YOUR ATTORNEY TELLS ME THAT SHE WANTS TO HAVE A

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

534

1 CONFERENCE WITH ME AND WITH THE SOLICITOR CONCERNING YOUR
2 PAST RECORD. I DON'T KNOW IF YOU HAVE A PAST RECORD BUT I
3 WOULD ASSUME FROM HER COMMENTS THAT YOU DO; DO YOU
4 UNDERSTAND THAT?

5 DEFENDANT SPEARS: YES, SIR.

6 THE COURT: ALL RIGHT, NOW I WILL TELL YOU THIS,
7 IF YOU TELL ME THAT YOU DO NOT WISH TO TESTIFY AND AFTER
8 THAT DURING THIS TRIAL, YOU CANNOT DO IT AFTER THE TRIAL,
9 BUT DURING THIS TRIAL AND WHILE TESTIMONY IS BEING
10 PRESENTED IF YOU CHANGE YOUR MIND YOU CAN CERTAINLY DO SO.
11 ALL YOU HAVE TO DO IS MAKE ME AWARE OF THAT; DO YOU
12 UNDERSTAND?

13 DEFENDANT SPEARS: YES, SIR.

14 THE COURT: I WANT YOU TO UNDERSTAND THAT UNTIL
15 TESTIMONY IS COMPLETED YOU STILL HAVE THAT RIGHT AND I WILL
16 ALLOW YOU TO CHANGE YOUR MIND IF AT THIS TIME YOU DO NOT
17 WANT TO TESTIFY.

18 NOW HAVE YOU UNDERSTOOD EVERYTHING THAT I HAVE
19 TOLD YOU?

20 DEFENDANT SPEARS: YES, SIR.

21 THE COURT: DO YOU WANT TO MAKE A DECISION NOW
22 AS TO WHETHER TO TESTIFY OR NOT?

23 DEFENDANT SPEARS: I WANT TO GO OVER IT WITH MY
24 ATTORNEY FIRST.

25 THE COURT: ALL RIGHT, AND ONCE YOU'VE DONE THAT

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

535

1 I WANT YOU TO LET ME KNOW, OKAY?

2 DEFENDANT SPEARS: YES, SIR.

3 THE COURT: ALL RIGHT, SIR, BUT YOU DO
4 UNDERSTAND YOUR RIGHTS COMPLETELY?

5 DEFENDANT SPEARS: YES, SIR.

6 THE COURT: THANK YOU VERY MUCH, YOU MAY BE
7 SEATED.

8 LET ME, I FAILED TO DO ONE THING, STAND AGAIN.
9 PLACE HIM UNDER OATH, IF YOU WOULD.

10 **DEFENDANT BRIAN KENDRICK SPEARS,**

11 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

12 THE COURT: ALL RIGHT, MR. SPEARS, I GENERALLY
13 PLACE DEFENDANTS UNDER OATH BEFORE I INSTRUCT THEM AS TO
14 THEIR RIGHTS. NOW A MOMENT AGO I WENT THROUGH YOUR RIGHTS
15 AS COMPLETELY AS I COULD AND YOU HAVE ADVISED ME THAT YOU
16 DID UNDERSTAND EVERYTHING THAT I TOLD YOU; YOU UNDERSTAND
17 YOUR RIGHTS FROM THE FIFTH AMENDMENT; IS THAT THE TRUTH?

18 DEFENDANT SPEARS: YES, SIR.

19 THE COURT: DO YOU TELL ME THAT UNDER OATH?

20 DEFENDANT SPEARS: YES, SIR.

21 THE COURT: DO YOU ADOPT YOUR RESPONSES TO MY
22 QUESTIONS THAT WERE GIVEN JUST A MOMENT AGO?

23 DEFENDANT SPEARS: YES, SIR.

24 THE COURT: AND THAT IS YOUR TESTIMONY?

25 DEFENDANT SPEARS: YES, SIR.

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

536

1 THE COURT: ALL RIGHT, SIR, THANK YOU.

2 MS. ELDER: AND, YOUR HONOR, JUST FOR THE RECORD
3 THERE ARE, SO WE CAN JUST GO AHEAD AND PUT THIS ON RECORD,
4 THERE ARE TWO SENTENCES OR TWO CONVICTIONS, I BELIEVE. ONE
5 IS A CARRYING A CONCEALED WEAPON, THE OFFENSE DATE WAS 11-
6 01-05; HIS SENTENCE BEGAN 1-4-06.

7 ALSO THERE WAS A SECOND CONVICTION FOR RECEIVING
8 OR POSSESSING A FIREARM; THAT OFFENSE DATE WAS 2003.

9 THE COURT: ALL RIGHT, AND BOTH OF THOSE CARRIED
10 MORE THAN ONE YEAR?

11 MS. ELDER: THAT'S CORRECT, YOUR HONOR.

12 THE COURT: OKAY, AND THEY ARE CERTAINLY WITHIN
13 THE LAST TEN YEARS, ARE THEY NOT?

14 MS. ELDER: YES, SIR.

15 THE COURT: ALL RIGHT, MS. PRATT, THAT SEEMS TO
16 BE THE EXTENT OR YOUR CLIENT'S RECORD. ARE THERE ANY OTHER
17 MATTERS THAT YOU WOULD RAISE BY WAY OF IMPEACHMENT, MS.
18 ELDER?

19 MS. ELDER: NOT AS FAR AS ---

20 THE COURT: BAD ACTS OR ANYTHING ELSE?

21 MS. ELDER: NOT AS FAR AS RECORD, YOUR HONOR, IS
22 CONCERNED THAT'S CORRECT, AND OBVIOUSLY WHAT MAY COME UP AT
23 CROSS EXAMINATION, I BELIEVE WHAT MS. PRATT IS REFERRING TO
24 ABOUT MR. SPEARS' TESTIMONY IS IF HE TESTIFIES ARE THEY
25 GOING TO BE ABLE TO BRING UP ANY OF THE LYRICS THAT WE'VE

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

537

1 GONE THROUGH. I DON'T, I CAN'T PREDICT THAT BECAUSE I
2 DON'T KNOW WHAT IF HE TESTIFIES WHAT'S HE'S GOING TO SAY.

3 THE COURT: WELL IF HE TESTIFIES YOU CAN
4 CERTAINLY ASK HIM ABOUT THOSE.

5 MS. ELDER: YES, SIR, SO I DO NOT PERCEIVE HIM
6 GOING INTO IT.

7 THE COURT: HE CAN DENY THEM OR OTHERWISE OR
8 EXPLAIN THEM.

9 MS. ELDER: YES, SIR.

10 THE COURT: HE WOULD HAVE A RIGHT TO EXPLAIN
11 THOSE, THOSE LYRICS AS WELL.

12 MS. PRATT: AND PERHAPS I COULD SPEAK TO THAT,
13 YOUR HONOR. I HADN'T RAISED THAT MOTION YET BUT MY CONCERN
14 WOULD NOT JUST BE THE ONES THAT HAVE BEEN ADMITTED IN BUT
15 WHETHER THE SOLICITOR WOULD BE ALLOWED TO GO INTO ANY OF
16 THE OTHER LYRICS WHICH WE CONSIDER, THE COURT HAS ALREADY
17 CONSIDERED TO BE PREJUDICIAL AND NOT MEETING THE CHEESEBORO
18 STANDARD AS I UNDERSTAND IT. SO I'M CONCERNED AND THAT
19 WOULD BE CERTAINLY AN ISSUE FOR MY CLIENT AS TO WHETHER OR
20 NOT THAT WOULD BE SOMETHING IN DECIDING WHETHER HE'S NOT
21 GOING TO TESTIFY OR TESTIFY.

22 THE COURT: ALL RIGHT, MS. ELDER, I HAVE LOOKED
23 AT THESE LYRICS AND I HAVE FOUND THAT SOME HAVE THE
24 REQUIRED SPECIFICITY OTHERS DO NOT. I WOULD EXPECT YOU TO
25 HOLD YOUR CROSS EXAMINATION TO THE ONES THAT WE HAVE

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

538

1 ADMITTED.

2 MS. ELDER: WELL, YOUR HONOR, MY PROBLEM WITH
3 THAT IS THIS, I DON'T KNOW WHAT HE'S GOING TO TESTIFY TO.
4 IF HE GETS, I CERTAINLY UNDERSTAND THE COURT'S RULING ON MY
5 CASE IN CHIEF PRIOR TO HIS TESTIMONY. THAT, I CERTAINLY,
6 LIKE I SAID WE WENT THROUGH THAT PROCESS AND WE HAVE TO
7 MAKE THAT DECISION BUT ONCE HE TAKES THE STAND I HAVE AN
8 OPPORTUNITY TO IMPEACH HIM SO OR TO ATTACK HIS CREDIBILITY
9 OR ANYTHING ELSE HE MAY TESTIFY TO.

10 I HAVE NO IDEA WHAT HE'S GOING TO SAY ON THE
11 STAND. I CAN'T AT THIS POINT IN TIME, I HAVE, LIKE I SAID
12 I DON'T KNOW WHAT HE'S GOING TO SAY. IF HE SAYS SOMETHING
13 THAT OPENS THE DOOR I'M CERTAINLY GOING TO TRY TO USE
14 SOMETHING HE MAY OR MAY NOT HAVE WRITTEN TO IMPEACH THAT
15 TESTIMONY.

16 THE COURT: WELL IF ---

17 MS. ELDER: SO I CAN'T SAY ---

18 THE COURT: IF IT IS SPECIFIC, IF IT IS SPECIFIC
19 I THINK THEN IT BECOMES RELEVANT OR MORE RELEVANT.

20 MS. ELDER: RIGHT, AND THAT'S WHY ---

21 THE COURT: MORE RELEVANT AND IT MAY OUTWEIGH
22 THE PREJUDICE BUT, MS. ELDER, I DON'T WANT OPEN DOOR WHERE
23 WE JUST DELVE INTO ALL THE SPECIFICS OF ALL THE LYRICS
24 THAT, THAT WERE PRESENTED TO THE COURT, I DON'T WANT TO DO
25 THAT. I WANT TO LIMIT YOU TO IF, IF HE TESTIFIES TO A

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

539

1 SPECIFIC MATTER AND THERE IS VERY SPECIFIC EVIDENCE CONTRA
2 TO THAT IN HIS LYRICS I WOULD ALLOW YOU TO, TO ADDRESS THAT
3 BUT ---

4 MS. ELDER: YES, SIR.

5 THE COURT: --- AGAIN I WANT TO CAUTION YOU THAT
6 I THINK THE BEST PRACTICE WOULD PROBABLY BE TO STAY AWAY
7 FROM IT AS FAR AS YOU CAN EXCEPT THE ONES THAT I'VE
8 ADMITTED, OKAY.

9 MS. ELDER: WELL AND LIKE I SAID, YOUR HONOR, I
10 DON'T, I DON'T INTEND TO PUT THEM IN ANYMORE BECAUSE WE'VE
11 GONE OVER THAT, HOWEVER I, I DON'T KNOW WHAT HE'S GOING TO
12 SAY SO --

13 THE COURT: AND I DON'T EITHER, I DON'T KNOW IF
14 HE'S GOING TO TESTIFY.

15 MS. ELDER: YOU KNOW, IF HE GETS UP THERE AND
16 SAYS I NEVER HAD A GUN, I DON'T LIKE GUNS AND ---

17 THE COURT: WELL THEN ---

18 MS. ELDER: --- I'VE GOT 500 PAGES OF SOMETHING
19 SAYS SOMETHING COMPLETELY DIFFERENT SO, YOU KNOW, THAT'S,
20 THAT'S THE ISSUE. OBVIOUSLY WE'LL TAKE THAT UP OUTSIDE THE
21 PRESENCE OF THE JURY SHOULD THAT ISSUE ARISE. I WOULDN'T
22 JUST BLURT OUT WITH THE JURY UNDERSTANDING YOUR COURT'S
23 RULING, YOUR HONOR.

24 THE COURT: ALL RIGHT.

25 MS. PRATT: AND, YOUR HONOR, I HAVE SOMETHING TO

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

540

1 SAY ABOUT THE RECORD, I DIDN'T GET A CHANCE TO SAY ANYTHING
2 THERE. THE NCIC THAT I'VE BEEN PROVIDED BY THE STATE SHOWS
3 THAT BOTH OF THESE CRIMES THAT MY CLIENT HAS BEEN CONVICTED
4 OF ARE CLASS II MISDEMEANORS. THEY ARE NOT FELONIES. I
5 DON'T HAVE ANY PROOF OTHERWISE AND I WOULD BE ARGUING THAT
6 THEY DO NOT MEET THE STANDARDS AND THEY ARE ALSO UNDER
7 GREEN V. STATE, TOO CLOSE TO THE MAIN ISSUE IN THIS CASE
8 ABOUT WHETHER HE HAD A GUN OR NOT AND SO I BELIEVE THAT
9 THEY WOULD BE UNDER THE STANDARD OF MORE PREJUDICIAL THAN
10 PROBATIVE AS WELL AS THE FACT THAT THEY ARE CLASS II
11 MISDEMEANORS WOULD MEAN THAT SHOULD NOT BE ADMITTED.

12 THE COURT: WHAT WAS THE PENALTIES, WHAT'S THE
13 POTENTIAL PENALTY ON THEM?

14 MS. PRATT: HE RECEIVED PROBATION; I DON'T HAVE
15 ANY INFORMATION AS TO THE PENALTIES.

16 MS. ELDER: TWO YEARS OF SUPERVISION, YOUR
17 HONOR.

18 THE COURT: PARDON?

19 MS. ELDER: TWO YEARS OF SUPERVISION, YOUR
20 HONOR.

21 MS. PRATT: PROBATION.

22 THE COURT: DO YOU KNOW WHAT THE POTENTIAL
23 PENALTY WAS, MS. ELDER?

24 MS. ELDER: I DO NOT, IT'S NOT, OBVIOUSLY IT'S
25 NOT ON THERE, YOUR HONOR. HE RECEIVED A 2 YEAR SUPERVISION

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

541

1 PERIOD I BELIEVE IN '06 AND HE RECEIVED A SUSPENDED
2 SENTENCE IN '02.

3 MS. PRATT: I BELIEVE BEFORE WE MAKE A RULING WE
4 NEED TO KNOW MORE ABOUT THOSE. THEY ARE CONVICTIONS AND I
5 BELIEVE THE BURDEN IS ON THE STATE TO SHOW THAT THEY SHOULD
6 BE USED.

7 MS. ELDER: WE'LL BE GLAD TO GO PULL THE STATUTE
8 OFF THE NORTH CAROLINA, YOUR HONOR.

9 THE COURT: SOUTH CAROLINA THEY WOULD BE AND
10 I'LL LET MR., LOOKS LIKE MR. FILLIBERTO IS ON THE WAY
11 DOWNSTAIRS TO CHECK ON THAT, OKAY.

12 MS. ELDER: YES, SIR, UNDER SOUTH CAROLINA THERE
13 WOULD BE A FIVE-YEAR PENALTY RANGE WHICH WOULD --

14 MS. PRATT: OR PERHAPS ONE IF IT'S NOT UNLAWFUL
15 POSSESSION OF A FIREARM. IT DEPENDS ON THE ELEMENTS, I
16 WOULD IMAGINE.

17 MS. ELDER: CARRYING A CONCEALED WEAPON.

18 THE COURT: ALL RIGHT, I'M GOING TO LET YOU
19 ARGUE THAT A LITTLE BIT LATER.

20 MS. ELDER: YES, SIR.

21 THE COURT: MS., DO YOU PLAN, IF YOU PUT YOUR
22 DEFENDANT UP WILL HE BE LAST?

23 MS. PRATT: PROBABLY, YOUR HONOR, YES.

24 THE COURT: GIVE US SOME TIME, OKAY, ALL RIGHT.

25 MS. PRATT: DEPENDING ON HOW OUR TIMING IS GOING

DETECTIVE HULL - CROSS EXAMINATION BY MS. PRATT

542

1 TODAY.

2 THE COURT: OKAY, VERY WELL.

3 MS. PRATT: IF I COULD HAVE ONE MOMENT TO SPEAK
4 TO MY CLIENT'S MOTHER. I'M NOT SURE IF I'M GOING TO USE
5 HER OR NOT AND I'D LIKE HER IN THE COURTROOM BEFORE THE
6 JURY COMES IN.

7 THE COURT: CERTAINLY.

8 MS. PRATT: SHE JUST GOT HERE.

9 THE COURT: ALL RIGHT.

10 MS. PRATT: THANK YOU, YOUR HONOR, JUST ONE
11 MINUTE.

12 THE COURT: DO WE HAVE ALL OF OUR JURORS HERE
13 YET?

14 THE BAILIFF: I THINK WE WERE MISSING ONE JUST A
15 MOMENT AGO, YOUR HONOR.

16 THE COURT: ALL RIGHT, AS SOON AS THEY ARE HERE
17 WOULD YOU BRING THEM IN.

18 THE BAILIFF: ALL RIGHT, SIR.

19 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
20 9:32 A.M.)

21 THE COURT: GOOD MORNING, GOOD TO SEE YOU ALL
22 BACK. ALL RIGHT, ARE WE READY TO PROCEED?

23 MS. PRATT: DEFENSE IS READY, YOUR HONOR.

24 THE COURT: ALL RIGHT, MS. PRATT.

25 MS. PRATT: THANK YOU, YOUR HONOR. I WOULD CALL

MS. BROWN - DIRECT EXAMINATION BY MS. PRATT

543

1 ALEXIS DENISE BROWN TO THE WITNESS STAND, I BELIEVE SHE'S
2 JUST OUTSIDE THE DOOR.

3 ALEXIS DENISE BROWN

4 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

5 MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
6 SPELL YOUR LAST NAME FOR THE RECORD.

7 THE WITNESS: ALEXIS DENISE BROWN, B-R-O-W-N.

8 DIRECT EXAMINATION

9 BY MS. PRATT:

10 Q MS. BROWN, WHERE DO YOU RESIDE?

11 A IN RED SPRINGS, NORTH CAROLINA.

12 Q ALL RIGHT, AND HAVE YOU ALWAYS LIVED IN
13 NORTH CAROLINA?

14 A YES.

15 Q HOW OLD ARE YOU?

16 A TWENTY-ONE.

17 Q AND HOW FAR DID YOU GO IN SCHOOL?

18 A I GRADUATED.

19 Q DO YOU HAVE, ARE YOU SINGLE OR ARE YOU
20 MARRIED?

21 A I'M SINGLE.

22 Q AND DO YOU HAVE ANY CHILDREN?

23 A YES.

24 Q WHAT, WHAT IS THEIR NAMES AND AGE?

25 A I HAVE A TWO-YEAR-OLD SON, J. L. B.

MS. BROWN - DIRECT EXAMINATION BY MS. PRATT

544

1 Q ALL RIGHT, AND WHO IS J. L. B. 'S
2 FATHER?

3 A AARON HAMMONDS.

4 Q AARON HAMMONDS, AND HE IS THE DECEASED IN
5 THIS CASE, IS HE NOT?

6 A YES.

7 Q MS. BROWN, WERE YOU PRESENT THE NIGHT OF
8 THIS INCIDENT?

9 A YES.

10 Q HOW DID YOU COME TO MYRTLE BEACH?

11 A WITH AARON HAMMONDS AND LEMARK IRONS AND
12 BRITTNEY MANOR.

13 Q ALL RIGHT, AND YA'LL DROVE DOWN FROM
14 LUMBERTON AREA?

15 A YES.

16 Q HOW LONG DID IT TAKE YOU TO GET DOWN HERE?

17 A ABOUT TWO HOURS.

18 Q ALL RIGHT, DO YOU KNOW ABOUT WHAT TIME YOU
19 ARRIVED?

20 A NO, NOT EXACTLY.

21 Q WAS IT DARK?

22 A YES.

23 Q ALL RIGHT, AND WHAT WERE YA'LL DOING ON THE
24 BOULEVARD?

25 A WE WERE WALKING.

MS. BROWN - DIRECT EXAMINATION BY MS. PRATT

545

1 Q KIND OF CHECKING THINGS OUT?

2 A YEAH.

3 Q I KNOW YOU'RE REAL NERVOUS JUST RELAX, DO
4 YOU NEED SOME WATER OR ANYTHING?

5 A NO, I'M OKAY.

6 Q OKAY, ALL RIGHT, NOW DO YOU REMEMBER THE
7 NIGHT OF MAY THE 27TH OF 2007?

8 A YES, MA'AM.

9 Q TELL ME JUST BEFORE THE SHOOTING WHO WAS
10 TOGETHER AND WHAT YA'LL WERE DOING?

11 A ME, BRITTNEY, LEMARK, AND AARON WAS ALL
12 WALKING DOWN THE STRIP.

13 Q OKAY, AND DO YOU REMEMBER ABOUT WHERE, WHAT
14 YOU SAW, DID ANY LANDMARK STICK OUT IN YOUR MIND?

15 A IT WAS JUST A WHOLE BUNCH OF SHOPPING
16 PLACES, FOOD STORES AND WHAT NOT.

17 Q AND WHICH SIDE OF THE STREET WERE YOU ON?

18 A WE WAS ON THE RIGHT HAD SIDE.

19 Q OKAY, NEARER TO THE OCEAN OR NEAREST TO THE
20 STORES?

21 A TO THE STORES.

22 Q OKAY, AND WHO WAS WALKING WITH WHO?

23 A AARON AND LEMARK WAS IN FRONT OF ME AND
24 BRITTNEY.

25 Q OKAY, AND THE FOUR OF YOU WERE YOU WITH

MS. BROWN - DIRECT EXAMINATION BY MS. PRATT

546

1 ANY OTHER PEOPLE AS WELL?

2 A THERE WAS MATT JENKINS AND THEIR COUSIN MAN
3 WAS BEHIND US BUT THEY WAS ABOUT A COUPLE OF INCHES BEHIND
4 US THOUGH.

5 Q OKAY, AND DID YOU ALL COME DOWN TOGETHER OR
6 JUST THE FOUR OF YOU AND THEN MATT AND MAN CAME SEPARATELY?

7 A YEAH, THEY FOLLOWED US DOWN HERE.

8 Q OKAY, ALL RIGHT, DID YA'LL COME DOWN HERE
9 WITH ANY INTENT TO GET INTO ANY KIND OF TROUBLE OR
10 PROBLEMS?

11 A NO.

12 Q NOW DURING THAT NIGHT DID THERE COME A TIME
13 THAT YOU SAW SOME OTHER BOYS FROM LUMBERTON?

14 A NO.

15 Q DID YOU WALK PAST ANY PEOPLE THAT WERE,
16 THAT WERE HERE FROM YOUR AREA?

17 A NO.

18 Q NO, NOT AT ALL, SO YOU DON'T REMEMBER
19 ANYTHING LIKE THAT?

20 A NO.

21 Q OKAY, DO YOU REMEMBER LEMARK IRONS WALKING
22 AWAY AND COMING BACK?

23 A YES.

24 Q ALL RIGHT, AND WHEN LEMARK CAME BACK, I
25 DON'T WANT YOU TO TELL ME WHAT HE SAID CAUSE HE'S NOT HERE,

MS. BROWN - DIRECT EXAMINATION BY MS. PRATT

547

1 BUT HOW DID HE SEEM? DID HE SEEM HAPPY, SAD, AGITATED,
2 CALM?

3 A HE WAS DRINKING SO HE WAS CALM.

4 Q OKAY, DIDN'T SEEM UPSET IN ANY WAY?

5 A NO.

6 Q ALL RIGHT, AND THEN WHAT'S THE NEXT THING
7 THAT YOU REMEMBER?

8 A SOMEONE WALKED UP ON THE SIDE OF US AND
9 STARTED SHOOTING.

10 Q AND WHAT DO YOU REMEMBER ABOUT THE MAN THAT
11 STARTED SHOOTING?

12 A IT WAS A DARK SKINNED MALE WITH LONG HAIR.

13 Q LONG HAIR?

14 A UH-HUH.

15 Q WHAT KIND OF LONG HAIR DID HE HAVE?

16 A DREADS.

17 Q DREADS, OKAY, AND I'M GOING TO SHOW YOU
18 WHAT HAS BEEN, BEFORE I DO THAT, DID YOU TALK TO THE
19 POLICE?

20 A YES.

21 Q AND DID YOU GET INVOLVED IN DESCRIPTIONS AT
22 ALL WITH THEM?

23 A YES.

24 Q I'M GOING TO SHOW YOU WHAT'S BEEN MARKED AS
25 DEFENSE EXHIBIT 4 AND ASK YOU IF THAT LOOKS LIKE THE PERSON

MS. BROWN - DIRECT EXAMINATION BY MS. PRATT

548

1 YOU SAW?

2 A YES.

3 Q IS THAT LIKE THE HAIR OF THE PERSON YOU
4 SAW?

5 A UH-HUH.

6 Q ANY DOUBT IN YOUR MIND THAT THAT PERSON WAS
7 THE SHOOTER?

8 A NO.

9 Q AND YOU SAW IT, RIGHT?

10 A YES.

11 Q AND DID YOU KNOW AT THE TIME THAT YOU WERE
12 PREGNANT WITH AARON'S BABY?

13 A YES.

14 Q AND YOU HAD THE BABY AFTER HE DIED, RIGHT?

15 A UH-HUH.

16 Q REMEMBER ANYTHING ELSE ABOUT WHAT HAPPENED
17 WITH THE SHOOTER?

18 A NO.

19 Q DID HE TOUCH YOU IN ANY WAY OR COME CLOSE
20 TO YOU?

21 A I WAS PUSHED BY SOMEONE I DON'T KNOW WHO IT
22 WAS BUT SOMEONE PUSHED ME.

23 Q ALL RIGHT, AND I BROUGHT YOU DOWN HERE
24 UNDER SUBPOENA, CORRECT?

25 A YES.

MS. BROWN - REDIRECT EXAMINATION BY MS. PRATT

549

1 Q AND I PAID YOUR WITNESS FEE SO YOU HAD
2 MONEY FOR FOOD, CORRECT?

3 A YES.

4 Q ALL RIGHT, BUT YOU UNDERSTAND THAT YOU'RE
5 UNDER OATH?

6 A RIGHT.

7 MS. PRATT: THANK YOU, I BELIEVE THAT'S ALL I
8 HAVE OF THIS WITNESS.

9 **CROSS EXAMINATION**

10 **BY MS. ELDER:**

11 Q MS. BROWN, YOU ALSO DESCRIBED THE PERSON
12 THAT YOU THOUGHT WAS THE SHOOTER YOU DESCRIBED THE CLOTHING
13 AS WELL; IS THAT CORRECT?

14 A IF I REMEMBER, YES.

15 Q DO YOU REMEMBER TALKING TO INVESTIGATORS
16 FROM MYRTLE BEACH ABOUT THAT?

17 A YES.

18 Q DO YOU REMEMBER WHAT COLOR SHIRT YOU TOLD
19 THEM THEY HAD?

20 A NO.

21 Q OKAY, IF I TOLD YOU YOU HAD TOLD THE
22 INVESTIGATOR HE WAS WEARING A RED SHIRT WHEN YOU GAVE THAT
23 INTERVIEW WOULD YOU BELIEVE THAT TO BE ACCURATE?

24 A YEAH, MAYBE.

25 Q YOU GAVE THAT INTERVIEW RIGHT AFTER THE

MS. BROWN - REDIRECT EXAMINATION BY MS. PRATT

550

1 SHOOTING, CORRECT?

2 A UH-HUH.

3 Q OKAY, SO IT WAS FRESHER IN YOUR MIND AT
4 THAT POINT IN TIME?

5 A YES.

6 Q OKAY, YOU RECALL ALSO TELLING THEM OTHER
7 THAN WHAT HE WAS WEARING A RED SHIRT WHERE HE GRABBED THE
8 GUN FROM?

9 A YES.

10 Q WHERE WAS IT FROM?

11 A HE GRABBED IT OUT OF HIS PANTS.

12 Q I BELIEVE DID YOU TELL THEM, I BELIEVE YOU
13 TOLD THEM FROM HIS WAISTBAND; IS THAT CORRECT?

14 A YEAH, UH-HUH.

15 Q OKAY, SO YOU THOUGHT HE HAD DREADS, A RED
16 SHIRT, AND THE GUN CAME FROM HIS WAISTBAND?

17 A YES.

18 MS. ELDER: JUST A MOMENT, YOUR HONOR.

19 Q (CONTINUING) DID YOU ALSO RECALL TELLING
20 INVESTIGATORS THAT THE SHOOTER HAD A RED BANDANNA ON HIS
21 FACE?

22 A UH-HUH.

23 Q IS THAT CORRECT?

24 A YES.

25 Q AND WHEN YA'LL WERE, YA'LL WERE DRIVING

MR. JENKINS - DIRECT EXAMINATION BY MS. PRATT

551

1 DOWN HERE FROM LUMBERTON DID YOU NOTICE ANYTHING OTHER,
2 ANYTHING SUSPICIOUS GOING ON ON YOUR WAY DOWN HERE?

3 A NO.

4 Q DID YOU TELL POLICE ABOUT A GREEN ALERO?

5 A YES, NOW THAT'S WHAT WAS TOLD TO ME AFTER
6 THE FACT.

7 Q OKAY, YOU DIDN'T SEE IT YOURSELF?

8 A NO.

9 MS. ELDER: NO FURTHER QUESTIONS, YOUR HONOR.

10 THE COURT: MS. PRATT?

11 MS. PRATT: NO REDIRECT; I'D ASK THAT SHE BE
12 RELEASED FROM HER SUBPOENA.

13 MS. ELDER: NO OBJECTION, YOUR HONOR.

14 THE COURT: ALL RIGHT, MA'AM, YOU MAY STEP DOWN
15 AND YOU ARE RELEASED FROM YOUR SUBPOENA, THAT MEANS THAT
16 YOU COULD GO, THANK YOU FOR COMING.

17 MS. PRATT: SHE MAY ALSO REMAIN IN THE COURTROOM
18 IF SHE CHOOSES, YOUR HONOR?

19 THE COURT: IF SHE CHOOSES SHE MAY REMAIN IN THE
20 COURTROOM.

21 MS. PRATT: THANK YOU, YOUR HONOR. MATTHEW
22 JENKINS.

23 MAY WE APPROACH FOR JUST A MOMENT, YOUR HONOR?

24 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
25 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING

MR. JENKINS - DIRECT EXAMINATION BY MS. PRATT

552

OF THE JURY AND THE COURT REPORTER.)

MATTHEW JENKINS

BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
SPELL YOUR LAST NAME FOR THE COURT.

THE WITNESS: MATTHEW JENKINS, J-E-N-K-I-N-S.

DIRECT EXAMINATION

BY MS. PRATT:

Q MR. JENKINS, I KNOW YOU'RE IN A J. REUBEN
LONG JUMPSUIT BUT YOU'RE ACTUALLY, I THINK, FROM NORTH
CAROLINA, AREN'T YOU?

A YES, MA'AM.

Q AND YOU'RE IN PRISON UP THERE?

A YES, MA'AM.

Q AND YOU'RE ACTUALLY IN PRISON FOR, FOR WHAT
CHARGE?

A ROBBERY AND DANGEROUS WEAPON.

Q OKAY, AND THAT HAS NOTHING TO DO WITH THIS
INCIDENT HERE, DOES IT?

A NO, MA'AM.

Q OKAY, YOU, DO YOU REMEMBER THE INCIDENT AND
WHAT HAPPENED THE NIGHT OF MAY 27TH, 2007, THE NIGHT THAT
AARON WAS KILLED?

A YES, MA'AM.

Q AND YOU WERE DOWN HERE IN MYRTLE BEACH,

MR. JENKINS - DIRECT EXAMINATION BY MS. PRATT

553

1 CORRECT?

2 A YES, MA'AM.

3 Q AND HOW DID YOU GET TO MYRTLE BEACH?

4 A I RODE WITH ONE OF MY FRIENDS.

5 Q ALL RIGHT, AND YOU CAME DOWN HERE FOR BIKE
6 WEEK?

7 A YES, MA'AM.

8 Q OKAY, DO YOU KNOW ABOUT WHAT TIME YOU GOT
9 HERE?

10 A I WOULD SAY RIGHT AROUND 7, 7:30.

11 Q ALL RIGHT, AND WHAT WERE YA'LL DOING ON THE
12 STRIP?

13 A JUST WALKING, CHILLING.

14 Q ALL RIGHT, TALKING TO PEOPLE, HAVING A GOOD
15 TIME?

16 A YES, MA'AM.

17 Q OKAY, AND WHO WAS, WHO WAS PRESENT IN THE
18 GROUP THAT YOU WERE HANGING WITH?

19 A IT WAS ME, CHARLES SINCLAIR, LEMARK IRONS,
20 AARON HAMMONDS, ALEXIS, A GIRL NAMED ALEXIS, AND BRITTNEY.

21 Q ALL RIGHT, AND ALEXIS IS SEATED HERE IN THE
22 COURTROOM, RIGHT?

23 A YES, MA'AM.

24 Q OKAY, DO YOU REMEMBER JUST WHAT WAS GOING
25 ON JUST BEFORE THE SHOOTING HAPPENED?

MR. JENKINS - DIRECT EXAMINATION BY MS. PRATT

554

1 A YES, MA'AM, WE WERE JUST WALKING AND --

2 Q ALL RIGHT, DID YOU PASS ANYBODY FROM
3 LUMBERTON THAT YOU REMEMBER SEEING?

4 A NO, MA'AM.

5 Q OKAY, SO THERE WASN'T, WERE YOU WALKING
6 LIKE ONE DIRECTION OR BACK AND FORTH, HOW DID THAT GO?

7 A ONE DIRECTION.

8 Q AND YOU DID NOT SEE ANYBODY FROM ANOTHER
9 GROUP OF YOUR FRIEND OR OTHER GROUP FROM LUMBERTON?

10 A I DIDN'T.

11 Q ALL RIGHT, DO YOU REMEMBER LEMARK IRONS
12 LEAVING THE GROUP?

13 A I REMEMBER HIM LEAVING BUT I AIN'T KNOW
14 WHERE HE WENT TO.

15 Q OKAY, AND DO YOU REMEMBER HIM COMING BACK?

16 A YES, MA'AM.

17 Q OKAY, HOW DID HE SEEM WHEN HE CAME BACK,
18 WAS HE HAPPY, SAD, AGITATED, CALM, HOW WAS HIS ATTITUDE?

19 A HE WAS ACTING THE SAME WAY HE WAS ACTING
20 BEFORE HE LEFT.

21 Q OKAY, AND YOU DIDN'T GO WITH HIM, DID YOU?

22 A NO, MA'AM.

23 Q ALL RIGHT, WHAT DO YOU REMEMBER NEXT?

24 A I REMEMBER WE WAS, WE WALKED UP A COUPLE
25 MORE BLOCKS AND SOMEBODY CAME FROM BEHIND US AND STARTED

MR. JENKINS - DIRECT EXAMINATION BY MS. PRATT

555

1 SHOOTING.

2 Q ALL RIGHT, DID YOU ACTUALLY SEE THE
3 SHOOTER?

4 A NO, MA'AM.

5 Q OKAY, WHEN THE SHOOTING HAPPENED DID YOU
6 HIT THE GROUND?

7 A YES, MA'AM.

8 Q OKAY, ALL RIGHT, AND YOU DIDN'T SEE HIM?

9 A NO, MA'AM.

10 Q OKAY, DO YOU REMEMBER SEEING ANYBODY ELSE
11 IN THE GROUP THAT LEMARK HAD GONE AND TALKED TO THAT HAD
12 DREADS; DO YOU REMEMBER ANYTHING LIKE THAT?

13 A I DIDN'T SEE NOBODY THAT HE WENT AND TALK
14 TO, I AIN'T FOUND OUT THAT HE WENT TO TALK TO SOMEBODY FROM
15 LUMBERTON TILL AFTER THE FACT, AFTER IT HAPPENED.

16 Q ALL RIGHT, NOW AFTER YA'LL GOT BACK TO
17 LUMBERTON WAS THIS KIND OF THE TALK OF THE TOWN?

18 A YES, MA'AM.

19 Q ALL RIGHT, AND YOU REMEMBER SEEING THE
20 COMPOSITE?

21 A YES, MA'AM.

22 Q WHO DID YOU THINK THE COMPOSITE WAS WHEN
23 YOU SAW IT?

24 A BIRD.

25 MS. PRATT: THANK YOU, I HAVE NOTHING FURTHER.

MR. BISHOP - DIRECT EXAMINATION BY MS. PRATT

556

1 MS. ELDER: ONE MOMENT, YOUR HONOR. YOUR HONOR,
2 WE HAVE NO QUESTIONS OF THIS WITNESS.

3 THE COURT: YOU MAY STEP DOWN, SIR.

4 MS. PRATT: MAY HE BE RELEASED FROM HIS SUBPOENA
5 AND RETURNED TO NORTH CAROLINA, YOUR HONOR?

6 THE COURT: CERTAINLY.

7 MS. PRATT: THANK YOU, YOUR HONOR.

8 THE COURT: NO OBJECTION, MS. ELDER?

9 MS. ELDER: NO, SIR, YOUR HONOR.

10 THE COURT: ALL RIGHT.

11 (WHEREUPON, A BENCH CONFERENCE WAS HELD OFF THE
12 RECORD IN THE PRESENCE OF THE JURY, BUT OUT OF THE HEARING
13 OF THE JURY AND THE COURT REPORTER.)

14 **DEANDRE BISHOP**

15 **BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:**

16 MADAM CLERK: SPEAK INTO THE MICROPHONE AND
17 STATE YOUR FULL NAME AND SPELL YOUR LAST NAME.

18 THE WITNESS: DEANDRE BISHOP, B-I-S-H-O-P.

19 **DIRECT EXAMINATION**

20 **BY MS. PRATT:**

21 Q MR. BISHOP, YOU'RE HOUSED IN J. REUBEN LONG
22 DETENTION CENTER RIGHT NOW; ARE YOU NOT?

23 A YES, MA'AM.

24 Q AND YOU HAVE PENDING CHARGES THAT HAVE
25 NOTHING TO DO WITH THIS CASE; IS THAT RIGHT?

MR. BISHOP - DIRECT EXAMINATION BY MS. PRATT

557

1 A YES, MA'AM.

2 Q YOU'RE REPRESENTED BY WESLEY LOCKLAIR WHO'S
3 AN ATTORNEY HERE IN HORRY COUNTY ON THOSE CHARGES?

4 A YES, MA'AM.

5 Q OKAY, AND THIS MORNING DID YOU HAVE A
6 CHANCE TO SPEAK TO JOHNNY GARDNER WHO'S KIND OF STANDING IN
7 FOR WESLEY?

8 A YES, MA'AM.

9 Q ALL RIGHT, NOW YOU, ARE YOU UNDER PROFFER
10 WITH THE STATE IN REGARDS TO THE OTHER CHARGES?

11 A YES, MA'AM.

12 Q OKAY, AND YOU UNDERSTAND THAT, THAT I HAVE
13 NOTHING TO DO WITH ANYTHING ABOUT YOUR TESTIFYING IN
14 REGARDS TO THAT, CORRECT?

15 A YES, MA'AM.

16 Q OKAY, ARE YOU KIND OF NERVOUS ABOUT
17 TESTIFYING?

18 A YES, MA'AM.

19 Q WAS THERE A TIME IN THE LAST THREE YEARS
20 THAT YOU CAME IN TOUCH BEEN IN CONTACT WITH JEFFREY BETHEA?

21 A YES, MA'AM.

22 Q DO YOU REMEMBER ABOUT WHEN THAT WAS OR
23 WHERE YA'LL WERE?

24 A WHICH TIME?

25 Q THE VERY FIRST TIME?

MR. BISHOP - CROSS EXAMINATION BY MS. ELDER

558

1 A A-2, 2007.

2 Q OKAY, RIGHT NEAR THE BEGINNING?

3 A YES, MA'AM.

4 Q DID MR. BETHEA SAY ANYTHING ABOUT HIS
5 CHARGES?

6 A I TALKED TO HIM BUT HE REALLY DIDN'T SAY
7 NOTHING ABOUT IT THEN.

8 Q DID HE YELL OUT ANYTHING THAT YOU REMEMBER
9 ABOUT WHAT HAD GONE ON IN THE INCIDENT?

10 A NOT DURING A-2.

11 Q OKAY, WHEN DID THAT HAPPEN THEN?

12 A WHEN WE WAS IN B-2.

13 Q ALL RIGHT ---

14 A MINI-MAX.

15 Q IN WHAT DID YOU CALL IT?

16 A MINI-MAX.

17 Q MINI-MAX, OKAY, AND WHAT HAPPENED THEN?

18 A WE WAS HOUSED IN THE SAME ROOM TOGETHER.

19 Q OKAY, AND WHAT DID MR. BETHEA SAY ABOUT THE
20 CHARGES?

21 A HE TOLD ME THAT HE DID IT BUT HE WASN'T
22 GOING DOWN BY HISSELF.

23 MS. PRATT: THANK YOU, I HAVE NOTHING FURTHER.

24 CROSS EXAMINATION

25 BY MS. ELDER:

MR. BISHOP - CROSS EXAMINATION BY MS. ELDER

559

1 Q MR. BISHOP, YOU INDICATED THAT YOU'RE UNDER
2 A PROFFER AGREEMENT FOR YOUR CHARGES WHICH ARE, WHAT,
3 KIDNAPING?

4 A I PLEAD THE FIFTH ABOUT ANY OF MY CHARGES.

5 Q WELL I'M JUST ASKING YOU ABOUT WHAT YOU'RE
6 UNDER CHARGES FOR?

7 A OH, ARMED ROBBERY, KIDNAPPING.

8 Q AND SINCE YOU'RE UNDER PROFFER YOU'VE HAD
9 AN OPPORTUNITY OBVIOUSLY TO TALK TO SOMEBODY IN MY OFFICE
10 BEFORE TODAY?

11 A NO.

12 Q HOW DID YOU GET A PROFFER AGREEMENT IF YOU
13 DIDN'T ENTER INTO AN AGREEMENT WITH THE STATE?

14 A MY LAWYER CAME AND TALKED TO ME. I NEVER
15 TALKED TO NOBODY FROM THE SOLICITOR'S OFFICE PERIOD.

16 Q YOU DIDN'T SIGN AN AGREEMENT WITH THE
17 STATE?

18 A I DID, BUT I NEVER TALKED TO NOBODY FROM
19 YOUR OFFICE.

20 Q OKAY, AND SINCE YOUR LAWYER CAME AND TALKED
21 TO YOU AND YOU SIGNED THE AGREEMENT TO COOPERATE WITH THE
22 STATE HAVE YOU EVER NOTIFIED ME THAT YOU HAD INFORMATION ON
23 THIS CASE BEFORE TODAY?

24 A I WROTE A LETTER TO THE SOLICITOR.

25 Q TO WHO?

MR. BISHOP - CROSS EXAMINATION BY MS. ELDER

560

1 A SCOTT HIXSON.

2 Q ABOUT YOUR CHARGES?

3 A NO.

4 Q OKAY, AND ---

5 A ABOUT THIS.

6 Q --- DETECTIVES, THESE TWO DETECTIVES CAME
7 AND TALKED TO YOU THREE DAYS AGO, RIGHT?

8 A YES.

9 Q AND THEY ASKED YOU DID YOU KNOW ANYTHING
10 ABOUT THIS CASE, DIDN'T THEY?

11 A YES.

12 Q AND YOU TOLD THEM ABSOLUTELY NOTHING,
13 DIDN'T YOU?

14 A YES.

15 MS. ELDER: NO FURTHER QUESTIONS, YOUR HONOR.

16 MS. PRATT: NO REDIRECT, YOUR HONOR. I'D ASK
17 THAT HE BE RELEASED FROM HIS SUBPOENA.

18 THE COURT: ANY OBJECTION? ANY OBJECTION?

19 MS. ELDER: OH, NO, SIR, YOUR HONOR.

20 THE COURT: YOU MAY STEP DOWN. THANK YOU FOR
21 COMING, AND YOU ARE EXCUSED FROM YOUR SUBPOENA.

22 ALL RIGHT, LADIES AND GENTLEMEN OF THE JURY, I
23 HAVE TO TAKE UP A MATTER OUTSIDE YOUR PRESENCE. IF YOU
24 WOULD, MR. ROPP, TAKE YOUR JURY INTO THEIR ROOM JUST A FEW
25 MINUTES.

1 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
2 9:53 A.M.)

3 MS. PRATT: YOUR HONOR, AT THIS POINT AS IT
4 WOULD BE MY LAST WITNESS IF HE DECIDED TO TESTIFY WOULD BE
5 MY CLIENT. I WOULD NEED THE INFORMATION IN REGARDS TO
6 WHETHER HIS CHARGES WOULD COME IN AND THEN I'VE GOT TO TALK
7 TO HIM.

8 THE COURT: IS MR. FILIBERTO BACK?

9 MS. ELDER: NO, YOUR HONOR. IF I COULD HAVE
10 FIVE MINUTES I'LL CALL DOWNSTAIRS.

11 THE COURT: CERTAINLY, OKAY, WILL DO. LADIES,
12 AS YOU BOTH PROBABLY KNOW MY CUSTOM IS TO INFORM THE
13 ATTORNEYS OF MY CHARGE ON THE LAW BEFORE YOU ARGUE. I
14 THINK THAT THAT'S ONLY FAIR AND IT'S ALSO MY CUSTOM TO
15 PROVIDE THE JURY WITH A WRITTEN TRANSCRIPT OF MY CHARGE,
16 OKAY, SO AFTER YOU FINISH WITH THIS WITNESS, MS. PRATT, WE
17 WILL CONFERENCE CONCERNING MY CHARGE. CLAIRE HAS BEEN
18 WORKING ON THOSE WHILE THIS CASE HAS BEEN GOING ON. I HAVE
19 A PRETTY GOOD IDEA WHAT I'M GOING TO CHARGE BUT WE WILL,
20 WE'LL TALK ABOUT IT IN CHAMBERS AND WE'LL COME BACK OUT AND
21 LET YOU PUT ANY OBJECTIONS AT ALL THAT YOU MIGHT HAVE OR
22 ANY REQUESTS FOR ADDITIONS ON THE RECORD AND THEN WE WILL
23 GO INTO CLOSING REMARKS AND I WILL CHARGE IT.

24 I WANT TO PLACE ON THIS RECORD THE FACT THAT THE
25 LAST TWO WITNESSES -- MS. PRATT, WOULD YOU GIVE ME THEIR

1 NAMES AGAIN?

2 MS. PRATT: YOUR HONOR, THE FIRST WITNESS WAS
3 MATTHEW JENKINS AND HE WAS APPOINTED AN ATTORNEY BECAUSE OF
4 THE ORDER FROM NORTH CAROLINA.

5 THE COURT: AND THAT WAS MR. GARDNER WHO IS HERE
6 TODAY?

7 MS. PRATT: THAT'S CORRECT, YOUR HONOR.

8 THE COURT: MR. GARDNER, I SEE YOU IN THE
9 COURTROOM AND, MR. GARDNER, YOU HAD AN OPPORTUNITY TO
10 DISCUSS THIS TESTIMONY WITH MR. JENKINS?

11 MR. GARDNER: YES, SIR.

12 THE COURT: OKAY, AND HE WAS AWARE OF HIS
13 RIGHTS?

14 MR. GARDNER: YES, SIR.

15 THE COURT: OF NOT TO TESTIFY AND HIS, THE FACT
16 THAT ANYTHING HE SAID COULD BE USED AGAINST HIM, HE
17 UNDERSTOOD THAT?

18 MR. GARDNER: HE DID, YOUR HONOR.

19 THE COURT: AND YOU WERE ALSO HERE STANDING IN
20 FOR MR. LOCKLAIR WHO IS IN ANOTHER COURT THIS MORNING AND
21 COULD NOT BE HERE BUT YOU ALSO APPEARED FOR MR. -

22 MS. PRATT: DEANDRE BISHOP.

23 THE COURT: MR. BISHOP, LIKEWISE DID YOU ALSO
24 INFORM HIM OF HIS RIGHTS? MR. BISHOP SEEMED TO INDICATE
25 THAT ON THE STAND BUT I WANT TO MAKE SURE THAT YOU DID.

1 MR. GARDNER: YES, SIR, I DID.

2 THE COURT: ALL RIGHT, THANK YOU VERY MUCH. ALL
3 RIGHT, LET'S TAKE A BRIEF RECESS, OKAY.

4 MS. PRATT: YES, SIR.

5 (WHEREUPON, A RECESS WAS TAKEN AND THE FOLLOWING
6 TAKES PLACE ON THE RECORD AFTER THE RECESS.)

7 THE COURT: YOU'RE STILL UNDER OATH, SIR. HAVE
8 YOU HAD AN OPPORTUNITY NOW TO SPEAK WITH YOUR ATTORNEY
9 ABOUT YOUR RIGHT TO TESTIFY?

10 DEFENDANT SPEARS: YES, I HAVE.

11 THE COURT: DO YOU REMEMBER THE MATTERS THAT I
12 TOLD YOU EARLIER OR THE INSTRUCTIONS THAT I GAVE YOU ABOUT
13 YOUR RIGHT TO REMAIN SILENT?

14 DEFENDANT SPEARS: YES, SIR.

15 THE COURT: DO YOU REMEMBER THE CAUTIONARY
16 LANGUAGE THAT I ALSO GAVE YOU ABOUT IT?

17 DEFENDANT SPEARS: YES, SIR.

18 THE COURT: OKAY, DO YOU WISH TO TESTIFY IN THIS
19 CASE?

20 DEFENDANT SPEARS: YES, SIR, I'M GOING TO
21 TESTIFY.

22 THE COURT: ALL RIGHT, VERY WELL.

23 MS. PRATT: MAY I BRING ONE MATTER UP, YOUR
24 HONOR, THAT I SHOULD HAVE MENTIONED BACK IN THE BACK. IN
25 LIGHT OF THE FACT THAT THE COURT IS NOT OR THE SOLICITOR IS

1 NOT GOING TO RAISE MY CLIENT'S RECORD BECAUSE OF THE TYPES
2 OF CHARGES THERE IS CONTAINED IN HIS SECOND STATEMENT THE
3 FACT THAT ONE OF THE REASONS THAT HE TOLD THEM IN THE FIRST
4 STATEMENT THAT HE WAS NOT THERE WAS BECAUSE HE WAS ON
5 PROBATION AND HE DIDN'T WANT TO GET IN TROUBLE FOR BEING ON
6 PROBATION. I WOULD LIKE TO, MY CLIENT WOULD USE THE PHRASE
7 GET INTO TROUBLE AND I WOULD SIMPLY ASK FOR A RULING THAT
8 THE SOLICITOR COULD NOT THEN SAY WHAT KIND OF TROUBLE AND
9 GO INTO THE PROBATION ISSUE.

10 THE COURT: WELL IF WE'RE NOT GOING INTO THE
11 CRIMINAL RECORD WE CAN DO IT THAT WAY, ALL RIGHT, JUST THAT
12 HE'S NOT GETTING INTO TROUBLE, MS. ELDER?

13 MS. ELDER: I WOULDN'T ELICIT THAT ANYWAY, YOUR
14 HONOR.

15 THE COURT: ALL RIGHT, OKAY.

16 MS. PRATT: THANK YOU, YOUR HONOR.

17 THE COURT: ALL RIGHT, MR. HEMINGWAY, IF YOU
18 WOULD BRING THE JURY IN.

19 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
20 10:31 A.M.)

21 THE COURT: ALL RIGHT, MS. PRATT?

22 MS. PRATT: THANK YOU, YOUR HONOR. YOUR HONOR,
23 I WOULD CALL THE DEFENDANT BRIAN KENDRICK SPEARS TO THE
24 WITNESS STAND.

25 THE COURT: VERY WELL.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

565

1 BRIAN KENDRICK SPEARS

2 BEING FIRST DULY SWORN, TESTIFIED AS FOLLOWS:

3 MADAM CLERK: PLEASE STATE YOUR FULL NAME AND
4 SPELL YOUR LAST NAME FOR THE RECORD.

5 THE WITNESS: MY NAME IS BRIAN SPEARS, S-P-E-A-
6 R-S.

7 DIRECT EXAMINATION

8 BY MS. PRATT:

9 Q BRIAN, HOW OLD ARE YOU?

10 A I'M 23.

11 Q YOU DON'T HAVE TO LEAN RIGHT INTO IT, IT
12 WILL PICK IT UP, YOU'RE 23 YEARS OLD?

13 A YES, MA'AM.

14 Q ALL RIGHT, AND ARE YOU SINGLE OR MARRIED?

15 A I'M SINGLE.

16 Q HOW FAR DID YOU GO IN SCHOOL?

17 A I WENT UP TO THE 9TH GRADE.

18 Q OKAY, DO YOU HAVE ANY CHILDREN?

19 A I HAVE A LITTLE GIRL, SHE'S THREE.

20 Q AND WHAT'S HER NAME?

21 A BRIANNA.

22 Q ALL RIGHT, AND YOU'RE FROM WHAT AREA?

23 A I'M FROM THE SOUTH OF LUMBERTON, NORTH
24 CAROLINA.

25 Q ALL RIGHT, AND YOU, YOUR PARENTS ARE HERE

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

566

1 IN THE COURTROOM, YOUR FATHER'S HERE?

2 A YES, MA'AM.

3 Q OKAY, I KNOW YOU'RE NERVOUS, JUST RELAX.

4 BRIAN, YOU'RE HERE AS YOU KNOW FOR THE LAST THREE DAYS ON
5 TRIAL FOR THE DEATH OF AARON HAMMONDS AND THE SHOOTING OF
6 THREE PEOPLE, LESHEIKA FELTON, KRYSTAL FOWLER, AND DJUAN
7 MONROE, CORRECT?

8 A YES, MA'AM.

9 Q DID YOU SHOOT THESE PEOPLE?

10 A NO, MA'AM.

11 Q LET'S GO BACK --

12 THE COURT: JUST SLIDE YOUR CHAIR UP THERE, MR.
13 SPEARS, THERE YOU GO.

14 MS. PRATT: (CONTINUING)

15 Q LET'S GO BACK TO WHAT WAS GOING ON IN MAY
16 OF 2007, OKAY?

17 A OKAY.

18 Q DO YOU REMEMBER YA'LL DECIDING TO COME TO
19 THE BEACH, HERE?

20 A YES, IT WAS, IT WAS A LAST MINUTE DECISION.

21 Q HOW DID YOU, WHY DID YOU DECIDE TO COME?

22 A BECAUSE TWO OF OUR FRIENDS WANTED US TO GO
23 ALONG WITH THEM, THEY JUST DIDN'T WANT TO GO BY THEIRSELF.

24 Q AND WHO WERE THOSE PEOPLE?

25 A T.C. AND ISHMAEL.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

567

1 Q OKAY, AND WHO ALL RODE DOWN TOGETHER?

2 A JUST ME, T.C., ISHMAEL, AND DOUGLAS, JUNE.

3 Q OKAY, AND WHAT KIND OF CAR DID YOU RIDE
4 DOWN IN?

5 A A WHITE HONDA CIVIC WITH PROBABLY 18 INCH
6 RIMS ON IT.

7 Q WHO OWNED THAT CAR?

8 A TOMMY SHAW, T.C.

9 Q OKAY, AND DO YOU REMEMBER ABOUT WHEN YOU
10 LEFT FROM LUMBERTON?

11 A I DON'T REMEMBER WHAT TIME IT WAS BUT WHEN
12 WE REACHED THE BEACH I THINK IT WAS DARK.

13 Q OKAY, AND WHAT, DO YOU REMEMBER WHERE YOU
14 PARKED, DO YOU REMEMBER ANYTHING ABOUT THAT?

15 A WE PARKED OVER THERE BY I WOULD SAY IT WAS
16 EITHER A K-MART OR A WALMART BUT THERE WAS A TACO BELL
17 CLOSE.

18 Q OKAY, AND YOU PARKED IN THAT PARKING LOT?

19 A YES, MA'AM.

20 Q AND THEN WHAT DID YOU GUYS DO?

21 A WE GOT OUT ON FOOT AND STARTED WALKING.

22 Q AND I'VE NEVER BEEN DOWN TO THE BOULEVARD
23 ON BIKE WEEK SO, AND I DON'T KNOW IF THESE JURORS HAVE, SO
24 CAN YOU TELL US WHAT IT'S LIKE DOWN THERE?

25 A WELL THERE WAS A LOT OF PEOPLE AND A LOT OF

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

568

1 TRAFFIC AND CARS AND JUST EVERYTHING OUT.

2 Q ALL RIGHT, PEOPLE WALKING FAST, WALKING
3 SLOW OR WHAT'S, LIKE WHAT ARE YOU DOING?

4 A WELL SOME PEOPLE ARE WALKING FAST AND SOME
5 PEOPLE ARE WALKING SLOW BECAUSE THEY'RE JUST TRYING TO
6 MINGLE AND SEE EVERYTHING AND THEN SOME PEOPLE, I GUESS,
7 THEY'RE GOING PLACES SO THEY ALREADY GOT THEIR DESTINATION.

8 Q OKAY, YOU STARTED UP AT THE TACO BELL AND
9 YOU STARTED WALKING DOWN THE BOULEVARD?

10 A YES, WE CAME UP THROUGH, I'M NOT FAMILIAR
11 WITH THE AREA, BUT WE, WE HAD TO CUT THROUGH SOME STREETS
12 TO MAKE IT TO THE BOULEVARD, THOUGH.

13 Q ALL RIGHT, AND ABOUT WHERE ON THE
14 BOULEVARD, WHAT WAS CLOSE TO YOU WHEN YOU CAME OUT, DO YOU
15 REMEMBER SEEING ANY LANDMARKS?

16 A WE CAME OUT WHERE A BARRICADE WAS AT WHERE
17 THEY BLOCKED OFF A STREET AND THERE WAS LIKE A LITTLE TIKI
18 SHACK WITH PALM TREES AND STUFF RIGHT THERE, I GUESS.

19 Q ALL RIGHT, DID YOU SEE LIKE A BUNGEE JUMP
20 OR ANYTHING LIKE THAT NEAR YOU?

21 A NO, MA'AM.

22 Q OKAY, AND WHICH WAY DID YOU START WALKING
23 WITH THE TRAFFIC OR AWAY FROM IT?

24 A I GUESS IT WOULD BE WITH THE TRAFFIC.

25 Q AND WHICH SIDE OF THE STREET WERE YA'LL ON?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

569

1 A WE WERE ON THE, IF THE BEACH IS RIGHT HERE
2 THEN WE'RE OVER HERE, WE'RE ON THIS SIDE.

3 Q NEAREST TO THE STORES?

4 A YES, MA'AM.

5 Q OKAY, AND I'M GOING TO SHOW YOU WHAT'S BEEN
6 ENTERED INTO EVIDENCE AS DEFENSE 1 AND ASK IF YOU
7 RECOGNIZE, AND I'M GOING TO THROUGH THESE OUT, THE FIRST
8 PICTURE OF THESE THREE HAVE BEEN ASSIGNED 12TH AVENUE
9 NORTH; THE SECOND SHOWING THE TRAFFIC LIGHTS ON THE LEFT
10 HAND SIDE OF IT; AND THEN THE THIRD ONE SHOWING THE GOLDEN
11 VILLA SIGN; DO YOU RECOGNIZE GENERALLY WHERE THOSE ARE?

12 A IN THIS AREA RIGHT HERE IN THE FIRST
13 PICTURE I THINK THIS IS WHERE THE BARRICADE WAS LOCATED AND
14 I THINK THIS IS WHERE THE STREET WAS BLOCKED OFF AT THAT WE
15 CAME UP OUT OF.

16 Q OKAY, SO YOU WOULD HAVE BEEN WALKING FROM
17 12TH DOWN TOWARDS 10TH AVENUE OR MR. JOE WHITE, RIGHT?

18 A I BELIEVE SO, MA'AM.

19 Q OKAY, ABOUT HOW MANY TIMES DID YOU GUYS
20 WALK UP AND DOWN THE STRIP?

21 A NUMEROUS OF TIMES. WE DIDN'T SPEND TOO
22 MUCH TIME ON THE, ON THE OTHER SIDE BUT WE DID GO INTO A
23 STORE ON THE OTHER SIDE WHERE A COUPLE OF GUYS IN OUR GROUP
24 BOUGHT SOME ALCOHOL.

25 Q OKAY, AND, AND YOU JUST, WERE YOU WALKING

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

570

1 FAST OR MOSEYING KIND OF --

2 A JUST, JUST MOSEYING ALONG, YOU KNOW WHAT I
3 MEAN. SOMETIMES WE'LL STOP, YOU KNOW, JUST POST UP, THEN
4 SOMETIMES WE JUST KEEP MOVING.

5 Q ALL RIGHT, DID YOU COME INTO A
6 CONFRONTATION WITH SOME PEOPLE FROM CONWAY?

7 A WELL WHILE WE WERE DOWN THERE, YOU KNOW
8 WHAT I MEAN, BIRD WAS COMING DOWN THE BOULEVARD IN HIS
9 ESCALADE AND HE SPOTTED A GROUP OF US FROM LUMBERTON CAUSE
10 WE HAD MET ANOTHER GROUP OF US FROM LUMBERTON AND HE JUMPED
11 OUT HIS ESCALADE AND STARTED TALKING SO HE STARTED
12 FOLLOWING US AND WALKING WITH US AND I GUESS HE GOT INTO A
13 CONFRONTATION. I CAN'T REMEMBER WHAT IT WAS ABOUT BUT ONE
14 OF THE GUYS IN THE, IN THE GROUP HAD TOOK WHAT APPEARED TO
15 BE A GUN OUT OF HIS BACK POCKET AND PUT IT INTO HIS FRONT.
16 AT THAT TIME I HAD STEPPED BACK AND WAS JUST OBSERVING IT,
17 YOU KNOW WHAT I MEAN.

18 Q ALL RIGHT, AND DID BIRD GET, HOW WAS HE,
19 THE INCIDENT AGGRAVATED OR HAPPY OR TALK TO ME ABOUT THAT?

20 A HE WASN'T HAPPY, YOU KNOW, HE WAS
21 THREATENING TO PUNCH THE GUY AND ALL THAT, YOU BETTER GET
22 OUT MY FACE AND ALL THAT STUFF, YOU KNOW WHAT I MEAN.

23 Q OKAY, LET ME ASK THE QUESTION YOU SAID THAT
24 BIRD WAS COMING DOWN THE BOULEVARD IN HIS ESCALADE HE
25 DIDN'T RIDE WITH YA'LL?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

571

1 A NO, HE DIDN'T COME WITH US.

2 Q DID YOU KNOW HE WAS COMING?

3 A I KNEW HE WAS HERE CAUSE HE ALWAYS GOES.

4 Q HE'D GONE OTHER YEARS?

5 A YEAH.

6 Q AND HOW DID YOU KNOW IT WAS HIS ESCALADE?

7 A WELL EVIDENTLY HE'S HANGING OUT THE WINDOW
8 AND, YOU KNOW WHAT I MEAN, HE JUMPS OUT AND IT'S GOT THE
9 RIMS ON IT, I KNOW WHAT THE RIMS LOOK LIKE.

10 Q OKAY, THEY'RE WHAT KIND OF RIMS?

11 A THEY'RE 24 INCH 6 POINT RIMS.

12 Q OKAY, AND SO YOU STARTED THEN FROM THAT
13 POINT ON HANGING WITH BIRD, RIGHT?

14 A WELL I WASN'T HANGING WITH HIM, I WAS JUST
15 TRYING TO KEEP UP WITH T.C., ISHMAEL, AND JUNE. I COULD,
16 YOU KNOW, CARE LESS WHERE THE REST OF THE GUYS WENT.

17 Q DO YOU KNOW WHERE THIS CONFRONTATION
18 HAPPENED; DO YOU REMEMBER SOME KIND OF LANDMARK?

19 A IF I'M NOT MISTAKEN IT'S A CORNER LIKE THE
20 PEOPLE HAVE TOLD ME THAT'S RIPPED THESE CORNERS IT'S A
21 CORNER WITH STEPS ON IT YOU COULD SIT ON AND IF YOU GO
22 AROUND THAT CORNER IT'S A LITTLE ALLEY IN THE BACK BUT IT
23 WAS RIGHT THERE ON THAT CORNER BY THOSE STEPS.

24 Q OKAY, AND THAT WOULD HAVE PUT YOU FURTHER
25 INTO MYRTLE BEACH, WHICH WAY DID YOU WALK FROM THERE?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

572

1 A WE WENT, WE WENT BACK DOWN.

2 Q OKAY, BACK TOWARDS WHERE YOUR CAR WAS?

3 A NO, WE, WE WALKED BACK DOWN THE BOULEVARD.

4 Q ALL RIGHT, WHAT HAPPENED NEXT?

5 A WELL, YOU KNOW, WE, WE POST UP. A LOT OF
6 US HAD ON EITHER RED OR BLACK AND WE WERE POSTING UP AND,
7 YOU KNOW WHAT I MEAN, A LOT OF BLOODS WERE STARTING TO COME
8 AROUND CAUSE MYRTLE BEACH HAS A LOT OF BLOODS AND THEY
9 THOUGHT WE WERE BLOODS AND THEY STARTED COMING AND HANGING
10 AROUND US AND BIRD WAS GETTING MAD. HE WAS LIKE YA'LL GOT
11 ALL YOU DOGS POSTING UP BESIDE US AND STUFF AND WE DIDN'T,
12 WE DIDN'T CARE, YOU KNOW WHAT I MEAN, WE DIDN'T CARE FOR
13 NONE OF THAT. WE DON'T REALLY HAVE ANY PROBLEM WITH THEM.

14 Q OKAY, SO WHAT DID YOU DO, WHAT HAPPENED
15 AFTER THAT?

16 A WELL WE, WE WALKED FURTHER DOWN THE
17 BOULEVARD PROBABLY CLOSE TO WHERE THE, WHERE THE BARRICADE
18 WAS AT.

19 Q AND WHAT HAPPENED THEN?

20 A WELL WHILE WE WERE STANDING SOMEBODY OUT OF
21 THE GROUP SAID, I CAN'T REMEMBER SOMEBODY IN THE GROUP SAID
22 THERE GO AARON AND HIS GIRL RIGHT THERE, THEY JUST PASSED.

23 Q OKAY, DO YOU, DO YOU HAVE ANY IDEA WHO THAT
24 MIGHT HAVE BEEN?

25 A NO, MA'AM.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

573

1 Q OKAY, AND WHO ALL WOULD HAVE BEEN WITH YOU
2 AT THAT TIME AS BEST YOU CAN REMEMBER?

3 A SMURF, T.C., JUNE, ISHMAEL, BIRD, BRANDON,
4 ANOTHER BRANDON, I CAN'T REMEMBER IF THERE WAS MORE THERE
5 OR NOT BUT IT WAS A LOT OF US, THOUGH.

6 Q OKAY, AND SO YOU SAW AARON AND HIS BOYS GO
7 BY, HOW MANY PEOPLE WENT BY; WHO DID YOU SEE?

8 A I DIDN'T, I REALLY DIDN'T SEE ANY, I SEEN
9 THE BACK OF THEM, IT WAS, IT WAS A SMALL GROUP OF THEM,
10 PROBABLY NO MORE THAN FIVE.

11 Q AND ABOUT WHAT TIME OF THE MORNING WAS
12 THIS?

13 A IT WAS, I KNOW IT WAS AFTER 12, I'M NOT
14 EXACTLY SURE WHAT TIME IT WAS.

15 Q HOW MANY TIMES DID AARON ACTUALLY PASS YOU?

16 A THAT WAS THE ONLY TIME ANYBODY EVER STATED
17 THAT. I, I DIDN'T NEVER SEE THEM DOWN HERE, THOUGH.

18 Q WERE YOU TALKING ONLY TO YOUR OWN PEOPLE OR
19 TALKING TO GIRLS OR WHAT WERE YOU DOING?

20 A I MEAN SOMEWHAT I WAS TALKING TO GIRLS BUT
21 I REALLY WASN'T TRYING TO GET SEEN TALKING TO GIRLS CAUSE I
22 DIDN'T WANT ANY OTHER GIRLS FROM LUMBERTON TO SEE ME
23 TALKING TO NO GIRLS, YOU KNOW WHAT I MEAN.

24 Q DID YOU KNOW WHO ELSE MIGHT BE THERE?

25 A NO, I DIDN'T KNOW.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

574

1 Q OKAY, AND THEN WHAT HAPPENED AFTER AARON
2 WENT PAST YOU GUYS?

3 A WELL LEMARK CAME BACK, YOU KNOW WHAT I
4 MEAN. WHEN HE CAME BACK HE CAME UP LIKE, MAN, WHAT'S GOOD,
5 YA'LL GETTING MONEY, YA'LL LOOKING FLY, YOU KNOW WHAT I
6 MEAN. I NEED TO KICK IT WITH YA'LL, AND HE HAD HIS HAND
7 OUT TRYING TO SHAKE BIRD HAND AND BIRD SMACKED HIS HAND AND
8 HE WAS LIKE, YOU KNOW WHAT I MEAN, YOU NEED TO GET THE FUCK
9 OUT OF HERE, YOU DOG ASS NIGGER, AND HE JUST STARTED
10 TRIPPING ON HIM AND, DO WAS LIKE, YOU KNOW WHAT I MEAN,
11 WHAT'S THE PROBLEM?

12 Q OKAY, AND DID LEMARK LEAVE?

13 A YEAH, HE LEFT EVENTUALLY, YEAH.

14 Q OKAY, ABOUT HOW LONG WAS THAT, THAT
15 TALKING?

16 A IT AIN'T LAST NO MORE THAN A MINUTE.

17 Q ALL RIGHT, AND THEN WHAT HAPPENED AFTER
18 THAT?

19 A WELL WHEN, WHEN LEMARK LEFT BIRD STARTED
20 TRIPPING AND, AND SAYING THAT HE WASN'T GOING TO LET THAT
21 SHIT SLIDE AND HE WASN'T GOING TO LET THAT FLY AND DOUGLAS
22 WAS LIKE, MAN, YOU NEED TO JUST CHILL OUT, YOU ON SOME
23 STUPID SHIT.

24 Q OKAY, AND DID THEY HAVE AN ARGUMENT FOR
25 VERY LONG?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

575

1 A NO, IT WASN'T VERY LONG.

2 Q AND THEN WHAT HAPPENED, WHERE DID YOU, WHAT
3 HAPPENED WITH JUNE?

4 A WELL JUNE, JUNE GOT MAD AND JUST WALKED
5 OFF, YOU KNOW WHAT I MEAN.

6 Q AND WHO DID HE WALK OFF WITH?

7 A I'M NOT SURE, I'M NOT SURE IF HE EVEN WENT
8 TOO FAR. I KNOW HE JUST, HE GOT AWAY FROM BIRD, YOU KNOW.

9 Q AND THEN WHAT DID YOU DO?

10 A WELL I WAS JUST STANDING THERE IN THE
11 CROWD.

12 Q ALL RIGHT, AND NOW, BRIAN, TELL ME WHAT
13 HAPPENED NEXT?

14 A WELL AFTER THAT, YOU KNOW WHAT I MEAN, HE'S
15 STILL RAMBLING ON ABOUT THIS STUFF, NOBODY REALLY PAYING
16 HIM NO ATTENTION CAUSE HE LIKES TO TALK, YOU KNOW WHAT I
17 MEAN. I'M STILL, I'M WATCHING THE CARS AND THE GIRLS AND
18 ALL THAT, YOU KNOW WHAT I MEAN. SO OUR CROWD STARTS TO
19 MOVE SO WE START TO STEP A LITTLE BIT AND BIRD HE JUST
20 TAKES OFF, YOU KNOW WHAT I MEAN, HE DIDN'T RUN, HE JUST
21 TOOK OFF, THOUGH, YOU KNOW WHAT I MEAN, IN A FAST PACE, YOU
22 KNOW. I'M STILL SPECTATING CARS AND THE NEXT THING YOU
23 KNOW I HEAR BOOM, BOOM, AND I TOOK OFF FROM THERE.

24 Q WHICH WAY DID YOU RUN?

25 A I RAN, I RAN BACK TOWARDS THE BARRICADE AND

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

576

1 CAME AROUND THE BARRICADE, THAT'S WHEN I MET ISHMAEL.

2 Q ALL RIGHT, YOU WERE GOING BACK TO WHERE
3 YOUR CAR WAS?

4 A YEAH, TRYING TO LOCATE IT.

5 Q DID YOU SEE THE SHOOTING?

6 A NO, MA'AM.

7 Q DO YOU KNOW ANYTHING ABOUT HOW THAT, HOW
8 THAT HAPPENED?

9 A NO, MA'AM.

10 Q YOU GO BACK TO YOUR CAR?

11 A YES, MA'AM.

12 Q AND WHAT HAPPENED AFTER THAT?

13 A WELL WHEN WE GOT BACK TO THE CAR ME, I SEEN
14 ISHMAEL FIRST, I SEEN DOUGLAS COME OVER A FENCE WHERE A LOT
15 OF DIRT WAS IN THE AIR FROM A LOT OF PEOPLE RUNNING, AND HE
16 CAUGHT UP WITH ME, YOU KNOW, AND ISHMAEL AND BY THE TIME WE
17 MADE IT TO THE CAR T.C. WASN'T EVEN BACK TO THE CAR. WHEN
18 HE CAME TO THE CAR WE HAD TO WAIT ON HIM AND HE WAS LIKE
19 WHAT'S GOING ON, WE WAS LIKE IT DON'T MATTER WE FIXING TO
20 LEAVE, YOU KNOW WHAT I MEAN.

21 Q AND DID YOU LEAVE RIGHT THEN?

22 A YEAH, WE LEFT THEN.

23 Q AND WENT BACK TO LUMBERTON?

24 A YEAH.

25 Q OKAY, THE NEXT DAY WHAT HAPPENED IN

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

577

1 LUMBERTON?

2 A WELL MY BABY MAMA'S MOTHER HAD A COOKOUT
3 FOR MEMORIAL DAY COOKOUT AND EVERYBODY BASICALLY FROM THE
4 SOUTH SIDE ATTENDED, PEOPLE FROM THE OTHER SIDE ATTENDED,
5 TOO, YOU KNOW WHAT I MEAN, OLDER PEOPLE AND STUFF CAUSE IT
6 REALLY WAS HER MOTHER'S COOKOUT, YOU KNOW WHAT I MEAN, SO A
7 LOT OF OLDER PEOPLE WERE THERE, TOO.

8 Q ALL RIGHT, AND WHO WAS THERE FROM, FROM
9 YOUR FRIENDS?

10 A ALMOST EVERYBODY THAT'S YOUNG FROM THE
11 SOUTH SIDE WAS THERE, YOU KNOW WHAT I MEAN.

12 Q SO THAT WOULD MEAN YOU, JUNE --

13 A ISHMAEL, T.C., SMURF, TERRELL, MONTE, JUST
14 EVERYBODY THAT WAS AT THE BOULEVARD AND PLUS.

15 Q ALL RIGHT, AND WAS BIRD THERE?

16 A YEAH, HE WAS THERE.

17 Q ALL RIGHT, WHAT WERE YA'LL TALKING ABOUT?

18 A WELL PEOPLE WERE REALLY JUST CHILLING
19 LISTENING TO MUSIC AND HE WAS JUST SAYING THAT AARON SMOKED
20 SAUSAGE AND WE AIN'T GOT TO WORRY ABOUT HIM NO MORE, HE'S
21 SMOKED SAUSAGE.

22 Q WHAT DOES THAT MEAN?

23 A WELL I'M NOT EXACTLY SURE BUT I GUESS HE
24 WAS SAYING HE WAS BLADE OUT OR WHATEVER, SPLIT OPEN, I
25 DON'T KNOW.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

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1 Q ALL RIGHT, NOW DID, DID BIRD SEEM UPSET
2 ABOUT THAT?

3 A NO, MA'AM.

4 Q OKAY, THE NEXT DAY DID SOMETHING APPEAR ON
5 THE NEWS OR IN THE PAPER?

6 A YES, MA'AM.

7 Q AND WHAT WAS THAT?

8 A IT WAS A COMPOSITE.

9 Q ALL RIGHT, AND I'M GOING TO SHOW YOU WHAT
10 HAS BEEN MARKED AS DEFENSE EXHIBIT NUMBER 4 AND ASK IF YOU
11 RECOGNIZE THAT?

12 A YES, MA'AM.

13 Q IS THAT WHAT YOU SAW ON THE NEWS?

14 A WELL AT FIRST WHEN I CAME, WHEN I CAME TO
15 LUMBEE HOMES I SEEN JUNE AND ISHMAEL AND THEY WERE LIKE,
16 BOY, YOU, YOU JUST MISSED IT. BIRD WAS ON THE NEWS AND I
17 WAS LIKE, MAN, GET OUT OF HERE AND THEY WERE LIKE IT WILL
18 COME ON AGAIN, IT WILL AIR AGAIN, IT AIRS AT 11, 6 AND
19 AGAIN AT SOME TIME AND WHEN I SEEN IT I WAS LIKE, OH, KIND
20 OF, IT REALLY LOOKS LIKE HIM.

21 Q ALL RIGHT, AND SO YOU KNEW THAT, THAT THAT
22 RELATED TO AARON'S DEATH, RIGHT?

23 A YES, MA'AM.

24 Q OKAY, AND WERE YOU AWARE OF WHEN BIRD CAME
25 DOWN HERE TO MYRTLE BEACH?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

579

1 A NO, MA'AM.

2 Q ALL RIGHT, WHEN WAS THE NEXT CONTACT THAT
3 YOU HAD WITH THE POLICE OR ANYBODY ABOUT THIS CASE?

4 A WELL I WAS, I WAS AT THE COURTHOUSE AND I
5 WAS PICKED UP AND THE OFFICER TOLD ME, HE WAS LIKE YOU'RE
6 NOT UNDER ARREST, YOU'RE JUST BEING DETAINED CAUSE SOME
7 PEOPLE NEED TO SPEAK TO YOU AND THEY TOOK ME TO THE
8 LUMBERTON POLICE DEPARTMENT.

9 Q AND WERE THE PEOPLE THAT NEEDED TO SPEAK TO
10 YOU OFFICER HULL THAT'S SITTING RIGHT HERE?

11 A YES, MA'AM.

12 Q AND ANOTHER OFFICER?

13 A IT WAS, IT WAS A LOT OF THEM.

14 Q A LOT OF THEM?

15 A YEAH, THEY, YEAH, I KNOW, I KNOW THEY
16 WEREN'T FROM LUMBERTON CAUSE THEY HAD ON BAHAMA SHIRTS AND
17 STUFF LIKE THAT.

18 Q ALL RIGHT, PEOPLE IN LUMBERTON DON'T WEAR
19 BAHAMA SHIRTS?

20 A NO, NOT REALLY, NO.

21 Q OKAY, SO THEY WEREN'T WEARING UNIFORMS?

22 A SOME OF THEM WERE AND SOME OF THEM WEREN'T.

23 Q WAS DETECTIVE HULL IN A SUIT LIKE THIS?

24 A YEAH, HE PRETTY MUCH ALWAYS STAYS IN A
25 SUIT.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

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1 Q OKAY, AND THERE WAS SOME PEOPLE FROM
2 LUMBERTON THERE?

3 A YES, MA'AM.

4 Q SOME OFFICERS IN AND OUT?

5 A YES, MA'AM.

6 Q ALL RIGHT, AND YOU GAVE A STATEMENT TO
7 DETECTIVE HULL, DIDN'T YOU?

8 A YES, MA'AM.

9 Q AND WHAT DID YOU TELL HIM?

10 A I TOLD HIM I WAS, I WASN'T THERE, PERIOD.

11 Q WHY DID YOU DO THAT?

12 A I DIDN'T WANT TO GET IN TROUBLE OR INVOLVED
13 IN IT, PERIOD.

14 Q OKAY, AND THEN THEY LET YOU, DID THEY LET
15 YOU LEAVE?

16 A NO.

17 Q SO IT DIDN'T HELP, DID IT?

18 A NO, MA'AM.

19 Q WHAT HAPPENED?

20 A HE PUT THE WARRANTS ON ME.

21 Q OKAY, AND DID YOU GIVE ANOTHER STATEMENT?

22 A YES, MA'AM.

23 Q OKAY, AND WHAT DID YOU TELL HIM IN THAT
24 STATEMENT?

25 A I TOLD HIM THAT I WAS DOWN HERE. I TOLD

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

581

1 HIM MY NAME WAS BOS, TOLD HIM WHERE I WAS FROM AND I TOLD
2 HIM WHAT HAPPENED ON THE BOULEVARD.

3 Q YOU TOLD HIM YOU DIDN'T SHOOT AARON, DIDN'T
4 YOU?

5 A YEAH, I TOLD HIM I DIDN'T SHOOT AARON.

6 Q DID YOU TELL HIM THAT BIRD DID IT?

7 A NO, MA'AM.

8 Q WHAT DID YOU TELL HIM ABOUT THAT?

9 A I TOLD HIM THAT BIRD WAS JUST GOING OFF ON
10 PEOPLE THE WHOLE NIGHT AND I DON'T KNOW FOR SHORE IF HE DID
11 IT OR NOT BUT I KNOW HE LEFT IN THAT DIRECTION AND I HEARD
12 THOSE SHOTS.

13 Q OKAY, AND DID YOU TELL THEM ABOUT JUNE?

14 A YEAH, I TOLD THEM ABOUT JUNE.

15 Q OKAY, YOU STILL STAYED IN JAIL, DIDN'T YOU?

16 A YES, MA'AM.

17 Q OKAY, THERE'S BEEN A LOT OF TALK ABOUT YOUR
18 RELATIONSHIP WITH AARON AND WITH, WITH TURK OR G-BLACK; G-
19 BLACK WAS A GOOD FRIEND OF YOURS, WASN'T HE?

20 A YES, MA'AM.

21 Q ALL RIGHT, AND G-BLACK WAS KILLED?

22 A YES, MA'AM.

23 Q WAS AARON ACCUSED OF THAT CRIME?

24 A YES, MA'AM.

25 Q DID YA'LL THINK AARON HAD DONE IT?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

582

1 A I'M NOT FOR SURE, THERE WAS A LOT OF
2 SPECULATION IN IT FROM THAT THE GUYS FROM THE EAST POSSIBLY
3 AND THEN SOME GUYS FROM THE SOUTH POSSIBLY COULD HAVE HAD
4 SOMETHING TO DO WITH IT.

5 Q BUT MOST OF YOU PRETTY MUCH THOUGHT AARON
6 WAS IN IT, RIGHT?

7 A NOT, NOT EXACTLY, YEAH, HE WAS IN IT BUT
8 NOT EXACTLY, THOUGH.

9 Q OKAY, AND PEOPLE FROM YOUR GROUP WERE ANGRY
10 ABOUT TURK OR G-BLACK'S DEATH, RIGHT?

11 A YES, MA'AM.

12 Q WERE THINGS SAID ABOUT KILLING AARON
13 BECAUSE OF THAT?

14 A I REMEMBER SOME, SOME SAYING THAT BUT NOT
15 MANY, NOT MANY REALLY HAD, PEOPLE COULDN'T EVEN SAY WHO DID
16 IT. THEY DIDN'T EVEN TRULY KNOW WHO KILLED ERIC.

17 Q OKAY, DO YOU REMEMBER BIRD SAYING ANYTHING
18 ABOUT IT?

19 A YES, MA'AM.

20 Q AND WHAT DID HE SAY?

21 A HE SAID THAT HE WASN'T, HE WASN'T GOING TO
22 LET THAT SHIT SLIDE ABOUT BLACK AND THAT HE WAS GOING TO
23 GET EVERY SINGLE LAST ONE OF THEM.

24 Q NOW THERE'S BEEN SOME TATTOOS I THINK OF
25 YOURS PUT INTO EVIDENCE. I'M GOING TO SHOW YOU WHAT HAS

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

583

1 BEEN MARKED AS STATE'S EXHIBIT 9(B), 9(C), 14(A), AND
2 14(B), OKAY, AND I WANT YOU TO JUST LOOK AT THEM FOR A
3 MINUTE; DO YOU RECOGNIZE WHAT'S IN THOSE PICTURES?

4 A YES, MA'AM.

5 Q ARE THOSE YOUR TATTOOS?

6 A YES, MA'AM.

7 Q AND THEY'RE PICTURES THAT WERE TAKEN OUT AT
8 J. REUBEN LONG?

9 A YES, MA'AM.

10 Q OKAY, THERE HAS BEEN TESTIMONY THAT YOU HAD
11 SOME OF THOSE TATTOOS BEFORE THIS INCIDENT, SOME OF THEM
12 AFTER, AND BEEN QUESTIONS ABOUT THAT, TELL ME ABOUT THAT
13 AND BE SPECIFIC ABOUT WHICH ONE IS WHEN, OKAY?

14 A WELL THIS ONE RIGHT HERE WITH THE GUN ON MY
15 ARM RIGHT HERE AND THIS ONE I HAVE HAD THEM SINCE I WAS 18.

16 Q AND THAT WOULD BE ON 9 WHICH, 9(B)?

17 A YES, MA'AM.

18 Q OKAY, YOU HAD THOSE SINCE YOU WERE 18?

19 A YES, MA'AM.

20 Q ALL RIGHT, DO THEY HAVE ANY SPECIAL
21 SIGNIFICANCE?

22 A NO, MA'AM, ALL THIS ONE REPRESENTS IS THAT
23 THE STRIP I STAY ON WHICH IS 41 AND THAT, THAT THE PRESENCE
24 OF G.D. WAS ON THE BLOCK.

25 Q AND G.D. IS WHAT?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

584

1 A GROWTH AND DEVELOPMENT.

2 Q ALL RIGHT, AND IS THAT THE NAME OF YOUR
3 ORGANIZATION?

4 A YES, MA'AM.

5 Q HAD IT BEEN KNOWN BY ANY OTHER NAME IN THE
6 PAST?

7 A GANGSTER DISCIPLES.

8 Q ALL RIGHT, WHAT, WHAT IS THAT?

9 A IT'S A, IT'S A BROTHERHOOD.

10 Q AND WHAT'S IT'S PURPOSE?

11 A WELL REALLY IT'S THE, YOU KNOW WHAT I MEAN,
12 RISE ABOVE OPPRESSION AND, YOU KNOW WHAT I MEAN, ABOUT
13 EDUCATION, ECONOMICS, AND POLITICS, AND SOCIAL DEVELOPMENT
14 AND UNITY.

15 Q OKAY, AND YOU'RE PRETTY CLOSE WITH A LOT OF
16 DIFFERENT FRIENDS THAT ARE ALSO IN THAT GROUP, AREN'T YOU?

17 A YES, MA'AM.

18 Q AND THEN LOOK AT THE NEXT ONE WHAT DOES,
19 WHAT NUMBER IS IT AND WHAT IS IT?

20 A THAT'S 9(C).

21 Q AND WHAT IS IT?

22 A IT'S A TATTOO OF R.I.P. G-BLACK ON MY NECK
23 WITH A PISTOL UP UNDER IT.

24 Q ALL RIGHT, AND IS THAT ON THIS SIDE OF YOUR
25 NECK?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

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1 A ON MY RIGHT SIDE OF MY NECK.

2 Q OKAY, WHEN DID YOU DO THAT?

3 A I BELIEVE '08, MA'AM.

4 Q ALL RIGHT, SO YOU WOULD HAVE BEEN IN J.

5 REUBEN LONG?

6 A YES, MA'AM.

7 Q OKAY, AND WHY DID YOU DO THAT?

8 A BECAUSE ON THIS ARM I HAD A, A TATTOO OF
9 TURK AND IT WAS JUST, IT WAS JUST, IT WAS NOT GOOD AT ALL
10 AND AT THE TIME THE GUY WAS GIVING ME FREE TATTOOS AND I
11 SAID IF I'M GOING TO GET OTHER TATTOOS DIRECTLY I MIGHT AS
12 WELL GET HIS AT LEAST DECENT AND I PUT A GUN UP UNDER IT TO
13 SHOW THAT HE DIED FROM THE BULLET OF A GUN. I DON'T KNOW
14 WHAT TYPE BUT, YOU KNOW.

15 Q OKAY, THREE TATTOOS IN PRISON?

16 A YES, MA'AM, HE WAS, HE WAS FROM ROBESON
17 COUNTY.

18 Q OKAY, ALL RIGHT, AND WHAT ABOUT THE NEXT
19 ONE, WHAT NUMBER IS IT AND WHAT'S IT ABOUT?

20 A THAT'S 14(A) .

21 Q AND TELL ME ABOUT THOSE?

22 A WELL IT'S, IT'S A STAFF. I HAD THIS ONE
23 WHEN I, WHEN I CAME IN AND AS YOU CAN SEE IT WAS TRASHED.
24 THAT'S ONE OF THE ONES I HAD HIM TO DO OVER AND HE ADDED
25 EXTRA STUFF TO IT CAUSE HE DESIGNED AND HE PUT A LITTLE

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

586

1 SHAVING AROUND IT AND PUT BOS AT THE TOP OF IT AND G'S UP
2 AND I HAD, I TOLD HIM TO PUT THE RESPECT AT THE BOTTOM OF
3 IT.

4 Q OKAY, AND THEN THE LAST ONE THAT'S IN
5 EVIDENCE?

6 A THAT'S G.D., I HAD IT BEFORE I CAME IN. AS
7 YOU CAN IT WAS FADED AND TRASHED, TOO, AND I HAD HIM TO GO
8 OVER IT WITH, I WANTED HIM TO JUST GO OVER IT BUT HE
9 OUTLINED IT AND WENT AROUND IT, YOU KNOW WHAT I MEAN, AND
10 PUT A DROP OF BLOOD COMING OFF THE TAIL FOR THE STRUGGLE
11 AND I HAD HIM TO PUT HONOR UP UNDER IT.

12 Q HONOR?

13 A YES, MA'AM.

14 Q SO YOU HAD HONOR AND RESPECT ---

15 A YES, MA'AM.

16 Q --- ON YOUR ARMS?

17 A YES, MA'AM.

18 Q OKAY, DO ANY OF THESE TATTOOS MEAN I KILLED
19 AARON?

20 A NO, MA'AM.

21 Q DO THEY HAVE ANYTHING TO DO WITH AARON?

22 A NO, MA'AM.

23 Q NOW THERE'S BEEN ENTERED INTO EVIDENCE SOME
24 LYRICS FROM OR SOMETHING THAT YOU WROTE WHILE YOU WERE IN
25 PRISON; IS THAT RIGHT?

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

587

1 A YES, MA'AM.

2 Q ALL RIGHT, AND I KNOW YOU'VE BEEN WRITING A
3 LOT WHILE WE'VE BEEN DOING THIS; DO YOU WRITE A LOT?

4 A YES, MA'AM.

5 Q WHAT, WHAT DO YOU WRITE?

6 A I WRITE RAP MUSIC.

7 Q ALL RIGHT, AND, AND IF I WERE TO LOOK AT
8 THIS STUFF HOW WOULD I KNOW IT WAS RAP MUSIC?

9 A CAUSE I HAVE ORGANIZED IT THE WAY IT'S
10 SUPPOSED TO BE PAIRED, PREPARED, YOU KNOW. I DO COURSES,
11 BRIDGES, I MAY SHOW THE VERSES AT EITHER 3/16 OR 2/24 AND
12 3/12 WITH BRIDGE HOOKED UP TO IT.

13 Q OKAY, AND THERE WERE SOME PARTS THAT WERE
14 READ BY DETECTIVE HULL, WERE THOSE THINGS THAT YOU HAD
15 WRITTEN?

16 A YES, MA'AM.

17 Q AND YOU WROTE THEM WHILE YOU WERE IN JAIL?

18 A YES, MA'AM.

19 Q SO IT'S AFTER AARON HAD DIED?

20 A YES, MA'AM.

21 Q ONE OF THEM WAS, IT START, DETECTIVE HULL
22 STARTED READING SOMETHING ABOUT SOMEBODY KILLED MY HOMIE,
23 DO YOU REMEMBER WRITING THAT ONE?

24 A YES, MA'AM.

25 Q OKAY, WHAT WAS YOUR PURPOSE IN WRITING

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

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1 THAT?

2 A WELL I HAVE A LOT OF SONGS AND IN ORDER TO
3 PRODUCE A GOOD ALBUM YOU HAVE TO HAVE A LOT OF DIFFERENT
4 THINGS FOR SONGS, YOU KNOW WHAT I MEAN, AND YOU GOT, YOU
5 GOT TO JUST COME UP WITH DIFFERENT STUFF. YOU CAN'T JUST
6 RAP ABOUT THE SAME THING, YOU GOT TO ADD DIFFERENT THINGS.

7 Q WHEN YOU WRITE DOES IT ALWAYS COME FROM
8 YOUR PERSONAL EXPERIENCE OR DOES IT COME FROM OTHER THINGS?

9 A NO, MA'AM, I WRITE OFF OF WHAT I THINK
10 PEOPLE WANT TO HEAR, WHAT THE AUDIENCE WOULD LIKE, YOU KNOW
11 WHAT I MEAN, THINGS I HEARD OTHER RAPPERS SAY, YOU KNOW
12 WHAT I MEAN, THINGS I THINK THAT COULD JUST CATCH A
13 PERSON'S EAR AND THAT'S ALREADY BEEN TRIED SO I KNOW THAT
14 I'LL BE GOOD WHEN I BRING IT IN.

15 Q AND IS THIS SOMETHING YOU'RE PLANNING TO
16 DO?

17 A YES, MA'AM.

18 Q HAVE YOU TALKED TO ANYBODY ABOUT WORKING
19 WITH YOU?

20 A YES, MA'AM.

21 Q WHO IS THAT?

22 A WELL I'VE DONE SONGS WITH, WITH JUNE S.
23 DOUGLAS AND I'VE ALSO TRIED TO DO THINGS WITH TRILL AND
24 OTHER GUYS THAT I MIGHT HAVE MET IN HERE, TOO.

25 Q OKAY, THERE WAS TESTIMONY ABOUT WHO MIGHT

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589

1 HAVE HAD A GUN THE NIGHT OF THE INCIDENT; DO YOU KNOW WHO
2 MIGHT HAVE HAD A GUN THE NIGHT OF THE INCIDENT BACK IN MAY?

3 A MA'AM, I, WHERE I'M FROM PEOPLE DON'T
4 ACTUALLY JUST GO AROUND LIKE, "YO, LOOK AT WHAT I GOT" SO
5 I'M NOT AWARE OF ACTUALLY WHO HAD A GUN ON THEM BUT I WOULD
6 ASSUME THAT PEOPLE WOULD AT LEAST OWN A GUN MAYBE, YOU KNOW
7 WHAT I MEAN.

8 Q OKAY, DO YOU USUALLY HAVE A GUN?

9 A YES, MA'AM.

10 Q ALL RIGHT, DID YOU HAVE A GUN WITH YOU ON
11 THE BOULEVARD THAT NIGHT?

12 A NO, MA'AM.

13 Q HAD YOU BROUGHT A GUN DOWN TO MYRTLE BEACH?

14 A YES, MA'AM.

15 Q AND WHERE DID YOU LEAVE IT?

16 A I LEFT IT IN THE CAR.

17 Q ALL RIGHT, HAD YOU BEEN TALKING TO OTHER
18 PEOPLE ABOUT THAT?

19 A NO, MA'AM.

20 Q OTHER PEOPLE IN THE CAR?

21 A NO, MA'AM.

22 Q SO YOU DON'T KNOW WHETHER, WHO'D YOU RIDE
23 WITH?

24 A T.C, JUNE, AND ISHMAEL.

25 Q OKAY, YOU DON'T KNOW IF THEY HAD A GUN ON

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

590

1 THEM OR LEFT IT IN THE CAR?

2 A NO, MA'AM.

3 Q ALL RIGHT, AND WHAT ABOUT BIRD DID HE
4 USUALLY HAVE A GUN?

5 A MA'AM, ALMOST EVERYBODY IN LUMBERTON HAS A
6 GUN ESPECIALLY IF THEY'RE YOUNG.

7 Q DO YOU KNOW IF HE HAD A GUN THAT NIGHT?

8 A NO, MA'AM.

9 Q OKAY --

10 MS. PRATT: THE COURT'S INDULGENCE.

11 Q (CONTINUING) LET'S TALK ABOUT MR. SMITH,
12 YOU REMEMBER A FELLOW NAMED TIMOTHY FRANKLIN SMITH THAT
13 TESTIFIED YESTERDAY?

14 A YES, MA'AM.

15 Q ALL RIGHT, WAS HE IN YOUR CELL?

16 A YES, MA'AM.

17 Q OKAY, HOW LONG WAS HE IN YOUR CELL?

18 A I'M NOT FOR SURE, MIGHT HAVE BEEN ABOUT TWO
19 MONTHS.

20 Q OKAY, AND LET'S TELL THE JURY SO THEY
21 UNDERSTAND THAT JUST WHAT THESE CELLS LOOK LIKE, WHAT SIZE
22 AND TALK TO ME ABOUT THAT?

23 A THE CELL IS NO WIDER THAN PROBABLY HALF OF
24 THE JURY BOX AND IT PROBABLY COMES OUT A LITTLE BIT MORE
25 BUT THEY PROBABLY ABOUT 9 TO 10 PEOPLE IN THEM.

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1 Q THEY'RE MADE FOR FOUR, AREN'T THEY?

2 A THEY'RE MADE FOR FOUR.

3 Q AND HOW MANY ARE NORMALLY ON THE FLOOR?

4 A FIVE.

5 Q IS THAT BECAUSE OUR JAIL IS OVERCROWDED?

6 A YES, MA'AM.

7 Q OKAY, AND HOW MANY TIMES, I MEAN DID PEOPLE
8 MOVE IN AND OUT OF THESE CELLS OR --

9 A YES, MA'AM, SOMETIMES.

10 Q OKAY, HOW DOES, WHAT WOULD BE A TYPICAL
11 DAY, WOULD YOU BE ALL WITHIN THE CELL OR MOVING AROUND,
12 KIND OF GIVE ME --

13 A MOVING AROUND, YOU COME OUT THREE TIMES A
14 DAY, MAYBE MORE, DEPENDS ON IF YOU GOT TO GO OUT TO SEE THE
15 NURSE OR YOU GO OUTSIDE OR SOMETHING LIKE THAT.

16 Q HOW OFTEN DO YOU GET TO GO OUTSIDE?

17 A MAYBE TWICE A WEEK.

18 Q OKAY, BUT YOU'D BE, IF YOU LEFT YOUR, YOUR
19 CELL WHERE WOULD YOU GO?

20 A JUST AROUND IN THE POD TO THE BATHROOM, TO
21 THE SHOWERS, TO THE TELEPHONES, WATCH T.V.

22 Q AND THE POD WOULD BE LIKE AN OPEN AREA LIKE
23 THIS COURTROOM?

24 A YES, MA'AM.

25 Q IN THE CELL THAT YOU WERE IN WHEN YOU HAD

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

592

1 MR. FRANKLIN THERE WAS IT IN A POD THAT HAD LIKE TWO
2 LEVELS?

3 A YES, MA'AM.

4 Q OKAY, AND PEOPLE WOULD COME DOWN AND
5 CONGREGATE?

6 A YES, MA'AM.

7 Q ALL RIGHT, HOW MANY, HOW MANY HOURS MAYBE
8 OUT OF THE DAY WOULD YA'LL BE STUCK IN THE CELL?

9 A PROBABLY ABOUT I'D SAY 19.

10 Q NINETEEN OUT OF 24?

11 A YES, MA'AM.

12 Q OKAY, WHICH LEAVES FIVE THAT YOU MIGHT BE
13 IN AND OUT?

14 A YES, MA'AM.

15 Q OKAY, AND YOU WOULD LEAVE TO, YOU SAID THE
16 NURSE?

17 A NURSE, SHOWER, WATCH T.V., TELEPHONE,
18 OUTSIDE REC.

19 Q OKAY, AND IF YOUR ATTORNEY CAME TO SEE YOU?

20 A ATTORNEY VISITS.

21 Q OKAY, AND YOU GOT YOUR DISCOVERY SOMETIME
22 IN 2007; IS THAT RIGHT?

23 A YES, MA'AM, I THINK DECEMBER.

24 Q DID YOU HAVE IT BEFORE MR. SMITH GOT INTO
25 YOUR CELL?

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1 A YES, MA'AM.

2 Q OKAY, ABOUT HOW MUCH DISCOVERY DID YOU GET?

3 A MA'AM, IF I HAD ALL OF IT INCLUDING THE
4 RESULTS FROM THE IT WOULD PROBABLY BE ABOUT THAT THICK.

5 Q ALL RIGHT, SO IT WAS A BUNCH?

6 A YES, MA'AM.

7 Q DID YOU CARRY IT WITH YOU EVERYWHERE?

8 A NO, MA'AM.

9 Q LEAVE IT YOUR CELL?

10 A YES, MA'AM.

11 Q OKAY, AND DO YOU BELIEVE, WOULD IT BE
12 REASONABLE TO SAY THAT THERE WOULD HAVE BEEN TIMES THAT
13 YOUR DISCOVERY IS IN YOUR CELL AND MR. FRANKLIN, TIMOTHY
14 FRANKLIN SMITH WAS IN THERE AND YOU WEREN'T?

15 A YES, MA'AM.

16 Q OTHER PEOPLE IN THERE LOOKING AT YOUR
17 DISCOVERY?

18 A YES, MA'AM.

19 Q OKAY, IS THERE ANY WAY TO LOCK IT UP SO
20 PEOPLE CAN'T GET AT IT?

21 A NO, MA'AM.

22 Q AND THERE HAVE BEEN TIMES WHILE YOU'VE BEEN
23 IN THAT THEY'VE SWEEPED AND TAKEN YOUR DISCOVERY OUT OF YOUR
24 CELL, RIGHT?

25 A YES, MA'AM.

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1 Q OKAY, DID YOU EVER TALK TO MR. SMITH ABOUT
2 YOUR CHARGES?

3 A MA'AM, YES, I TOLD HIM THAT I REALLY WANTED
4 TO GO HOME AND I DON'T SEE HOW THEY HAVE BEEN INCARCERATED.

5 Q OKAY, DID YOU, DID YOU TELL HIM THAT YOU
6 WERE THE ONE THAT SHOT AARON?

7 A NO, MA'AM.

8 Q DID YOU TALK TO HIM ABOUT ANYTHING THAT WAS
9 GOING ON IN YOUR CASE?

10 A WELL WHEN I CAME IN FROM ATTORNEY VISIT
11 WITH YOU ONE DAY I STARTED LOOKING THROUGH MY MOTION CAUSE
12 YOU WAS TELLING ME THIS, THIS NEW THING THAT THEY WERE
13 TRYING TO COME UP WITH TWO SHOOTERS SO I START LOOKING
14 THROUGH MY, MY BALLISTICS AND THE AUTOPSY THING AND TRYING
15 TO GET ON THE 22 PROJECTILE AND THE 25 SUBJECT AND I
16 STARTED LOOKING THROUGH IT.

17 Q AND DID HE ASK YOU ABOUT THAT OR DID YOU
18 TALK TO HIM?

19 A HE ASKED ME ABOUT IT.

20 Q OKAY, IS HE THE KIND OF PERSON YOU'D
21 NORMALLY CONFIDE IN?

22 A NO, MA'AM.

23 Q I MEAN HE'S A 45-YEAR-OLD WHITE GUY, RIGHT?

24 A YES, MA'AM.

25 Q DO YOU HAVE VERY MANY 45-YEAR-OLD WHITE

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

595

1 FRIENDS?

2 A NO, MA'AM.

3 Q AND WOULD YOU HAVE TOLD HIM THINGS THAT
4 WOULD BE REAL PRIVATE?

5 A NO, MA'AM.

6 Q NOW THERE'S BEEN SOME LANGUAGE READ INTO
7 THE RECORD ABOUT DISCOVERY, BIRD'S DISCOVERY, AND AARON'S
8 PHOTO ON A TEE SHIRT; DO YOU REMEMBER ANYTHING ABOUT THAT?

9 A YES, MA'AM.

10 Q OKAY, AND THAT WAS IN A LETTER THAT YOU
11 WROTE TO WHO?

12 A TO MY FRIEND TRILL.

13 Q ALL RIGHT, AND WHO IS TRILL?

14 A BRAD MCCORMICK.

15 Q ALL RIGHT, HOW DO YOU KNOW HIM?

16 A I'VE KNOWN HIM FOR A LONG TIME SINCE I WAS
17 PROBABLY ABOUT 13, HE'S BEEN A GOOD FRIEND.

18 Q IS HE INVOLVED WITH THE 41 WITH YOU?

19 A YES, MA'AM.

20 Q OKAY, AND DID YOU SAY IN THAT, THAT LETTER
21 THAT YOU WANTED TO HAVE AARON'S AUTOPSY PHOTO ON A TEE
22 SHIRT?

23 A NO, MA'AM.

24 Q WHAT DID YOU SAY, WHAT WERE YOU TALKING
25 ABOUT?

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1 A WELL BRAD TOLD ME THAT HE WANTED ME TO SEND
2 HIM ALL THE STATEMENTS, BASICALLY HE WANTED ME TO GIVE HIM
3 THE WHOLE MOTION CAUSE HE WANTED TO LOOK OVER IT AND I TOLD
4 HIM IF I SENT YOU STATEMENTS I WOULD NEED PROBABLY ABOUT 20
5 ENVELOPES BUT I AM GOING TO SEND YOU THE PICTURES AND I
6 SENT HIM THE PICTURES AND I TOLD HIM, HELL, SHIT, IF YOU
7 WANT TO GET A SHIRT MADE WITH AARON IT.

8 Q OKAY, SO I GUESS IT COULD BE INTERPRETED
9 DIFFERENT WAYS DEPENDING ON HOW YOU PUT THE EMPHASIS ON IT
10 WHEN YOU READ IT, RIGHT?

11 A YES, MA'AM.

12 Q OKAY, ALL RIGHT, WERE YOU ALWAYS IN THE
13 SAME CELL THAT YOU'VE BEEN IN?

14 A NO, MA'AM.

15 Q OKAY, TELL ME A LITTLE BIT ABOUT THAT?

16 A WELL I, I'VE BEEN MOVED A COUPLE OF TIMES,
17 ONCE CAUSE THEY SHUT DOWN A-2 AND MOVED EVERYBODY INTO A-1.
18 SOMETIMES I HAVE PUT IN INMATE REQUESTS, I'VE BEEN IN MAX.
19 I WANTED TO BE IN MAX BECAUSE I WANTED TO GO OVER MY
20 DISCOVERY AND I FELT THAT I COULDN'T GO OVER MY DISCOVERY
21 IN PRIVATE CAUSE WITH A LOT OF PEOPLE IN YOUR CELL YOU PULL
22 OUT A THICK EVERYBODY WANT TO LOOK, EVERYBODY WANT TO ASK,
23 YOU KNOW WHAT I MEAN, AND I FELT LIKE PEOPLE WERE GOING
24 THROUGH MY STUFF SO I'VE BEEN MOVED A LOT AND SOMETIMES I
25 REFUSED TO SIGN WRITE UPS AND BEEN MOVED TO MINI MAX.

MR. SPEARS - DIRECT EXAMINATION BY MS. PRATT

597

1 Q OKAY, AND IN MINI MAX ARE YOU ALONE?

2 A NO, MA'AM, NOT REALLY.

3 Q OKAY, HOW ABOUT DID YOU EVER GO TO MAX?

4 A YES, MA'AM.

5 Q OKAY, AND YOU WERE ALONE THEN?

6 A NO, MA'AM.

7 Q NO?

8 A NO, YOU'RE NOT EVEN ALONE IN SOLITARY
9 CONFINEMENT.

10 Q OKAY, I'M GOING TO SHOW YOU WHAT IS MARKED
11 AS DEFENSE EXHIBIT 3 AND ASK IF YOU KNOW WHO THAT IS?

12 A YES, MA'AM, THAT'S JEFFREY BETHEA.

13 Q KNOWN AS BIRD?

14 A YES, BIRD.

15 Q IS THAT THE WAY HE LOOKED ON THE NIGHT THAT
16 AARON HAMMONDS WAS SHOT?

17 A YEAH, BUT OTHER THAN HE'S, HE'S GOT THEM
18 PULLED BACK SO HE CAN TAKE A CLEAR PICTURE, HE LET'S THEM
19 HANG.

20 Q ALL RIGHT, AND THIS COMPOSITE THAT IS
21 DEFENSE EXHIBIT 4 DOES THAT LOOK MORE LIKE HOW JEFFREY
22 LOOKED THAT NIGHT?

23 A YES, MA'AM.

24 Q IS THAT THE WAY HIS HAIR WAS?

25 A YES, MA'AM.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

598

1 Q THANK YOU. ONE LAST QUESTION, BRIAN, DID
2 YOU, YOU HEARD BRITTNEY MANOR AND ALEXIS BROWN TESTIFY
3 ABOUT WHAT THEY SAW THE SHOOTER WITH DREADS, RIGHT?

4 A YES, MA'AM.

5 Q DO YOU KNOW ALEXIS OR BRITTNEY PERSONALLY?

6 A NO, MA'AM.

7 Q DO YOU THINK YOU WENT TO SCHOOL WITH THEM
8 OR ANYTHING?

9 A NO, MA'AM.

10 Q ALL RIGHT, AND THEY WERE AARON'S FRIENDS,
11 CORRECT?

12 A YES, MA'AM.

13 MS. PRATT: THANK YOU, I HAVE NOTHING FURTHER.

14 THE COURT: MS. ELDER.

15 MS. ELDER: THANK YOU, YOUR HONOR.

16 CROSS EXAMINATION

17 BY MS. ELDER:

18 Q ALL RIGHT, LET'S MAKE SURE I GOT THIS
19 STRAIGHT, FIRST OF ALL YOU WEREN'T IN MYRTLE BEACH ON MAY
20 27TH, CORRECT?

21 A THAT'S WHAT I TOLD MIKE HULL.

22 Q OKAY, THEN A WEEK LATER YOU SAID, WELL, I
23 WAS IN MYRTLE BEACH, THAT I DIDN'T SEE ANYTHING, I DON'T
24 KNOW WHO SHOT AARON, NOTHING, RIGHT?

25 A YES, MA'AM.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

599

1 Q YOU ALSO SAID THAT YOU WALKED OFF WITH
2 JUNE, RIGHT?

3 A I MIGHT HAVE DID, YEAH.

4 Q AND YOU HEARD JUNE TESTIFY AND SAY YOU
5 DIDN'T WALK OFF WITH HIM? YOU HEARD HIM TESTIFY YESTERDAY?

6 A I HEARD HIM TESTIFY THAT HE GOT INTO AN
7 ARGUMENT AND HE WALKED OFF, YES, MA'AM.

8 Q AND I ASKED SPECIFICALLY IF YOU WENT WITH
9 HIM AND HE SAID NO YOU STAYED WITH BIRD?

10 A I STAYED WITH THE CROWD AND THEM, YES,
11 MA'AM.

12 Q SO WHEN YOU TOLD INVESTIGATORS THAT YOU
13 WALKED OFF WITH JUNE TO TAKE YOURSELF OUT OF THE SITUATION,
14 ON THE SECOND INTERVIEW WHEN YOU FINALLY ADMITTED YOU WERE
15 IN MYRTLE BEACH YOU SAID BUT I WALKED OFF JUNE WHICH IS NOT
16 TRUE; IS THAT CORRECT?

17 A MA'AM, WHEN JUNE WALKED OFF HE WALKED OFF
18 IN THE SAME DIRECTION THAT OUR CROWD STARTED MOVING IN,
19 MA'AM.

20 Q YOU DIDN'T GO WITH JUNE LIKE YOU ORIGINALLY
21 TOLD POLICE?

22 A HAND AND HAND, NO.

23 Q NOW WHAT I FIND REAL INTERESTING IS THAT IN
24 YOUR INTERVIEWS WITH POLICE YOU NEVER TOLD THEM YOU HAD A
25 GUN THAT NIGHT?

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

600

1 A NO, MA'AM.

2 Q THAT'S NEW TODAY, RIGHT?

3 A YES, MA'AM.

4 Q WHY DIDN'T YOU TELL THEM YOU HAD A GUN?

5 A MA'AM, I DIDN'T WANT TO GET INTO TROUBLE
6 THE SAME REASON THAT I TOLD THEM THE FIRST TIME I WASN'T
7 THERE AT ALL, I DIDN'T WANT TO GET INVOLVED.

8 Q ALL RIGHT, SO YOU DIDN'T TELL THEM A GUN,
9 ANYTHING ABOUT A GUN UNTIL TODAY FIVE MINUTES AGO AFTER YOU
10 HEARD TIM SMITH SAY YOU HAD A GUN, JEFFREY BETHEA SAID YOU
11 HAD A GUN, AND NATHANIEL DOUGLAS SAY, SAID YOU HAD A GUN,
12 THAT'S WHEN YOU FINALLY TOOK THE STAND AND SAY, YEP, YOU
13 KNOW WHAT I HAD A GUN THAT NIGHT BUT IT WASN'T ME, RIGHT?

14 A NO, I DIDN'T DO IT BECAUSE OF THEIR
15 TESTIMONY.

16 Q WELL YOU DIDN'T DO IT BEFORE EITHER, DID
17 YOU?

18 A NO, MA'AM.

19 Q WHAT KIND OF GUN DID YOU HAVE?

20 A IT WAS A BLACK, FADED BLACK 380 11 SHOT.

21 Q AND WHERE, WHERE WAS THE GUN, WHERE'S THE
22 GUN NOW, WHAT DID YOU DO WITH IT?

23 A I GAVE IT TO A FRIEND.

24 Q WHY?

25 A BECAUSE I DIDN'T NEED IT.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

601

1 Q YOU DIDN'T THINK IT WAS IMPORTANT TO GIVE
2 YOUR GUN TO THE POLICE TO HAVE IT TESTED?

3 A NO, MA'AM.

4 Q COULD HAVE EXONERATED YOU, WASN'T YOUR GUN,
5 YOU DIDN'T GIVE IT TO POLICE, THOUGH, DID YOU?

6 A NO, MA'AM.

7 Q YOU WERE ANGRY ABOUT ERIC GETTING KILLED,
8 G-BLACK GETTING KILLED, RIGHT?

9 A YEAH, I WAS SAD AND ANGRY.

10 Q AND WHEN YOU WERE TALKING ABOUT THE GANG
11 WAS DISCUSSING IT AND THEY WERE ANGRY AND THEY WERE TALKING
12 ABOUT RETALIATION YOU WERE PART OF THAT GANG, RIGHT?

13 A I'M A PART OF G.D., YES, MA'AM.

14 Q AND WHEN DETECTIVES INTERVIEWED ABOUT IT
15 THE SECOND TIME ALTHOUGH YOU DENIED IT THE FIRST YOU CALLED
16 IT A GANG? YOU KNOW IT'S A GANG, WE ALL KNOW IT'S A GANG,
17 RIGHT?

18 A NO, MA'AM, IT'S NOT A GANG AND FOR ME TO
19 CALL IT A GANG I WOULD BE DISRESPECTING WHAT I AM.

20 Q DO YOU EDUCATE YOURSELF ON GANG HISTORY?

21 A YES, MA'AM.

22 Q WHAT KIND OF GANG HISTORY DO YOU EDUCATE
23 YOURSELF ON?

24 A MAINLY ON MY ORGANIZATION.

25 Q AND WHAT IS YOUR ORGANIZATION?

1 A G.D.

2 Q NOW YOU HAVE DESCRIBED BIRD AS A TALKER, HE
3 TALKED A LOT?

4 A YES, MA'AM.

5 Q AND YOU TOLD POLICE THAT HE'S A BIG TALKER?

6 A YES, MA'AM.

7 Q AND YOU ALSO TOLD THEM YOU DIDN'T TAKE HIM
8 SERIOUS BECAUSE HE ALWAYS TALKED SO MUCH?

9 A YES, MA'AM.

10 Q NEVER FOLLOWS THROUGH?

11 A SOMETIMES.

12 Q YOU WERE UPSET AT HIM AND ANGRY AT HIM
13 BECAUSE HE DIDN'T FOLLOW THROUGH AND GET RETRIBUTION FOR G-
14 BLACK'S MURDER; ISN'T THAT RIGHT?

15 A NO, MA'AM.

16 Q AND YOU WENT TO WALMART IN APRIL OF '07 TO
17 DO WHAT BIRD HAD NOT DONE; ISN'T THAT CORRECT?

18 A NO, MA'AM.

19 Q AND YOU AFTER YOU WERE SERVED WITH MURDER
20 WARRANTS FOR SHOOTING SOMEBODY GOT A TATTOO THAT SAID REST
21 IN PEACE G-BLACK WITH A GUN UNDERNEATH IT, RIGHT?

22 A YES, MA'AM.

23 Q YOU ALSO GOT TATTOOED AFTER YOU HAD BEEN
24 SERVED WARRANTS FOR MURDERING SOMEBODY WITH THE WORD
25 RESPECT TATTOOED UNDER YOUR GANG SYMBOL, RIGHT?

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

603

1 A YES, RESPECT AND HONOR.

2 A YOU ALSO, AFTER YOU GOT SERVED WITH MURDER
3 WARRANTS FOR MURDERING AARON HAMMONDS, GOT YOUR G.D. TATTOO
4 OF YOUR GANG YOU GOT IT COLORED IN, THE TAIL OF IT COLORED
5 IN, AND YOU GOT A TEARDROP ADDED TO END WITH THE WORD HONOR
6 WRITTEN UNDER IT, TOO; ISN'T THAT RIGHT?

7 A NO, MA'AM, IT'S NOT A TEARDROP. IF I
8 WANTED TO PUT A TEARDROP I WOULD HAVE PUT IT ON THE RIGHT
9 SIDE UNDER MY EYE.

10 Q WHAT'S A TEARDROP MEAN?

11 A A TEARDROP MEANS YOU KILLED SOMEBODY.

12 Q YOU SAID TIM SMITH CAME IN AND MADE ALL
13 THIS UP ABOUT YOU, RIGHT?

14 A YES, MA'AM, HE ADD SOME THINGS THAT HE KNOW
15 ABOUT ME, YES, MA'AM.

16 Q AND HE MADE UP ALL THAT STUFF ABOUT YOUR
17 FAMILY, NONE OF THAT WAS TRUE, RIGHT?

18 A SOME OF IT.

19 Q ALL THAT STUFF HE KNEW ABOUT YOUR MAMA AND
20 WHO THEY WERE AND YOUR DADDY AND CAME OUT AND HANGING OUT
21 IN LUMBERTON THAT WAS ALL FALSE, TOO?

22 A YES, MA'AM, AND HE DOESN'T KNOW MY MOTHER
23 AND I NEVER SPOKE WITH HIM ABOUT MY MOTHER.

24 Q AND ALL THAT STUFF HE ADMITTED ABOUT HOW HE
25 USED TO KNOW SOME OF THE SAME PEOPLE CAUSE HE WAS KIND OF A

1 PLAYER FROM LUMBERTON HE MADE ALL THAT UP, TOO, RIGHT?

2 A YES, MA'AM.

3 Q AND THE AUTOPSY PICTURE HE SAID YOU SHOWED
4 HIM YOU NEVER SHOWED HIM?

5 A I SHOWED EVERYBODY IN THE CELL. I HAD MY
6 MOTION OUT, THEY STEPPED UP, I LET THEM SEE IT.

7 Q CAUSE YOU WERE PROUD OF IT, WEREN'T YOU?

8 A NO, MA'AM.

9 Q IT WAS A TROPHY?

10 A NO, MA'AM, IT WAS A STACK OF PAPERWORK.

11 Q AND I AM CURIOUS, THOUGH, BECAUSE SINCE
12 THIS IS THE FIRST TIME YOU MENTIONED A GUN HERE IN THIS
13 COURTROOM HOW IS IT IF TIM SMITH NEVER TALKED TO YOU ABOUT
14 THIS HOW IS IT THAT TIM SMITH KNEW EXACTLY WHAT YOU WERE
15 GOING TO TESTIFY TO TODAY, THAT YOU HAD A GUN AND IT WAS IN
16 YOUR CAR IN MYRTLE BEACH BECAUSE NONE OF US KNEW IT UNTIL
17 TODAY? WE'LL GET BACK TO THAT.

18 MS. PRATT: YOUR HONOR, I WOULD ASK THAT HE BE
19 ALLOWED TO ANSWER THAT QUESTION.

20 THE COURT: HE CAN ANSWER IT.

21 MS. ELDER: (CONTINUING)

22 A MA'AM, I DON'T KNOW WHERE HE GOT HIS STORY
23 FROM BUT HIS STORY DOESN'T MAKE NO SENSE. BY THE TIME I
24 WOULD HAVE SEEN AARON AND I WOULD HAVE TRIED TO RUN BACK TO
25 MY VEHICLE TO GET A GUN I WOULD HAVE NEVER FOUND HIM AGAIN.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

605

1 ALL THOSE PEOPLE OUT THERE IT WOULD HAVE TOOK ME AT LEAST
2 10 MINUTES TO GET BACK TO THE CAR.

3 Q MY QUESTION WAS IF YOU NEVER TALKED TO TIM
4 SMITH HOW IS IT THAT HE KNEW YOUR GUN WAS IN THE CAR WHEN
5 NOBODY FROM THE STATE, WHEN THE POLICE, NOTHING IN YOUR
6 DISCOVERY SAID ANYTHING ABOUT YOU HAVING A GUN BECAUSE THIS
7 IS THE FIRST DAY WE LEARNED ABOUT IT? HOW IS IT THAT IF
8 TIM SMITH NEVER TALKED TO YOU ABOUT ANY OF THIS STUFF HE
9 KNEW THAT? HOW DID HE KNOW THAT?

10 A MA'AM, I DON'T KNOW HOW HE PUT THAT STORY
11 TOGETHER.

12 Q THIS LETTER TO TRILL YOU WRITE?

13 A YES, MA'AM.

14 Q YOU SAID YOU COULDN'T SEND THE 41 PAGES OF
15 BIRD'S STATEMENT, WHY DID HE WANT BIRD'S STATEMENT IN
16 PARTICULAR?

17 A HE WANTED EVERYBODY'S STATEMENTS.

18 Q BUT YOU DON'T TALK ABOUT EVERYBODY'S
19 STATEMENTS, YOU TALK ABOUT BIRD'S STATEMENT?

20 A YEAH, HE REALLY WANTED TO READ WHAT BIRD
21 SAID.

22 Q BECAUSE BIRD WAS IN YOUR GANG, RIGHT?

23 A YES, MA'AM.

24 Q AND HE WAS NOW, YA'LL THOUGHT HE WAS A
25 SNITCH; IS THAT CORRECT?

1 A NO, MA'AM, HE WAS IN DISBELIEF FROM HOW
2 THIS MAN WOULD JUST, JUST ULTIMATELY JUST DISRESPECT LIKE
3 THAT.

4 Q BECAUSE HE SNITCHED?

5 A NO, MA'AM.

6 Q ARE YOU TELLING ME IN EVERYTHING THAT
7 YOU'VE WRITTEN YOU HAVE NEVER CALLED BIRD A SNITCH?

8 A BIRD HAS TURNED PEOPLE IN IN THE PAST ON
9 THINGS.

10 Q AND HE TURNED YOU IN, RIGHT?

11 A HE GAVE POLICE MY NAME.

12 Q AND THAT MAKES HIM A SNITCH, RIGHT?

13 A NOT NECESSARILY, MA'AM, MAKES HIM A DIRTY
14 GUY.

15 Q NOW YOU DON'T SAY I CAN'T SEND BIRD'S
16 STATEMENT AND I'M JUST GOING TO SEND YOU A COUPLE OF
17 PICTURES BECAUSE THIS IS ALL I CAN SEND? YOU SAID I AM
18 SENDING AARON'S DEAD ASS AND YOU SENT ONE PAGE, YOU SENT
19 ONE PAGE OF PAPER, ONE PICTURE?

20 A YES, MA'AM.

21 Q YOU HAD A LOT OF PICTURES IN YOUR
22 DISCOVERY, DIDN'T YOU?

23 A YES, MA'AM.

24 Q YOU HAD SOME OF THE BOULEVARD?

25 A YES, MA'AM.

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

607

1 Q YOU HAD SOME OF THE SHELL CASINGS THAT WERE
2 TAKEN, RIGHT?

3 A YES, MA'AM.

4 Q YOU DIDN'T SEND HIM THOSE, DID YOU?

5 A HE SPECIFICALLY REQUESTED HE WANTED THE
6 GUYS STATEMENTS AND THE PICTURES OF AARON.

7 Q SO THE ONLY THINGS YOU SENT HIM WAS AARON'S
8 AUTOPSY PICTURE?

9 A YES, MA'AM, AND I ---

10 Q YOU DID WRITE THAT'S AARON'S DEAD ASS,
11 RIGHT?

12 A YES, MA'AM.

13 Q NOW MS. PRATT ASKED YOU SPECIFICALLY ABOUT
14 HOW YOU WERE MOVING AROUND THE JAIL. WHY WAS IT REALLY
15 THAT YOU WERE MOVED AROUND THE JAIL SO MANY TIMES?

16 A I WAS MOVED FOR NOT SIGNING WRITE UPS. I
17 WAS MOVED CAUSE I REQUESTED TO BE MOVED. I WAS MOVED CAUSE
18 POD SHUT DOWN.

19 Q YOU GOT A LOT OF WRITE UPS, DIDN'T YOU?

20 A OH, YES, MA'AM.

21 Q SO YOU HAD SOME TROUBLE AT THE JAIL?

22 A ONLY WHEN I REALLY WANTED IT.

23 Q YOUR RAP LYRICS NONE OF IT IS BASED ON LIFE
24 EXPERIENCES?

25 A SOME AND SOME NOT.

1 Q OKAY, SO SOME OF THIS THAT YOU WRITE IS IN
2 FACT THINGS THAT YOU HAVE EXPERIENCED, CORRECT?

3 A SOMEWHAT.

4 Q SO YOUR HOMIE G-BLACK WAS IN FACT KILLED?

5 A YEAH, HE WAS MURDERED.

6 Q OKAY, AND YOU ADMIT IT NOW THAT YOU CARRY A
7 GUN, RIGHT?

8 A YEAH, I CARRY A GUN.

9 Q LET ME ASK YOU THIS, "MURDER WAS THE CASE
10 REVENGE FOR G-BLACK LOOK IN MY EYES YOU CAN SEE MY PAIN,
11 HEART TURNED COLD I'LL PUT A BULLET STRAIGHT IN YOUR BRAIN,
12 YOU SAY I'M A NOBODY, WHY DO HOMICIDE UNIT BE SCREAMING MY
13 NAME," ALL OF THAT IS PRETTY MUCH TRUE, ISN'T IT?

14 A NO, MA'AM.

15 MS. ELDER: ONE MOMENT, YOUR HONOR.

16 Q (CONTINUING) WHAT DO YA'LL DO TO SNITCHES?

17 A WHAT DO WE DO TO SNITCHES?

18 Q IN GANGS WHAT DO YOU DO TO SNITCHES?

19 A WELL I DON'T KNOW WHAT PEOPLE WOULD THINK
20 WOULD HAPPEN TO THEM BUT I KNOW QUITE A FEW OF THEM THAT'S
21 STILL WALKING AROUND IN THE NEIGHBORHOOD.

22 Q BUT SOME OF THEM GET TAKEN OUT BY THEIR
23 GANG, RIGHT?

24 A MAYBE IN CERTAIN AREAS.

25 Q AND WERE YOU GOING TO GIVE TRELL BIRD'S

MR. SPEARS - CROSS EXAMINATION BY MS. ELDER

609

1 STATEMENT TO SHOW THAT HE WAS A SNITCH, DISRESPECT, HE
2 DISRESPECTED YOUR GANG?

3 A NO.

4 Q HE NEEDED TO BE TAKEN CARE OF?

5 A I WAS GOING TO GIVE HIM THE STATEMENT SO
6 HE'LL BE AWARE OF EXACTLY WHAT HE SAID.

7 Q YOU IN FACT MADE THREATS AGAINST BIRD WHEN
8 YOU FOUND OUT HE WAS GOING TO TESTIFY AGAINST YOU, DIDN'T
9 YOU?

10 A NO, MA'AM.

11 Q YOU IN FACT MADE THREATS AGAINST A LOT OF
12 PEOPLE IN THIS CASE WHEN YOU FOUND OUT THIS WAS GOING TO
13 TRIAL, DIDN'T YOU?

14 A NO, MA'AM.

15 Q NEVER MADE A THREAT?

16 A NO, MA'AM.

17 Q NOBODY'S LIFE?

18 A NO, MA'AM.

19 Q NOT BIRD'S?

20 A NO, MA'AM.

21 Q NONE OF THE WITNESSES?

22 A NO, MA'AM.

23 Q AND NOT MINE?

24 A NO, MA'AM.

25 MS. ELDER: NO OTHER QUESTIONS, YOUR HONOR.

MR. SPEARS - REDIRECT EXAMINATION BY MS. PRATT

610

1 THE COURT: ANY FOLLOW UP, MS. PRATT?

2 MS. PRATT: JUST A TOUCH.

3 REDIRECT EXAMINATION

4 BY MS. PRATT:

5 Q WHAT MS. ELDER SAID ABOUT THIS EVERYBODY
6 HAVING GUNS, THAT'S NOT THE FIRST TIME THAT THAT'S ACTUALLY
7 COME OUT IN THIS CASE, IS IT?

8 A NO, MA'AM.

9 Q I MEAN THAT WAS IN YOUR DISCOVERY, WASN'T
10 IT?

11 A YES, MA'AM.

12 Q IT WAS IN JUNE'S STATEMENT?

13 A YES, MA'AM.

14 Q AND HE SAID EVERYBODY HAD GUNS, DIDN'T HE?

15 A YES, MA'AM.

16 Q AND DO YOU REMEMBER HIM SAYING IN HIS
17 STATEMENT THAT I DON'T KNOW IF THEY BROUGHT THEM TO THE
18 BEACH?

19 A YES, MA'AM.

20 Q OKAY, SO IT'S NOT THE FIRST TIME THAT
21 ANYBODY SAID THAT EVERYBODY HAD GUNS OR CARRIED, IS IT?

22 A NO, MA'AM.

23 Q OKAY, AND YOU WERE TALKING ABOUT A DROP OF
24 BLOOD AS OPPOSED TO A TEARDROP?

25 A YES, MA'AM.

MR. SPEARS - REDIRECT EXAMINATION BY MS. PRATT

611

1 Q A TEARDROP YOU SAID WOULD NORMALLY BE AT
2 THE EYE?

3 A YEAH, I WOULD HAVE PUT IT ON THE, G WOULD
4 HAVE PUT IT ON HIS RIGHT SIDE OF HIS EYE.

5 Q AND THAT WOULD MEAN THAT HE'D KILLED
6 SOMEBODY?

7 A YOU KILLED SOMEBODY.

8 Q AND WOULD THAT NORMALLY BE OPEN LIKE --

9 A IT WOULD HAVE BEEN CLOSED UP OR OPEN.

10 Q OKAY, AND WHAT DID YOU PUT ON YOUR ARM?

11 A I PUT A DROP OF BLOOD, I DIDN'T DESIGN THE
12 TATTOO, THE INDIAN GUY DESIGNED IT BUT IT'S A DROP OF BLOOD
13 FOR THE SHED IN THE STRUGGLE.

14 Q BLOOD SHED IN THE STRUGGLE?

15 A YES, MA'AM.

16 MS. PRATT: OKAY, I THINK THAT'S ALL I'VE GOT,
17 THANK YOU.

18 THE COURT: MS. ELDER?

19 MS. ELDER: NO FURTHER QUESTIONS, YOUR HONOR.

20 THE COURT: YOU MAY STEP DOWN, SIR. IS THAT THE
21 DEFENSE?

22 MS. PRATT: THAT WOULD BE THE DEFENSE CASE, YOUR
23 HONOR.

24 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF
25 THE JURY, I HAVE BEEN WORKING DURING THIS TRIAL AND YOU MAY

1 HAVE SEEN MS. HALL ON HER COMPUTER. WHAT WE WERE DOING
2 DURING THAT TIME WAS PREPARING A CHARGE ON THE LAW IN THIS
3 CASE. I LIKE TO HAVE MY CHARGES ON THE LAW PREPARED SO
4 THAT I CAN SHARE THEM WITH THE ATTORNEYS BEFORE THEY DO
5 THEIR, THEIR CLOSING REMARKS SO THEY'LL UNDERSTAND WHAT I
6 DEEM TO BE A PROPER CHARGE ON THE LAW IN THIS CASE.

7 NOW WHAT I PROPOSE TO DO AT THIS TIME IS TO, TO
8 GO OVER THOSE CHARGES WITH THE ATTORNEYS TO MAKE SURE THERE
9 ANY ADDITIONS THAT I NEED TO PUT IN OR DELETIONS THAT I
10 NEED TO MAKE AND WE'RE GOING TO BE DISCUSSING FINAL
11 ARGUMENTS. SO WHAT I WANT TO DO AND I KNOW IT'S A LITTLE
12 BIT EARLY THIS MORNING BUT IN THE INTEREST OF TIME WHY
13 DON'T WE, IT'S 11:30, WHY DON'T I LET YOU GO TO LUNCH UNTIL
14 1:00, OKAY, AND WHEN YOU COME BACK AT 1:00 I WILL HAVE ALL
15 THESE MATTERS TAKEN CARE OF AND WE CAN GO DIRECTLY INTO
16 CLOSING REMARKS.

17 NOW LET ME TELL YOU ONE OTHER THING THAT I DO, I
18 REALLY DON'T KNOW ANY OTHER JUDGES THAT DO IT. I GUESS IT
19 JUST CREATES WORK FOR ME BUT MS. HALL AND I ALWAYS PREPARE
20 A WRITTEN TRANSCRIPT OF THE CHARGE WHICH I WILL GIVE YOU ON
21 THE LAW. THE LAW IN THESE CASES AND IN FACT MOST CASES IS
22 VERY COMPLEX AND WHERE I CERTAINLY DON'T EXPECT A JURY OF
23 LAYPERSONS TO UNDERSTAND EVERYTHING THAT I, I CHARGE THEM
24 OR TO REMEMBER IT ALL CAUSE THEY'RE QUITE LENGTHY, SO WHAT
25 I DO IS I PREPARE A TRANSCRIPT AND THE SUPREME COURT HAS

1 SAID THAT IT'S ALL RIGHT FOR ME TO DO THAT AND GIVE YOU
2 THAT TRANSCRIPT TO USE IN YOUR JURY ROOM AS LONG AS I GIVE
3 YOU MY CHARGE DIRECTLY VERBATIM FROM MY TRANSCRIPT AND
4 THAT'S WHAT I WILL DO FOR YOU AT THE END OF THIS TRIAL.
5 IT'S A LITTLE DIFFERENT FROM WHAT THE USUAL YOU MIGHT HAVE
6 EXPECTED OR, OR EXPERIENCED IF YOU WERE IN TRIALS BUT IT'S
7 JUST MY POLICY. I FIND THAT IT REALLY IS HELPFUL FOR THE
8 JURIES WHEN I DO THAT, SO WHEN WE COME BACK WE'LL HAVE
9 EVERYTHING READY TO GO FOR YOU.

10 AS I SAID I HAVE MY CHARGES, I'M GOING TO REVIEW
11 THEM ONE MORE TIME WITH THE ATTORNEYS AND TAKE UP ANY FINAL
12 MOTIONS AND WHEN YOU GET BACK AT 1:00 WE'LL BE READY TO GO
13 WITHOUT DELAY, OKAY. THANK YOU VERY MUCH. MR. ROPP, TAKE
14 YOUR JURY OUT.

15 (WHEREUPON, THE JURY WAS EXCUSED FOR LUNCH AT
16 11:30 A.M.)

17 THE COURT: MS. PRATT, I ASSUME YOU WANT TO
18 RENEW YOUR MOTION?

19 MS. PRATT: YES, YOUR HONOR, I RENEW ALL THE
20 MOTIONS THAT I'VE MADE IN THIS TRIAL IN REGARDS TO EVIDENCE
21 OR OTHER MATTERS INCLUDING MY MOTION FOR A DIRECTED
22 VERDICT.

23 THE COURT: ANY ADDITIONAL GROUNDS THAN THOSE
24 PREVIOUSLY STATED?

25 MS. PRATT: NO, YOUR HONOR.

1 THE COURT: ALL RIGHT, AND FOR THE SAME REASONS
2 I WOULD RESPECTFULLY DENY YOUR MOTIONS.

3 LADIES, I HAVE PREPARED FOR YOU COPIES OF THE
4 TRANSCRIPT OF MY CHARGE FOR EACH ONE OF YOU TO USE AND
5 REVIEW. I THINK IT WILL BE HELPFUL TO YOU DURING YOUR
6 CLOSING ARGUMENTS.

7 I WANTED TO DISCUSS WITH YOU THE VERDICT FORM.
8 WE HAVE FOUR CHARGES. WOULD YOU PREFER THAT WE HAVE FOUR
9 SEPARATE VERDICT FORMS OR WOULD YOU LIKE FOR CLAIRE TO SORT
10 OF CRAFT THIS IN SOME WAY THAT WE HAVE ALL THE VERDICTS ON
11 ONE PAGE?

12 MS. ELDER: YOUR HONOR, I'D PREFER SEPARATE
13 VERDICT FORMS.

14 THE COURT: ALL RIGHT, VERY WELL, THAT'S NOT A
15 PROBLEM, IN FACT IT'S PROBABLY THE BETTER WAY TO DO IT.
16 CLAIRE, IF YOU WOULD JUST DO A STANDARD, AND A VERDICT FORM
17 WILL SAY NOTHING BUT AS TO THE CHARGE OF ASSAULT AND
18 BATTERY WITH INTENT TO KILL, I THINK IT WOULD PROBABLY BE
19 BETTER IF WE PUT IN THE NAME OF THE VICTIM AS TO EACH
20 INDICTMENT.

21 MS. ELDER: YES, SIR.

22 THE COURT: WE'LL PUT THE INDICTMENT NUMBER AT
23 THE TOP BUT I'M SURE THE JURY CAN'T KEEP UP WITH THAT, PUT
24 THE INDICTMENT NUMBER AND IN THE, THE ACTUAL VERDICT FORM
25 I'LL SAY AS TO THE CHARGE OF ASSAULT AND BATTERY WITH

1 INTENT TO KILL WE, WITH INTENT TO KILL KRYSTAL FOWLER, WE
2 THE JURY UNANIMOUSLY FIND THE DEFENDANT, AND WE'LL HAVE
3 GUILTY, NOT GUILTY, THEY CAN CIRCLE ONE OR THE OTHER AND
4 WE'LL DO THAT ON EACH ONE OF THE THREE AND THE MURDER OF
5 AARON HAMMONDS WHATEVER, OKAY.

6 MS. ELDER: YES, SIR.

7 THE COURT: ALL RIGHT, AND THAT WILL BE
8 SUFFICIENT, DO YOU AGREE?

9 MS. PRATT: YES, SIR.

10 THE COURT: ALL RIGHT, ANYTHING FURTHER THAT WE
11 NEED TO TAKE UP BEFORE 1:00?

12 MS. ELDER: NO, SIR.

13 THE COURT: OKAY, LADIES, THANK YOU FOR MOVING
14 THIS ALONG. HOW LONG DO YOU ANTICIPATE YOU'LL NEED? I
15 DON'T WANT TO CRAMP YOU UP BUT WHAT ARE WE LOOKING AT, MS.
16 ELDER? I ASSUME YOU'RE GOING TO OPEN AND CLOSE?

17 MS. ELDER: NO, SIR, JUST CLOSE.

18 THE COURT: OKAY, YOU ARE GOING TO THEN ARGUE
19 FIRST, MS. PRATT?

20 MS. PRATT: YES, YOUR HONOR, ANTICIPATE, I AGREE
21 WITH YOU ON THE SERMON LENGTH 15 MINUTES TO 30 MINUTES OR
22 PEOPLE STOP LISTENING YOUR HONOR, SOMEWHERE IN THERE.

23 THE COURT: OKAY, AND HOW ABOUT YOU, MS. ELDER,
24 SOMETHING LIKE THAT?

25 MS. ELDER: YEAH, I USUALLY TRY TO STICK UNDER A

1 HALF AN HOUR, YOUR HONOR.

2 THE COURT: OKAY, SO WE DEFINITELY CAN GET THIS
3 INTO THE JURY'S HANDS ---

4 MS. ELDER: YES, SIR.

5 THE COURT: I WOULD ANTICIPATE THAT MY CHARGE
6 WILL TAKE ABOUT 30 MINUTES SO WE'LL HAVE IT TO THEM BY
7 2:30. OKAY, THANK YOU VERY MUCH.

8 MS. PRATT: THANK YOU, YOUR HONOR.

9 (WHEREUPON, COURT WAS RECESSED FOR LUNCH AND THE
10 FOLLOWING TAKES PLACE ON THE RECORD AFTER THE LUNCH
11 RECESS.)

12 THE COURT: ALL RIGHT, ANYTHING BEFORE THE JURY
13 COMES IN?

14 MS. ELDER: NO, SIR, YOUR HONOR.

15 THE COURT: LET THE RECORD REFLECT ATTORNEYS ARE
16 HERE AND SO IS THE DEFENDANT. MR. GREEN, WOULD YOU BRING
17 THE JURY IN?

18 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
19 1:14 P.M.)

20 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF
21 THE JURY, AS YOU KNOW ALL THE EVIDENCE IS IN IN THIS CASE
22 AND WE WILL NOW PROCEED WITH CLOSING ARGUMENTS. MS. PRATT
23 I BELIEVE WILL GO FIRST.

24 MS. PRATT: MAY IT PLEASE THE COURT?

25 THE COURT: YES.

CLOSING ARGUMENT

BY MS. PRATT:

LADIES AND GENTLEMEN, THE FIRST THING I WANT TO SAY IS I DON'T GET TO HAVE THE LAST WORD TODAY AND I'VE GOT A HUSBAND THAT THINKS I ALWAYS WANT TO HAVE THE LAST WORD, SO I WANT TO ASK YOU TO PLEASE CONSIDER AND REMEMBER SOME OF THE THINGS I'VE SAID THROUGHOUT AND AFTER BECAUSE MS. ELDER WILL GET THE CHANCE TO HAVE THE LAST WORD IN THE SITUATION.

DO YOU REMEMBER WHEN I FIRST WAS TALKING TO YOU IN THE OPENING AND I SAID THAT WHAT WE WERE LOOKING AT WAS A SITUATION OF WHAT YOU WOULD HEAR AND WHAT YOU WOULDN'T HEAR, WELL I THINK YOU AGREE THAT THAT'S EXACTLY WHAT'S GONE ON IN THIS CASE TODAY.

YOU HAVE A SITUATION WHERE YOU'VE HEARD SOME THINGS BUT THERE'S A LOT OF THINGS THAT JUST AREN'T THERE. FOR EXAMPLE, I TOLD YOU THAT THERE WOULD BE ONE GUN AND ONE SHOOTER AND NO OTHER FORENSICS AND THAT'S EXACTLY WHAT WE'VE GOT HERE.

I WANT YOU TO THINK IN TERMS OF THIS CASE AS BEING SIX, TWO, AND ONE. WE HAVE SIX INMATES, I THINK I CALLED THEM PERSONALITIES IN MY OPENING, SIX INMATES; WE'VE GOT TWO GIRLS THAT WERE AARON HAMMONDS GIRLFRIENDS, ONE OF WHOM IS NOW HIS BABY MAMA; AND WE'VE GOT ONE GUN, AND THAT'S HOW OUR NUMBERS SHAKE DOWN IN THIS CASE.

1 WE'VE GOT ONE GUN. WE KNOW THAT THERE WERE THREE
2 CASINGS AND, THERE WERE, I MEAN THREE BULLETS, EXCUSE ME,
3 AND EIGHT CASINGS AND THEY COULD SAY THAT IT WAS CONSISTENT
4 WITH EACH OTHER. WE DON'T HAVE A GUN SO SHE COULDN'T
5 SPECIFICALLY SAY THAT THE BULLETS CAME FROM THE SAME
6 CASING, BUT THEY WERE CONSISTENT AND THAT THAT INDICATED
7 THAT BASICALLY WE'RE TALKING ONE GUN AND IT WOULD MAKE NO
8 SENSE TO HAVE CASINGS THERE THAT DIDN'T MATCH THE BULLETS
9 THAT WERE IN THE VICTIM. THAT WOULDN'T FIT WITH WHAT THE
10 CASE WOULD BE ABOUT, SO WE HAVE THREE BULLETS CONSISTENT
11 WITH THE EIGHT CASINGS.

12 WE'VE GOT TWO FEMALES AND I DON T KNOW IF YOU
13 PICKED UP ON IT, IT WAS KIND OF INTERESTING TO ME THAT
14 WE'VE GOT ONE THAT SAID SHE WAS HIS GIRLFRIEND AND ONE THAT
15 SAID SHE WAS PREGNANT WITH HIS BABY AND BOTH OF THEM WERE
16 THERE THAT NIGHT WALKING WITH HIM SO I WONDER WHAT WAS
17 GOING ON THAT SITUATION BUT THE INTERESTING THING TO ME IS
18 THAT BOTH OF THEM SAID THAT THE SHOOTER HAD DREADS, BOTH OF
19 THEM, AND THEY DIDN'T HAVE ANY REASON TO SAY THAT THE
20 SHOOTER HAD DREADS OR NOT HAD DREADS. THERE'S NO REASON
21 FOR THEM TO BE LYING ABOUT IT CAUSE AFTER ALL THEY'RE THE
22 DECEASED'S WOMEN AND THEY SAID DREADS AND WHO IS THE ONLY
23 PERSON THAT WE HAVE OUT OF THESE THREE DEFENDANTS THAT HAD
24 DREADS. IT'S JEFFREY BETHEA, IT'S BIRD, AND BIRD TOLD YOU
25 HIMSELF THAT HE SAW THIS COMPOSITE AND HE CAME DOWN CAUSE

1 HE WAS GOING TO CLEAR HIS NAME, HE WAS GOING TO GET HIMSELF
2 OUT OF IT AND GO BACK UP TO NORTH CAROLINA. I THINK THAT'S
3 POWERFUL AND I HOPE THAT YOU'LL AS THE JUDGE TELLS YOU
4 ABOUT CREDIBILITY THAT YOU'LL THINK ABOUT THAT BECAUSE YOU
5 KNOW CREDIBILITY CAN BE JUDGED OR DECIDED IN A LOT OF WAYS.

6 YOU KNOW WE TALK ABOUT YOU USING YOUR COMMON
7 SENSE YOU KNOW HOW DO YOU TELL WHEN YOUR CHILDREN ARE
8 LYING. WHEN DO YOU EXPECT YOUR CHILDREN TO BE LYING. WELL
9 IF YOU WALK IN AND THE VASE IS BROKEN ON THE FLOOR AND YOUR
10 CHILD'S STANDING RIGHT BESIDE IT YOU KNOW WHAT YOUR COMMON
11 SENSE TELL YOU. IF THEIR HAND IS IN THE COOKIE JAR AND
12 THEY CAN'T GET IT OUT BECAUSE THE COOKIES ARE IN THEIR HAND
13 YOU KNOW WHAT IT'S TELLING YOU.

14 COMMON SENSE WOULD TELL YOU THAT THOSE TWO GIRLS
15 HAD NO REASON TO FABRICATE THEIR STORY AND IT'S INTERESTING
16 THAT ONE OF THEM WAS THE STATE'S WITNESS AND ONE OF THEM
17 WAS MINE, COULDN'T EVEN SAY WELL THEY WERE BOTH DEFENSE
18 WITNESSES, THOUGH, DAH, DAH, DAH, YOU KNOW IT WAS SOMETHING
19 A LITTLE DIFFERENT THAN THAT.

20 THEN WE HAVE SIX INMATES OR SIX PERSONALITIES AND
21 I WANT TO LOOK AT EACH ONE OF THEM BECAUSE I THINK IT'S
22 PRETTY IMPORTANT TO SEE EACH ONE OF THEM DIFFERENTLY. WHEN
23 YOU EVALUATE TESTIMONY YOU LOOK AT WHETHER SOMEBODY'S GOING
24 TO BE BIASED. YOU LOOK AT WHETHER OR NOT THEY'VE GOT SOME
25 REASON TO LIE OR SOME REASON TO TELL THE TRUTH, RIGHT, AND

1 YOU SPECIFICALLY LOOK AT WHAT A PERSON MIGHT HAVE TO GAIN
2 BY TESTIFYING TODAY, WHAT THEY MIGHT HAVE TO LOOSE BY
3 TESTIFYING TODAY, WHETHER THEY'VE GOT A REASON TO LIE, A
4 REASON TO TELL THE TRUTH, AN OPPORTUNITY TO SPEAK WITH THE
5 DEFENDANT, AND A REASON THAT THE DEFENDANT WOULD TALK TO
6 THEM ABOUT SOMETHING, AND WE'VE GOT THAT ON ALL SIX OF
7 THESE INMATES.

8 THE FIRST INMATE THAT YOU HEARD FROM WAS
9 NATHANIEL DOUGLAS AND I'LL SAY THAT THAT BOY HAD A LOT TO
10 LOOSE. HIS CHARGES ARE STILL PENDING. HE HAS NO DEAL WITH
11 THE STATE. HE COULD HAVE DECIDED NOT TO TESTIFY AT ALL
12 BECAUSE HIS CHARGES ARE PENDING AND HE MAY STILL COME BACK
13 UP FOR TRIAL. I THINK HE SAID THAT, HE DOESN'T KNOW, BUT
14 HE GOT UP HERE AS THE STATE'S WITNESS AND HE TOLD YOU WHAT
15 HAPPENED AND HE TOLD YOU ABOUT THE ARGUMENT WITH BIRD AND
16 THE BOYS FROM CONWAY AND HOW HE WAS TRIPPING, TOLD YOU
17 ABOUT THE ARGUMENT WITH BIRD AND LEMARK AND HOW HE WAS
18 FREAKING OUT AND WHAT HE WAS SAYING AND THEN JUNE TOLD YOU
19 HE TURNED AROUND AND WALKED AWAY, AND I THINK EVERYBODY
20 ACTUALLY AGREED ON THAT TODAY AND I HOPE THAT MAKES A
21 DIFFERENCE FOR MR. DOUGLAS BECAUSE NOT ONLY DID HE SAY HE
22 TURNED AROUND AND WALKED AWAY BUT AFTER GIVING TWO
23 STATEMENTS SAYING HE WAS THERE BIRD SAYS HE WALKED AWAY AND
24 OBVIOUSLY BRIAN SAID HE WALKED AWAY CAUSE HE WALKED AWAY
25 BEFORE BRIAN DID.

1 NATHANIEL DOUGLAS TOLD YOU SOME OTHER THINGS. HE
2 TOLD YOU ABOUT A COMMENT BY BETHEA THE NEXT DAY TALKING
3 ABOUT IT, YOU KNOW, IT'S ON THE NEWS, THEY JUST HAD A
4 SHOOTING THE NIGHT BEFORE, IT'S NOT LIKE NOBODY'S GOING TO
5 BE TALKING ABOUT IT. I MEAN LET'S GET REAL THEY WOULDN'T
6 BE TALKING ABOUT MEMORIAL DAY, THEY'D BE TALKING ABOUT
7 SOMEBODY BETTING SHOT THE NIGHT BEFORE, AND HE SAYS THAT
8 NOT ONLY WAS BIRD SAYING AARON HAMMONDS IS SMOKED SAUSAGE
9 HE'S DANCING AROUND GLOATING ABOUT IT. BETHEA SAID THEY
10 WEREN'T EVEN TALKING ABOUT THE SHOOTING AT THE BARBECUE,
11 THAT MAY DEFY BELIEF.

12 BETHEA, NATHANIEL DOUGLAS TOLD YOU THAT THEY CAME
13 DOWN, JUNE AND BOS CAME DOWN TOGETHER AND HE TOLD YOU THERE
14 WAS NO PLAN. HE TOLD THERE WASN'T ANY CONSPIRACY OR SOME
15 FANCY PHONE CALL GET DOWN THERE AND LET'S KILL AARON. HE
16 TOLD YOU THAT. HE TOLD YOU THEY DECIDED TO COME DOWN TO
17 THE BEACH, THEY WERE CHASING WOMEN, THAT WAS WHAT THEY WERE
18 HERE FOR.

19 HE ALSO TOLD YOU THAT THEY SEARCHED HIS ROOM AND
20 IF YOU REMEMBER DETECTIVE HULL TOLD YOU THAT THEY SEARCHED
21 NATHANIEL DOUGLAS' ROOM AND THEY SEARCHED BRIAN SPEARS
22 ROOM, THEY DIDN'T SEARCH JEFFREY BETHEA.

23 NOW JEFFREY BETHEA WAS THE NEXT INMATE AND THIS
24 MAN HAS A LOT TO GAIN BY TESTIFYING. REMEMBER WE TALKED
25 ABOUT THE PROFFER AGREEMENT AND THE PROFFER AGREEMENT IS IN

1 EVIDENCE HERE. THE PROFFER AGREEMENT, IF I CAN LAY MY HAND
2 ON IT, WELL YOU GET TO LOOK AT IT SO I'M NOT GOING TO WORRY
3 ABOUT IT, I CAN TELL YOU WHAT IT SAYS. THE PROFFER
4 AGREEMENT SAYS THAT HE IS PLEADING GUILTY TO VOLUNTARY
5 MANSLAUGHTER FOR A NEGOTIATED 20 YEARS AND REMEMBER I ASKED
6 HIM SPECIFICALLY HE'S UP FOR MURDER WHAT COULD HE GET FOR
7 THAT, HE COULD GET LIFE. LIFE MEANS LIFE, IT MEANS YOU DIE
8 IN PRISON. HE COULD GET 20 YEARS FOR EACH ABIK CONSECUTIVE
9 ALTHOUGH I DON'T KNOW HOW YOU SERVE LIFE PLUS 60 BUT WE'VE
10 SEEN LIFE PLUS SOMETHING, SO HE HAD A LOT TO LOSE. HE
11 COULD HAVE GOTTEN AN ESTIMATED 130 YEARS AND HE GETS 20 AND
12 AFTER HE FINISHES SERVING WHATEVER PART OF THAT HE HAS TO
13 SERVE HE'LL BE BACK OUT ON THE STREET. HE'LL BE ABLE TO
14 SEE HIS CHILDREN. HE'LL BE ABLE TO SEE HIS GRANDCHILDREN.
15 HE'LL BE ABLE TO EAT MCDONALDS OR A STEAK. HE HAS A LOT TO
16 GAIN BY DOING THIS AND YOU NOTICE WHAT HE DID RIGHT FROM
17 THE VERY BEGINNING. FROM THE VERY BEGINNING HE WAS GOING
18 TO PUT SOMEBODY ELSE IN IT. HE SAID IT IN THE IN CAR VIDEO
19 THAT HE WAS GOING TO COME DOWN HERE, HE HAD BABIES, HE HAD
20 THIS OR THAT HE WAS GOING TO TELL THEM SO THAT HE COULD GO
21 BACK HOME. HE KNEW HE HAD TO DO THAT. I MEAN AFTER ALL HE
22 MATCHED THIS. HE KNEW THAT IT WAS A MATTER OF TIME BEFORE
23 THESE FINE DETECTIVES OVER HERE WOULD GET HIS NAME OUT OF
24 THE OFFICERS IN LUMBERTON AND COME AND PICK HIM UP SO HE
25 MIGHT AS WELL JUST COME DOWN HERE AND HE DID GO TO

1 FAYETTEVILLE FIRST.

2 NOW HE TOLD YOU THAT IT WASN'T THAT HE WAS
3 LEAVING BUT HE WENT SOMEWHERE FIRST AND THEN HE DECIDED TO
4 COME DOWN AND TALK AND HIS FIRST STATEMENT HE TELLS YOU HE
5 HAD NOTHING TO DO WITH IT, RIGHT, IT'S ALL BOS.

6 SECOND STATEMENT SUDDENLY HE'S AN ACCESSORY. HE
7 MIGHT HAVE, MIGHT HAVE LEFT OUT SOMETHING, MIGHT HAVE LEFT
8 OUT THAT HE WAS AN ACCESSORY. LET'S SEE HOW WAS HE AN
9 ACCESSORY, HE IN HIS STATEMENT TO DETECTIVE HULL TOLD HIM
10 HE TOLD THOSE BOYS TO KILL AARON.

11 NOW THE SOLICITOR WANTS YOU TO BELIEVE THAT
12 JEFFREY BETHEA IS ALL TALK BUT IF HE'S ALL TALK HOW DID HE
13 GET TO BE PRINCE. HOW DID HE GET TO BE OOG.

14 JEFFREY BETHEA WAS THE ONE WHO WAS THERE WHEN
15 TURK DIED. JEFFREY BETHEA WAS THE ONE WHO WAS BEING
16 FEELING THAT HE WAS RESPONSIBLE FOR TURK'S DEATH. HE WAS
17 THE ONE THAT HAD A REASON TO DO ANYTHING AT ALL TO AARON
18 HAMMONDS.

19 AND THEN WE GET TO TIMOTHY SMITH. TIMOTHY SMITH
20 WOULD HAVE YOU BELIEVE THAT BECAUSE HE'S WORRIED ABOUT HIS
21 GRANDCHILDREN HE DOESN'T WANT THEM IN A SITUATION THAT
22 MIGHT BE DANGEROUS. HE NEEDS TO COME TO THE SOLICITOR'S
23 OFFICE AND TELL THEM SOMETHING. TIMOTHY SMITH HAS A RECORD
24 THAT GOES ALL THE WAY BACK TO 1995 FOR LYING AND STEALING,
25 PUBLIC ASSISTANCE FRAUD, FOOD STAMP FRAUD, LARCENY,

1 ALLUDING ARREST, PROBATION VIOLATION, FAILURE TO APPEAR,
2 CONSPIRACY TO POSSESS STOLEN GOODS, LARCENY OF A MOTOR
3 VEHICLE, POSSESSION OF STOLEN GOODS, B&E, LARCENY AFTER
4 B&E, POSSESSION OF A FIREARM, TWO, COUNT THEM, TWO ALLUDING
5 ARREST, AND THEN B&E LARCENY AND LARCENY AFTER BREAK IN.

6 NOW HE TOLD US ON THE WITNESS STAND THAT HE'D
7 ONLY EVER SERVED 15 MONTHS IN JAIL WITH ALL THAT STUFF
8 SINCE 1995, 15 MONTHS IN JAIL. THAT'S A YEAR AND THREE
9 MONTHS OVER 12 DIFFERENT TYPES OF CHARGES. YOU THINK HE
10 MIGHT KNOW HOW TO WORK THE SYSTEM. YOU THINK HE MIGHT KNOW
11 WHAT HE HAS TO DO TO HELP CUT HIS TIME DOWN AND I REALIZE
12 THAT THE SOLICITOR DIDN'T MAKE A PROFFER WITH HIM OR MAKE A
13 DEAL WITH HIM BUT SHE DID SOMETHING THAT HE KNEW WOULD HELP
14 HIM OUT. SHE GAVE HIM A PR BOND SO THAT HE COULD GO BACK
15 TO NORTH CAROLINA AND DEAL WITH HIS NORTH CAROLINA CHARGES.
16 NOW I AM SURE THAT IN HIS LITTLE HEART OF HEARTS HE FIGURED
17 HE WAS GOING TO DO A LITTLE BIT OF TIME ON THAT STILL BE
18 OUT ON THAT PR BOND AND I DON'T KNOW MAYBE ALLUDE ARREST OR
19 FAIL TO APPEAR AND WE'D NEVER HAVE HIM BACK HERE TO DEAL
20 WITH OUR CHARGES CAUSE A PR BOND WHAT'S THERE TO BRING HIM
21 BACK.

22 BUT THAT BEING ASIDE LET'S LOOK AT SOME OTHER
23 THINGS IN REGARDS TO TIMOTHY SMITH. THERE WAS NO TAPE, I
24 GOT NO TRANSCRIPT. THERE'S NOTHING WHERE WE CAN SAY WHAT
25 HE REALLY SAID THE FIRST TIME HE TALKED TO DETECTIVE HULL

1 AT THE HOSPITAL OR ANY OTHER TIME THAT HE MIGHT HAVE TALKED
2 TO THE DETECTIVE OR THE SOLICITOR IN PREPARATION FOR THIS
3 TRIAL. WE'VE GOT NOTHING THAT WE COULD LOOK AT TO SEE WHAT
4 HE ACTUALLY SAID SO YOU DON'T KNOW IF HE CHANGED HIS STORY
5 OR NOT, AND I'M NOT TRYING TO SAY, AND PLEASE DON'T GET ME
6 WRONG, I AM NOT SAYING THAT MS. ELDER OR THESE DETECTIVES
7 TOLD HIM WHAT TO SAY BECAUSE I KNOW THESE PEOPLE, FOR 20
8 YEARS I KNOW THEM, THEY WOULDN'T DO THAT, BUT I BELIEVE
9 TIMOTHY SMITH KNOWS WHAT THEY NEEDED TO HEAR. I BELIEVE
10 HE'S BEEN IN WITH ENOUGH INMATES WITH ENOUGH CHARGES OVER
11 THE LAST 15 YEARS TO KNOW WHAT THEY NEED FOR MURDER. THEY
12 NEED A PLAN AND THEY NEED A WEAPON AND HE WAS MORE THAN
13 HAPPY TO PUT THAT IN.

14 NOW BRIAN TOLD YOU ABOUT THE WAY THAT IT WORKS IN
15 THEIR CELLS AND I HOPE YOU COULD IMAGINE HAVING NINE PEOPLE
16 IN ABOUT HALF YOUR JURY BOX. I GUESS YOU'VE GOT EIGHT
17 THERE RIGHT NOW SO PICTURE NINE 19 HOURS OUT OF A DAY.
18 YOU CAN'T PUT YOUR STUFF ANYWHERE. IT'S EASY TO GET AT IT
19 IF PEOPLE ARE INTERESTED. MR. SMITH HAD AMPLE OPPORTUNITY
20 TO LOOK AT THINGS. HE HAD AMPLE OPPORTUNITY TO TRY AND
21 PICK BRIAN'S BRAIN TO GET THINGS THAT HE MIGHT NEED TO HELP
22 HIMSELF.

23 HE SAYS HE'S WORRIED ABOUT HIS GRANDCHILDREN,
24 WELL WAS HE WORRIED ABOUT HIS GRANDCHILDREN WHEN HE STOLE
25 THE CAR. WAS HE WORRIED ABOUT HIS GRANDCHILDREN WHEN HE

1 BROKE INTO THE HOUSE OR ALLUDED ARREST OR COMMITTED THE
2 LARCENIES, NO, HE WASN'T. HE IS WHAT HE IS; HE'S A 45 YEAR
3 OLD WHITE MALE AND HE WANTS YOU TO BELIEVE THAT THIS 20-
4 YEAR-OLD YOUNG MAN WHEN HE WAS ARRESTED, 23-YEAR-OLD YOUNG
5 MAN NOW, FROM THE STREETS OF LUMBERTON WOULD JUST OPEN HIS
6 HEART AND TELL HIM THAT HE MURDERED SOMEBODY, AND IT'S A
7 GREAT STORY BUT I'LL POINT SOMETHING OUT TO YOU THAT YOU
8 NEED TO THINK ABOUT IT. YOU HAVE TO REMEMBER WHAT YOU
9 HEARD, YOU KNOW, CAUSE YOU, YOU WERE THE, YOU ARE THE
10 TRIERS OF THE FACT BUT HIS STORY DIDN'T MATCH WHAT BIRD
11 TOLD US.

12 IT DIDN'T MATCH WHAT BIRD TOLD US OR WHAT JUNE
13 SAID BECAUSE WHAT HE SAID WAS THAT BIRD WAS SUPPOSED TO
14 TAKE CARE OF IT AND DIDN'T AND THAT'S WHY BRIAN DID IT.
15 WELL THAT'S NOT WHAT EITHER ONE OF THOSE PEOPLE SAID.

16 AND THEN YOU HEARD FROM TWO OTHER, THREE OTHER
17 INMATES. THE FIRST ONE WAS MATTHEW JENKINS. MATTHEW
18 JENKINS CAME DOWN FROM NORTH CAROLINA, HE HAD NO DOG IN
19 THIS FIGHT, HE HAD NOTHING TO GAIN, NOTHING TO LOOSE. HE'S
20 SERVING A SENTENCE AND HE DIDN'T TRY AND LIE AND SAY IT WAS
21 THIS PERSON OR THAT PERSON. HE SIMPLY TOLD YOU HOW LEMARK
22 WAS WHEN HE CAME BACK, DIDN'T THINK THERE WAS ANY PROBLEM,
23 DIDN'T SEE THE SHOOTER, BUT WHEN HE SAW THE COMPOSITE HE
24 THOUGHT IT WAS BIRD.

25 AND YOU HAD DEANDRE BISHOP AND DEANDRE BISHOP HAD

1 A LOT TO LOSE TODAY AND HE AS HE TOLD YOU WAS AFRAID THAT
2 WHAT HE WAS DOING TODAY WAS GOING TO CAUSE HIM PROBLEMS
3 CAUSE IF YOU THINK ABOUT IT HE'S GOT A PROFFER WITH THE
4 STATE ON SOMETHING ELSE SO HE'S GOING TO BE TESTIFYING FOR
5 THEM AND HE NEEDS THEM TO CONSIDER WHAT HE'S DOING IN WHAT
6 THEY DO WITH HIM, BUT HE GOT UP ON THAT WITNESS STAND AND
7 HE TESTIFIED FOR US AND HE TOLD THE TRUTH.

8 HE TOLD YOU THAT HE HEARD BIRD SAY THAT HE DID IT
9 BUT HE WASN'T GOING DOWN ALONE. NOW WHY WOULD BIRD SAY
10 THAT, WELL THERE'S LOTS OF REASONS WHY PEOPLE SAY THINGS IN
11 PRISON. YOU KNOW THERE'S, THERE'S A REASON THAT HE MIGHT
12 HAVE TOLD HIM THAT BECAUSE THEY WERE IN THE SAME AREA AND
13 HE MIGHT HAVE WANTED TO SAY WHAT WAS GOING ON HIS CASE. HE
14 MAY HAVE THOUGHT THAT DEANDRE WAS JUST AS BAD A DUDE AS
15 HIM.

16 AND THEN BRIAN, BRIAN TESTIFIED, AND HE DIDN'T
17 HAVE TO, HE DIDN'T HAVE TO TELL YOU HIS SIDE OF THE STORY
18 BUT HE WANTED TO AND HE TOLD YOU ESSENTIALLY THE SAME THING
19 AS HIS SECOND STATEMENT. HE DIDN'T TELL YOU THE SAME
20 THINGS AS THE FIRST STATEMENT.

21 THE FIRST STATEMENT HE SAID I WASN'T EVEN THERE
22 BUT IN THE SECOND STATEMENT HE SAID I WENT, THIS IS WHAT I
23 DID. HE TOLD YOU ABOUT CARRYING A GUN AND THAT WAS
24 DANGEROUS THAT HE TOLD YOU THAT HE USUALLY CARRIES A GUN
25 BUT HE DIDN'T LIE ABOUT IT.

1 THE SOLICITOR ASKED WHY HE DIDN'T TURN THE GUN
2 OVER AND HAVE IT CHECKED. WELL I DON'T REMEMBER BETHEA
3 TURNING OVER HIS GUN AND HAVING IT CHECKED AND FRANKLY WITH
4 THE PASSAGE OF TIME IT'S THE SAME PROBLEM THAT WE HAD WITH
5 THE GUNSHOT RESIDUE. THE POLICE WOULDN'T HAVE KNOWN
6 WHETHER THAT, SOMEBODY HAD WASHED THEIR HANDS AND THAT'S
7 WHY THEY DIDN'T HAVE GUNSHOT RESIDUE AND THEY WOULDN'T HAVE
8 KNOWN IF IT WAS EVEN THE SAME GUN SO IT PROBABLY WOULDN'T
9 HAVE HAD ANY PROBATIVE VALUE AT ALL ANYWAY. HE TOLD YOU
10 WHAT HAPPENED IN THE CASE.

11 NOW BRIAN HAS BEEN CHARGED WITH MURDER AND THE
12 JUDGE IS GOING TO TELL YOU THE ELEMENTS OF THAT AND ASSAULT
13 AND BATTERY WITH INTENT TO KILL AND BASICALLY ASSAULT AND
14 BATTERY WITH INTENT TO KILL IS MURDER WITHOUT THE DEATH.
15 IT'S THE SAME KIND OF THING. HE'S GOING TO TALK TO YOU
16 ABOUT THE ELEMENTS. HE'S GOING TO TALK TO YOU ABOUT IDEAS
17 OF INTENT AND SO ON. THERE'S JUST ONE THING I WANT TO KIND
18 OF BRING TO YOUR MIND REAL QUICK CAUSE I KNOW YOU'RE
19 PROBABLY HOT AND TIRED AND EVERYTHING ELSE.

20 THEY MAY TRY TO ARGUE THAT BIRD AND BRIAN WERE
21 TOGETHER IN THIS AND, THEREFORE, EVEN YOU DON'T THINK THAT
22 BRIAN WAS THE SHOOTER THAT HE SHOULD BE CONVICTED BECAUSE
23 HE'S AN ACCOMPLICE. THE JUDGE IS ALSO GOING TO TELL YOU
24 THAT THE MERE PRESENCE OF A PERSON AT THE SCENE DOES NOT
25 MAKE THEM GUILTY. THERE HAS TO BE MORE THAN THAT. THERE

1 HAS TO BE A PLAN, A CONSPIRACY, SOME PUTTING TOGETHER THE
2 FACT THAT YOU WERE INVOLVED IN IT. JUST STANDING THERE
3 BESIDE SOMEBODY IS NOT ENOUGH AND THAT'S IMPORTANT FOR YOU
4 TO UNDERSTAND CAUSE A LOT OF PEOPLE GET THAT CONFUSED.

5 NOW THERE IS SOMETHING IN THE LAW THAT IS THE
6 PRESUMPTION OF INNOCENCE AND I TOLD YOU ABOUT THAT AND THE
7 JUDGE WILL TELL YOU ABOUT THAT. THAT MEANS THAT A
8 DEFENDANT IS PRESUMED INNOCENT AND THE STATE HAS TO REMOVE
9 THAT PRESUMPTION JUST LIKE TAKING THAT CHOIR ROBE OFF BY
10 GIVING YOU PROOF BEYOND A REASONABLE DOUBT.

11 A LOT OF TIMES WHAT WE DO WHEN WE LOOK AT PROOF
12 AND WHEN I TEACH ABOUT IT I TALK ABOUT THE FACT THAT YOU
13 HAVE TO HAVE BRICKS IN A WALL AND EACH BRICK IS A PIECE OF
14 EVIDENCE. FOR EXAMPLE IF WE HAD A BRICK THAT WAS DNA THAT
15 MATCHED THAT'D BE A BIG BRICK. IF WE HAD A BRICK THAT WAS
16 GUNSHOT RESIDUE THAT MATCHED THAT WOULD BE A BIG BRICK, AND
17 THEN WE'D BUILD ON TOP OF THAT AN I.D., A COMPOSITE, A
18 STATEMENT, A DESCRIPTION, AND WE'D HAVE A WALL AND WHEN YOU
19 GET TO A CERTAIN POINT YOU'RE BEYOND A REASONABLE DOUBT.

20 WHAT IS A REASONABLE DOUBT? IT'S A DOUBT THAT
21 WOULD MAKE A REASONABLE PERSON HESITATE TO ACT. HESITATE
22 TO ACT MEANS THAT YOU STOP AND YOU THINK ABOUT IT. YOU
23 DON'T GO THROUGH WITH WHAT YOU'RE THINKING ABOUT, OKAY.

24 YOUR VERDICT YOU, TO GIVE A VERDICT YOU NEED TO
25 BE CONVINCED BEYOND A REASONABLE DOUBT OF GUILT BEFORE YOU

1 CAN GIVE THAT VERDICT AND THAT VERDICT HAS TO BE UNANIMOUS,
2 NUMBER ONE. EACH OF YOU HAVE THE RIGHT TO ACT ON YOUR OWN
3 FEELINGS WHATEVER THEY ARE. YOU NEED TO USE YOUR OWN MORAL
4 CONVICTIONS. YOU DON'T HAVE TO COMPROMISE OR GIVE IN OR DO
5 ANYTHING ELSE THAT MIGHT CHANGE YOUR OPINION UNLESS YOU'RE
6 FIRMLY CONVINCED BY THE DISCUSSIONS THAT YOU HAVE BACK
7 THERE IN THE JURY ROOM, AND IF YOU HAVE A CONVICTION ABOUT
8 SOMETHING YOUR JURORS, YOUR FELLOW JURORS OUGHT TO RESPECT
9 YOUR CONVICTION ABOUT THAT.

10 THE LAST THING THAT I WANT TO LEAVE WITH YOU IS
11 THIS, IN MATH CLASS I KNOW YOU LEARNED A PLUS B EQUALS C.
12 WELL A IS THE COMPOSITE; B IS THE TWO GIRLS, THE TWO
13 GIRLFRIENDS OF AARON HAMMONDS; AND THERE'S C WHEN YOU ADDED
14 THIS WITH THEM WAS BIRD, JEFFREY BETHEA, BUT WHAT THAT ALSO
15 MEANS IN THAT A PLUS B PLUS C IS THAT BRIAN SPEARS IS NOT
16 GUILTY, THANK YOU.

17 THE COURT: THANK YOU. MS. ELDER?

18 MS. ELDER: THANK YOU, YOUR HONOR.

19 **CLOSING ARGUMENT**

20 **BY MS. ELDER:**

21 "I FIND TROUBLE WHEN I WANT IT," THAT PRETTY MUCH
22 SUMS IT UP. WE GOT THAT FROM BRIAN SPEARS LESS THAN AN
23 HOUR AGO, FIND TROUBLE WHEN I WANT IT. BOY HE SAID A MOUTH
24 FULL.

25 ON MAY 27TH, 2007, BRIAN SPEARS WAS OUT FOR

1 VENGENCE. HE WAS OUT FOR RETALIATION. HE BROUGHT THAT
2 QUEST FOR VENGENCE, RETALIATION INTO OUR STATE, INTO OUR
3 COUNTY, AND DOWN TO OUR BEACH.

4 I KNOW IT'S CONFUSING CAUSE IT WAS CONFUSING TO
5 ME, ALL THE STREET NAMES AND THE GANG SO I WROTE THIS UP SO
6 WE COULD GO THROUGH IT TO MAKE SURE WE ALL KNEW WHO WAS
7 WHO.

8 THERE IS ABSOLUTELY NO QUESTION BRIAN SPEARS,
9 JEFFREY BETHEA, NATHANIEL DOUGLAS WERE ALL IN A GANG. YOU
10 CAN DRESS IT UP; YOU CAN CALL IT ORGANIZATION; YOU CAN CALL
11 IT A CLUB; YOU CAN CALL IT WHATEVER YOU WANT TO, IT'S A
12 GANG, GANGSTER DISCIPLES, FOLK.

13 ERIC FLOYD WAS ALSO A MEMBER OF THAT GANG. HE
14 WENT BY THE STREET NAME G-BLACK. ERIC FLOYD WAS KILLED
15 SEVERAL YEARS BEFORE THIS INCIDENT AT THE BEACH. AARON
16 HAMMONDS WAS ARRESTED FOR IT. BRIAN SPEARS TOOK AARON
17 HAMMONDS OUT FOR THAT VERY REASON. HE HAD TO EXACT HIS
18 JUSTICE.

19 NOW BOS, BRIAN SPEARS, WAITED AND WAITED AND
20 WAITED CAUSE AARON HAMMONDS WAS IN PRISON, WAS IN JAIL, BUT
21 HE GOT OUT, WAS OUT FOR A FEW MONTHS. BOS TOOK HIS FIRST
22 OPPORTUNITY WALMART IN LUMBERTON, AGAIN A PUBLIC PLACE.
23 DON'T, IT DON'T MATTER WHO'S THERE, WENT TO WALMART IN
24 LUMBERTON TRIES TO TAKE AARON HAMMONDS OUT THERE. HE DOES
25 HIT HIM, SHOOTS HIM, BUT HE DOESN'T KILL HIM, BUT HE GETS

1 HIS OPPORTUNITY A LITTLE OVER A MONTH LATER ON THE
2 BOULEVARD, COMES DOWN HERE, HE LOADS UP WITH HIS BOYS, HE
3 AND JUNE, AND ISH, THEY GET IN THE CAR, ONE OTHER, GET IN A
4 CAR COME DOWN HERE. THEY DIDN'T HAVE ANY RESERVATIONS;
5 THEY DIDN'T HAVE A PLACE TO STAY. THEY CAME HERE ON
6 SATURDAY AFTERNOON. THEY GOT DOWN HERE ABOUT 8:00 AT NIGHT
7 AND THEY IMMEDIATELY START WALKING THE BOULEVARD.

8 NOW HE WAS IN RED. WELL NOW WAIT A MINUTE, HE'S
9 NOT A BLOOD, WONDER WHY HE'S WEARING RED. DANYELL HAMMONDS
10 WHO LIVES THERE, SHE'S KNOWS THE DEAL, SHE'S IN THE
11 COMMUNITY, SHE TOLD YOU WHY HE WAS WEARING RED. WHY WOULD
12 A RIVAL GANG MEMBER WEAR THE OTHER GANGS COLORS BECAUSE
13 THEY DO THAT WHEN THEY'RE GETTING READY TO DO SOMETHING, SO
14 ALL THE BOYS THAT BOS BROUGHT DOWN HAD ON RED, MET UP WITH
15 BIRD. THEY GOT DOWN TO THE BOULEVARD.

16 YOU HEARD THERE WAS SOME, THERE WAS SOME VERBAL
17 CONVERSATION BETWEEN JEFFREY BETHEA AND LEMARK IRONS AND
18 LEMARK IRONS WALKED OFF. IT'S DONE, BUT BRIAN SPEARS IS
19 ALL JACKED UP. HE MISSED AARON THE MONTH BEFORE. HE KNOWS
20 HE'S AT THE BEACH. HE'S SEEN HIM SEVERAL TIMES AND HE'S
21 PUMPING IT UP. "I'M GOING TO KILL HIM, WE'VE GOT TO DO
22 SOMETHING ABOUT THIS MAN, HE'S GOING TO TAKE US OUT, WE GOT
23 TO TAKE HIM OUT BEFORE HE TAKES US OUT. BIRD, MAN, WE GOT
24 TO DO SOMETHING, WE GOT TO DO SOMETHING," AND ALL THROUGH
25 HIS TRANSCRIPT BIRD TELLS YOU ON AT LEAST FOUR DIFFERENT

1 OCCASIONS THAT I READ OUT TO YOU BOS SAYING "I'M GOING TO
2 KILL THAT MOTHER FUCKER." BIRD SAYS "HEY, MAN, IF THEY
3 GOING TO GET US WE GOT TO GET THEM FIRST, LET'S GO."

4 HE GETS UP, GOES THAT WAY, THEY CROSS THE STREET,
5 AND THEY'RE GOING AFTER HIM. BIRD ADMITS "HEY, I WAS RIGHT
6 THERE WITH HIM. I'M GOING, I'M GOING, I'M GOING TO DO SOME
7 DAMAGE, BUT BEFORE I HAD THE CHANCE TO BOS TOOK CARE OF
8 IT." AND WHY DID BOS TAKE CARE OF IT, BECAUSE JUST ABOUT
9 EVERYBODY WHO GOT ON THAT STAND SAID BIRD'S A TALKER AND WE
10 ALL KNOW PEOPLE LIKE THAT, THEY TALK AND TALK AND TALK.
11 THEY TALK BIG, VERY RARELY DO THEY HAVE ANY FOLLOW THROUGH,
12 BOS KNEW THAT. BOS KNEW THAT BETHEA WAS NOT GOING TO TAKE
13 CARE OF AARON HAMMONDS SO HE PULLED OUT THAT GUN AND HE
14 FIRED THOSE SHOTS IN A PUBLIC PLACE WHERE THOUSANDS OF
15 PEOPLE WERE ON THAT BOULEVARD NOT CARING WHO HIS BULLET HIT
16 EXCEPT FOR ONE PERSON AARON HAMMONDS. HE KNEW HE WAS GOING
17 TO GET HIM. ALL THESE OTHER PEOPLE DON'T MATTER, THAT'S MY
18 TARGET.

19 NOW THE DESCRIPTION YOU'VE GOT TWO PEOPLE, BIRD
20 AND BOS, AND BIRD TELLS YOU, YEAH, I HAD DREADS, I WAS
21 WEARING BLACK. HOW MANY OTHER PEOPLE TOLD YOU HE WAS
22 WEARING BLACK. HE TOLD YOU NATHANIEL DOUGLAS TOLD YOU;
23 THEY BOTH TOLD YOU, WEARING BLACK. WHO WAS WEARING RED,
24 BOS SAID HE'S WEARING RED, BIRD SAID BOS WAS WEARING RED.
25 NATHANIEL DOUGLAS, BOS WAS WEARING RED. TWO GIRLS WHO GOT

1 UP ON THE STAND WHAT DID THEY TELL YOU THE SHOOTER WAS
2 WEARING, BOTH OF THEM HE WAS WEARING RED. BOTH OF THEM
3 SAID HE HAD A RED BANDANNA TIED AROUND HIS FACE. BOTH OF
4 THEM SAID THAT, RED BANDANNA.

5 BRITTNEY WHEN I ASKED ABOUT HEIGHT SHE SAID "WELL
6 I'M FIVE SIX, HE'S PROBABLY, HE WAS PROBABLY AN INCH OR TWO
7 TALLER THAN ME, MAKE HIM FIVE SEVEN, FIVE EIGHT, YOU GOT
8 TO, YOU GOT TO SEE BRIAN SPEARS AND YOU GOT TO SEE JEFFREY
9 BETHEA. JEFFREY BETHEA IS A BIG BOY. THERE AIN'T NO
10 MISTAKING HIM FOR FIVE SIX, FIVE SEVEN."

11 THERE IS A LOT OF MENTION ON THIS COMPOSITE AND I
12 WANT YOU TO THINK ABOUT WHAT YOU'VE HEARD ABOUT THIS
13 COMPOSITE, THE TESTIMONY THAT YOU'VE HEARD. EVERYBODY ON
14 THAT STAND SAID, NUMBER ONE, THIS IS A POSSIBLE SUSPECT.
15 DID YOU HEAR THEM SAY THIS IS THE SHOOTER? AND, NUMBER
16 TWO, THE PEOPLE SHE IDENTIFIED THAT DIDN'T SEE THE SHOOTING
17 ALL THEY SAID WAS, YEAH, LOOKS LIKE BIRD. WELL YOU KNOW
18 WHAT IT DOES LOOK LIKE BIRD BUT THINK ABOUT THIS, YOU TAKE
19 THIS BACK, SOMEBODY GAVE THIS AS A POSSIBLE DESCRIPTION OF
20 SOMEBODY WHO WAS THERE AT THE TIME OF THE SHOOTING.

21 YOU GOT TWO PEOPLE, TWO GIRLS, ONE BY THE STATE
22 ONE BY THE DEFENSE, THINK ABOUT WHAT THEY SAID, BOTH OF
23 THEM SAID RED BANDANNA ON THE FACE, SO TELL ME HOW WOULD
24 SOMEBODY GOING TO GIVE A COMPOSITE OF HIM HAVING A GOATEE
25 IF HE IN FACT HAD A RED BANDANNA ON HIS FACE. THIS IS NOT

1 THE SHOOTER. THIS IS SOMEBODY WHO'S STANDING BESIDE THE
2 SHOOTER AT THE TIME THAT IT HAPPENED, CAN'T HAPPEN IF YOU
3 LISTEN THE DESCRIPTION. THERE'S NO WAY THEY COULD DESCRIBE
4 THIS RIGHT HERE IF HE WAS IN FACT THE SHOOTER BECAUSE HE
5 HAD, THE SHOOTER HAD A RED BANDANNA SCARF TIED AROUND HIS
6 FACE.

7 NOW YOU HAVE SEVERAL INTERVIEWS, GOT AN INTERVIEW
8 FROM JEFFREY BETHEA. HE GIVES TWO INTERVIEWS BEFORE HE
9 MAKES A DEAL FOR ME, BEFORE HE AGREED TO TESTIFY, AND IN
10 BOTH INTERVIEWS HE PUTS HIMSELF HERE. HE PUTS HIMSELF
11 CLOSE TO THE TIME THAT THIS HAPPENED. HE SAID, THE FIRST
12 INTERVIEW BOS SHOT HIM. SECOND INTERVIEW, BOS SHOT HIM.
13 AFTER PROFFER, BOS SHOT HIM, TESTIFIED, BOS SHOT HIM.

14 ON THE SECOND INTERVIEW THAT HE GAVE BEFORE EVEN
15 TALKING TO THE STATE KNOWING THAT HE HAD BEEN CHARGED WITH
16 MURDER HE TELLS THEM, YOU KNOW WHAT I WAS INVOLVED, THIS IS
17 HOW I WAS INVOLVED. I WAS THERE, I'M THE LEADER OF THIS
18 GANG. I SAID WELL YOU KNOW WHAT WE BETTER GO, WE BETTER
19 GO DO IT. IT'S GOT TO BE TAKEN CARE OF, YOU NEED TO TAKE
20 CARE OF HIM, NEEDS TO BE KILLED BEFORE HE DOES SOMETHING TO
21 US, AND, YES, HE PLED GUILTY TO THAT, AND THE JUDGE IS
22 GOING TO GIVE YOU A CHARGE ABOUT ACCOMPLICE LIABILITY. HAND
23 OF ONE HAND OF ALL AND IT'S GOING TO SAY ---

24 MS. PRATT: OBJECTION, YOUR HONOR.

25 THE COURT: MY RULING, GO AHEAD.

1 MS. ELDER: AND HE'S GOING TO SAY THAT WHEN YOU
2 HAVE TWO PEOPLE ACTING TOGETHER TO COMMIT A CRIME IT DOES
3 NOT MATTER WHO PULLED THE TRIGGER. YOU ARE BOTH GUILTY
4 EVEN IF THERE'S ONE GUN, ONE BULLET, ONE DEATH, BOTH PEOPLE
5 ARE GUILTY OF MURDER, BOTH OF THEM.

6 NOW YOU ALSO HAVE AN INTERVIEW WITH NATHANIEL
7 DOUGLAS. DOES NATHANIEL TELL YOU, HE'S NOT UNDER
8 AGREEMENT, DOES HE TELL YOU THAT BIRD HAS A GUN, NO,
9 DOESN'T TESTIFY TO THAT. THE ONLY PERSON HE PUTS A GUN ON
10 IS BOS.

11 YOU GOT THE INTERVIEW WITH BOS. THE FIRST
12 INTERVIEW I WASN'T EVEN THERE. THE SECOND INTERVIEW I WAS
13 THERE BUT I WALKED OFF WITH JUNE. WELL THAT'S NOT TRUE.

14 THE THIRD INTERVIEW, THIRD, THIRD TIME HE
15 TESTIFIED TODAY WELL I HAD A GUN, IT WAS IN THE CAR, BUT I
16 DID HAVE A GUN, LITTLE BIT MORE, AND YOU KNOW WHAT WE DON'T
17 HAVE A GUN IN THIS CASE AND YOU KNOW WHY, BOS TOLD YOU WHY.
18 WELL I ASKED HIM, "WHAT DID YOU DO WITH THE GUN, YOU COULD
19 HAVE GIVEN THE GUN TO THE POLICE IF WE HAD OF KNOWN YOU HAD
20 A GUN YOU COULD HAVE GIVEN THE GUN TO THE POLICE. WHY
21 DIDN'T YOU GIVE IT TO THE POLICE, SHOW IT WASN'T YOUR GUN?
22 WELL I GOT RID OF IT. WHY DID YOU GET RID OF IT, CAUSE I
23 DIDN'T NEED IT ANYMORE." OF COURSE HE DIDN'T NEED IT
24 ANYMORE AARON HAMMONDS WAS DEAD. HE HAD ACCOMPLISHED HIS
25 GOAL.

1 NOW SINCE THE SHOOTING BRIAN SPEARS HAS DONE MANY
2 THINGS AND IT IS ALMOST LIKE THE THINGS HE HAS DONE SINCE
3 THE DEATH OF AARON HAMMONDS IT'S ALMOST LIKE HE'S BRAGGING.
4 IT'S ALMOST LIKE HE'S PUTTING IT OUT THERE SHOWING THESE
5 DIFFERENT THINGS SHOWING TROPHIES OF WHAT HE DID.

6 AFTER HE IS ARRESTED FOR MURDER, NOW G-BLACK HAS
7 BEEN DEAD, I BELIEVE THE TESTIMONY WAS SINCE ABOUT 2003
8 HE'S BEEN DEAD BUT BRIAN SPEARS WAITS UNTIL HE IS ARRESTED
9 FOR MURDER, GOES TO JAIL BEFORE HE GETS THIS TATTOO RIGHT
10 HERE. HE WANTS YOU TO THINK HE'S JUST HONORING HIS FRIEND.
11 WHY DIDN'T HE GET IT BEFORE, WHY DID HE WAIT FOUR YEARS AND
12 GET A MURDER CHARGE BEFORE HE GOT THIS? BECAUSE THIS IS A
13 TROPHY. HE GOT REVENGE FOR G-BLACK AND THERE'S THAT GUN TO
14 SHOW IT, REST IN PEACE G-BLACK.

15 NINE(B), YOU ARE SITTING IN JAIL FOR MURDER WITH
16 A SMALL CALIBER HANDGUN OUT ALLEGING AND WHAT DO YOU DO,
17 YOU GET NOT ONE GUN TATTOOED YOU GET TWO, ANOTHER TROPHY.

18 FOURTEEN(A), ONCE AGAIN YOU ARE IN JAIL FOR
19 MURDER, YOU GOT YOUR GANG TATTOO HERE WHEN YOU COME INTO
20 JAIL AND WHAT DO YOU DO AFTER YOU GET ARRESTED, AFTER YOU
21 HAVE KILLED SOMEBODY, YOU GET YET ANOTHER TROPHY. HERE WE
22 GO, B.O.S., G-UP RESPECT, YEP, HE'S EARNED SOME RESPECT NOW
23 HIS GANG AND HE WANTS EVERYBODY TO KNOW WHO HE IS AND HE
24 WANTS TO KNOW WHY. HE'S GOT RESPECT BECAUSE HE TOOK CARE
25 OF A PROBLEM THAT ANOTHER MEMBER COULD NOT.

1 FOURTEEN(B), ANOTHER TROPHY, HE'S GOT HIS GANG
2 TATTOO ON THERE ALREADY. AFTER HE'S ARRESTED CHARGED WITH
3 MURDER IN JAIL YOU CAN SEE WHAT HE GOT DONE. HE GOT THE
4 TAIL COLORED IN AND HE GOT THIS TEARDROP AND THAT WAS
5 ADDED.

6 MS. PRATT: OBJECTION, YOUR HONOR.

7 THE COURT: OVERRULED.

8 MS. PRATT: HE ALSO GOT THE WORD HONOR TATTOOED
9 ON THERE, ANOTHER TROPHY FOR WHAT HE DID, ANOTHER TROPHY
10 FOR TAKING CARE OF A PROBLEM.

11 BEFORE I GET INTO THIS I DID WANT TO PLAY OUT ONE
12 THING, REMEMBER DR. PROCTOR'S STATEMENT, ANGLE, WHERE THE
13 BULLETS WENT IN. THIS WAS ABOUT THE HEIGHT OF THE VICTIM
14 BRITTNEY SAYING THE DEFENDANT OR, I'M SORRY, THE SHOOTER
15 ABOUT FIVE-SEVEN, FIVE-EIGHT, A LITTLE TALLER THAN ME,
16 STRAIGHT OUT, WHERE'S THAT GOING TO GO. WE'RE TALKING
17 ABOUT SOMEONE NOT VERY TALL. WHO DOES THAT FIT? FROM THE
18 THREE PEOPLE YOU SAW IN THIS COURTROOM THIS WEEK WHO FITS
19 THAT DESCRIPTION? WHO IS THE SHORTEST OF THE THREE? YOU
20 SAW JEFFREY BETHEA, HE'S ABOUT AS BIG AS THE HEM.

21 NOW THE JUDGE IS GOING TO GIVE YOU THE CHARGE ON
22 MURDER AND WHAT HE'S GOING TO TELL YOU IS THAT THE KILLING
23 OF ANOTHER PERSON WITH MALICE AFORETHOUGHT, HATRED, ILL
24 WILL, THE INTENTIONAL DOING OF A WRONGFUL ACT. HE'S ALSO
25 GOING TO TELL YOU THAT A MALICE CAN BE EXPRESSED OR IMPLIED

1 AND I WANT TO TALK FIRST ABOUT EXPRESSED MALICE.

2 "MURDER WAS THE GAME, REVENGE FOR G-BLACK, LOOK
3 IN MY EYES YOU CAN SEE MY PAIN, HEART TURNED COLD, I'LL PUT
4 A BULLET STRAIGHT IN YOUR BRAIN. YOU SAY I'M NOBODY WHY
5 THE HOMICIDE UNIT BE SCREAMING MY NAME?" THAT'S ABOUT AS
6 EXPRESSED AS YOU CAN GET AND THIS WAS WRITTEN BY BOS AND
7 THIS WAS WRITTEN AFTER AARON GOT KILLED, THOSE THREE PEOPLE
8 GOT SHOT, AFTER HE WAS ARRESTED FOR MURDER AND PUT IN JAIL.

9 MALICE EXPRESSED: ILL WILL, HATRED, "YO, BRO,
10 BIRD'S STATEMENT IS 41 PAGES. I CAN'T MAIL IT, BUT I AM
11 SENDING AARON'S DEAD ASS. WHEN YOU GET OUT IF I'M STILL IN
12 MY CURRENT PLACE COME WITH GRANDMA BELL AND I'LL SIGN THE
13 STATEMENT OUT TO YOU, FUCK, GET A SHIRT MADE WITH AARON ON
14 IT THAT SAY NIGGA'S DEAD ASS."

15 TIM SMITH SAID IT BEST. HE SENT AN AUTOPSY
16 PICTURE OF THE VICTIM AND HIS MURDER TO HIS BUDDY, TO HIS
17 GANG FRIEND IN NORTH CAROLINA. HE WAS SHOWING THAT THING
18 LIKE HE HAD JUST KILLED A 10-POINT BUCK AND IT WAS A
19 TROPHY. WHY ELSE WOULD YOU PUT THAT AND WRITE THAT IN A
20 LETTER, SEND IT WITH A PICTURE AFTER YOU HAVE BEEN CHARGED
21 WITH MURDER AND IN JAIL? WHY WOULD YOU DO THAT IF IN FACT
22 YOU WEREN'T BRAGGING ABOUT IT, IF IN FACT IT WAS NOT TRUE?
23 THAT HAS TO BE ONE OF THE VILEST THINGS I'VE EVER HEARD
24 READ IN THIS COURTROOM AND THERE IS NO END TO THE ILL WILL
25 AND HOSTILITY CONTAINED IN THAT.

1 AND YOU HAVE TO ASK YOURSELF WHAT KIND OF PERSON
2 WOULD SAY THOSE THINGS, WOULD DO THOSE THINGS. WOULD BRAG
3 ABOUT TAKING THE LIFE OF ANOTHER HUMAN BEING AND YOU KNOW
4 WHAT IT DOESN'T MATTER HOW YOU DRESS HIM UP. YOU CAN DRESS
5 HIM UP, YOU CAN PUT GLASSES ON HIM, YOU CAN MAKE HIM LOOK
6 LIKE HE'S 15 YEARS OLD, BUT YOU KNOW WHAT? THE INSIDE
7 DOESN'T CHANGE. HE IS COLD. HE TELLS YOU THAT HIMSELF.
8 HE IS A KILLER AND HE NEEDS TO BE CONVICTED.

9 AND I'M GOING TO LEAVE YOU WITH THIS BECAUSE I
10 CAN'T THINK OF ANY OTHER WAY BETTER TO SUM IT UP THAN HOW
11 HE DID IT HIMSELF WHILE HE WAS SITTING IN JAIL WAITING FOR
12 THIS TRIAL. "SOMEBODY KILLED MY HOMIE AND I GOT TO EASE MY
13 PAIN AND THE ONLY WAY TO DO THAT IS TO SQUEEZE MY THANG,
14 THE MADNESS I'M FEELING IS DRIVING ME INSANE. I CAN FEEL
15 IT, IT'S CALLED MURDER, IT'S IN MY VEINS. IT'S REAL
16 SIMPLE, LOAD IT, COCK IT, SQUEEZE IT, BANG," AND YOU KNOW
17 WHAT THAT BANG WAS THE LAST THING AARON HAMMONDS EVER
18 HEARD.

19 THE COURT: THANK YOU. MR. ROPP, IF YOU WOULD,
20 MR. ROPP, AND THE EASEL, TOO. THANK YOU VERY MUCH.

21 **JURY CHARGE**

22 LADIES AND GENTLEMEN OF THE JURY, I REMIND YOU
23 THAT DURING THIS TRIAL, YOU AND I HAVE CERTAIN DUTIES TO
24 PERFORM. AS THE TRIAL JUDGE IT IS MY RESPONSIBILITY TO
25 PRESIDE OVER THE TRIAL OF THE CASE, AND I ALSO HAVE THE

1 DUTY TO RULE ON THE ADMISSIBILITY OF EVIDENCE OFFERED
2 DURING THIS TRIAL. YOU ARE TO CONSIDER ONLY THE COMPETENT
3 EVIDENCE BEFORE YOU. IF THERE WAS ANY TESTIMONY ORDERED
4 STRICKEN FROM THE RECORD IN THIS CASE DURING THE TRIAL, YOU
5 MUST DISREGARD THAT TESTIMONY. YOU ARE TO CONSIDER ONLY
6 THE TESTIMONY WHICH HAS BEEN PRESENTED FROM THIS WITNESS
7 STAND, ANY EXHIBITS WHICH MAY HAVE BEEN MADE A PART OF THE
8 RECORD IN THIS CASE, AND ANY STIPULATIONS OF COUNSEL.

9 I HAVE THE ADDITIONAL DUTY TO CHARGE YOU THE LAW
10 APPLICABLE TO THIS CASE. AS THE PRESIDING JUDGE, I AM THE
11 SOLE JUDGE OF THE LAW OF THIS CASE, AND IT IS YOUR DUTY AS
12 JURORS TO ACCEPT AND APPLY THE LAW AS I NOW STATE IT TO YOU.
13 IF YOU ALREADY HAVE ANY IDEA AS WHAT THE LAW IS OR WHAT THE
14 LAW OUGHT TO BE AND IT DOES NOT AGREE WITH WHAT I NOW TELL
15 YOU THE LAW IS, YOU MUST ABANDON THIS IDEA BECAUSE YOU ARE
16 SWORN TO ACCEPT THE LAW AND APPLY THE LAW EXACTLY AS I NOW
17 STATE IT TO YOU.

18 IN EVERY CASE TRIED IN THIS COURT BEFORE A JURY,
19 THE JURY BECOMES THE SOLE AND EXCLUSIVE JUDGE OF THE FACTS
20 IN A CASE. A TRIAL JUDGE CANNOT INTIMATE, STATE, COMMENT
21 ON, OR MAKE ANY STATEMENT TO A TRIAL JURY ABOUT THE FACTS
22 IN A CASE. SINCE YOU, THE JURY, ARE THE SOLE JUDGE OF THE
23 FACTS IN THE CASE, YOU ARE NOT TO INFER FROM WHAT I HAVE
24 SAID DURING THE PROGRESS OF THIS TRIAL IN RULING UPON THE
25 ADMISSIBILITY OF EVIDENCE, OR OTHERWISE, OR ANYTHING THAT I

1 SAY NOW DURING THE COURSE OF THIS INSTRUCTION TO YOU, THAT
2 I HAVE ANY OPINION ABOUT THE FACTS OF THIS CASE. THE LAW
3 DOES NOT ALLOW ME TO HAVE AN OPINION ABOUT THE FACTS IN
4 THIS CASE. THIS IS A MATTER SOLELY FOR YOU, THE JURY, TO
5 DETERMINE. AS JURORS IT IS YOUR DUTY TO DETERMINE THE
6 EFFECT, VALUE, WEIGHT, AND TRUTH OF THE EVIDENCE PRESENTED
7 DURING THIS TRIAL.

8 THE INDICTMENTS IN THIS CASE CHARGES THE
9 DEFENDANT WITH MURDER AND THREE COUNTS OF ASSAULT AND
10 BATTERY WITH INTENT TO KILL. I REMIND YOU THAT THE FACT
11 THE DEFENDANT WAS ARRESTED, CHARGED AND INDICTED IN THIS
12 CASE, IS NOT EVIDENCE IN THIS CASE AND CANNOT BE CONSIDERED
13 BY YOU AS EVIDENCE OF GUILT IN THIS CASE, NOR DOES IT
14 CREATE ANY PRESUMPTION OR INFERENCE OF GUILT. THIS
15 DOCUMENT OR THESE DOCUMENTS THAT I'VE REFERRED TO AS
16 INDICTMENTS ARE SIMPLY THE FORMAL WRITTEN INSTRUMENTS WHICH
17 CONTAIN THE CHARGES MADE AGAINST THE DEFENDANT. IT IS THE
18 FORMAL DOCUMENT OR THEY ARE THE FORMAL DOCUMENTS BY WHICH
19 THE CASE IS BROUGHT INTO THIS COURT.

20 THE FOUR INDICTMENTS IN THIS CASE ALLEGE TWO
21 DIFFERENT OFFENSES AGAINST THE DEFENDANT. THE CHARGES ARE:
22 INDICTMENT NO. ONE: MURDER; INDICTMENT NO. TWO, THREE, AND
23 FOUR; ASSAULT AND BATTERY WITH INTENT TO KILL.

24 EACH INDICTMENT CHARGES A SEPARATE AND DISTINCT
25 OFFENSE. YOU MUST DECIDE EACH INDICTMENT SEPARATELY ON THE

1 EVIDENCE AND THE LAW APPLICABLE TO IT UNINFLUENCED BY YOUR
2 DECISION AS TO ANY OTHER INDICTMENT. THE DEFENDANT MAY BE
3 CONVICTED OR ACQUITTED ON ANY OR ALL OF THE OFFENSES
4 CHARGED. YOU WILL BE ASKED TO WRITE A SEPARATE VERDICT OF
5 GUILTY OR NOT GUILTY FOR EACH INDICTMENT.

6 THE DEFENDANT HAS PLED NOT GUILTY TO THESE
7 INDICTMENTS, AND THAT PLEA PUTS THE BURDEN ON THE STATE TO
8 PROVE THE DEFENDANT GUILTY. A PERSON CHARGED WITH
9 COMMITTING A CRIMINAL OFFENSE IN SOUTH CAROLINA IS NEVER
10 REQUIRED TO PROVE HIMSELF INNOCENT.

11 I CHARGE YOU THAT IT IS AN IMPORTANT RULE OF LAW
12 THAT THE DEFENDANT IN A CRIMINAL TRIAL, NO MATTER WHAT THE
13 SERIOUSNESS OF THE CHARGE MAY BE, WILL ALWAYS BE PRESUMED
14 TO BE INNOCENT OF THE CRIME FOR WHICH THE INDICTMENT WAS
15 ISSUED UNLESS GUILT HAS BEEN PROVED BY EVIDENCE SATISFYING
16 YOU OF THAT GUILT BEYOND A REASONABLE DOUBT. THIS
17 PRESUMPTION OF INNOCENCE DOES NOT END WHEN YOU BEGIN YOUR
18 DELIBERATIONS BUT IT ACCOMPANIES THE DEFENDANT THROUGHOUT
19 THE TRIAL UNTIL YOU REACH A VERDICT OF GUILT BASED ON THE
20 EVIDENCE SATISFYING YOU OF THAT GUILT BEYOND A REASONABLE
21 DOUBT.

22 THE PRESUMPTION OF INNOCENCE IS LIKE A ROBE OF
23 RIGHTEOUSNESS PLACED ABOUT THE SHOULDERS OF THE DEFENDANT
24 WHICH REMAINS WITH THE DEFENDANT UNTIL IT HAS BEEN STRIPPED
25 FROM THE DEFENDANT BY EVIDENCE SATISFYING YOU OF THE

1 DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

2 THE PRESUMPTION OF INNOCENCE IS NOT A MERE LEGAL
3 THEORY. IT IS NOT JUST A LEGAL PHRASE. IT IS A
4 SUBSTANTIAL RIGHT TO WHICH EVERY DEFENDANT IS ENTITLED
5 UNLESS YOU THE JURY, ARE SATISFIED FROM THE EVIDENCE OF THE
6 DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

7 THE STATE HAS THE BURDEN OF PROVING THE DEFENDANT
8 GUILTY BEYOND A REASONABLE DOUBT. SOME OF YOU MAY HAVE
9 SERVED AS JURORS IN CIVIL CASES, WHERE YOU WERE TOLD THAT
10 IT'S ONLY NECESSARY TO PROVE THAT A FACT IS MORE LIKELY
11 TRUE THAN NOT, SUCH AS BY THE GREATER WEIGHT OR
12 PREPONDERANCE OF THE EVIDENCE. IN CRIMINAL CASES, THE
13 STATE'S PROOF MUST BE MORE POWERFUL THAN THAT. IT MUST BE
14 BEYOND A REASONABLE DOUBT.

15 PROOF BEYOND A REASONABLE DOUBT IS PROOF THAT
16 LEAVES YOU FIRMLY CONVINCED OF THE DEFENDANT'S GUILT.
17 THERE ARE VERY FEW THINGS IN THIS WORLD THAT WE KNOW WITH
18 ABSOLUTE CERTAINTY AND IN CRIMINAL CASES THE LAW DOES NOT
19 REQUIRE PROOF THAT OVERCOMES EVERY POSSIBLE DOUBT. IF,
20 BASED ON YOUR CONSIDERATION OF THE EVIDENCE, YOU ARE FIRMLY
21 CONVINCED THAT THE DEFENDANT IS GUILTY OF THE CRIME
22 CHARGED, YOU MUST FIND THE DEFENDANT GUILTY. IF ON THE
23 OTHER HAND, YOU THINK THAT THERE IS A REAL POSSIBILITY THAT
24 THE DEFENDANT IS NOT GUILTY, YOU MUST GIVE THE DEFENDANT
25 THE BENEFIT OF THAT DOUBT AND FIND HIM NOT GUILTY.

1 WHAT IS A REASONABLE DOUBT IN THE LAW? A
2 REASONABLE DOUBT IS THE KIND OF DOUBT THAT WOULD CAUSE A
3 REASONABLE PERSON TO HESITATE TO ACT.

4 THERE ARE TWO TYPES OF EVIDENCE WHICH ARE
5 GENERALLY PRESENTED DURING A TRIAL, DIRECT EVIDENCE AND
6 CIRCUMSTANTIAL EVIDENCE.

7 DIRECT EVIDENCE IS THE TESTIMONY OF A PERSON WHO
8 CLAIMS TO HAVE ACTUAL KNOWLEDGE OF A FACT, SUCH AS AN
9 EYEWITNESS. IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES
10 THE MAIN FACT TO BE PROVED.

11 CIRCUMSTANTIAL EVIDENCE IS PROOF OF A CHAIN OF
12 FACTS AND CIRCUMSTANCES INDICATING THE EXISTENCE OF A FACT.
13 IT IS EVIDENCE WHICH IMMEDIATELY ESTABLISHES COLLATERAL
14 FACTS FROM WHICH THE MAIN FACT MAY BE INFERRED.
15 CIRCUMSTANTIAL EVIDENCE IS BASED ON INFERENCE AND NOT ON
16 PERSONAL KNOWLEDGE OR OBSERVATION.

17 THE LAW MAKES ABSOLUTELY NO DISTINCTION BETWEEN
18 THE WEIGHT OR VALUE TO BE GIVEN TO EITHER DIRECT OR
19 CIRCUMSTANTIAL EVIDENCE. NOR IS A GREATER DEGREE OF
20 CERTAINTY REQUIRED OF CIRCUMSTANTIAL EVIDENCE THAN OF
21 DIRECT EVIDENCE. YOU SHOULD WEIGH ALL OF THE EVIDENCE IN
22 THE CASE. AFTER WEIGHING ALL THE EVIDENCE, IF YOU ARE NOT
23 CONVINCED OF THE GUILT OF THE DEFENDANT BEYOND A REASONABLE
24 DOUBT, YOU MUST FIND THE DEFENDANT NOT GUILTY.

25 IN THIS TRIAL YOU HAVE HEARD EVIDENCE REGARDING

1 AN ALTERCATION BETWEEN THE DEFENDANT AND THE VICTIM THAT
2 ALLEGEDLY OCCURRED ABOUT ONE MONTH BEFORE THE INCIDENT
3 WHICH IS THE SUBJECT OF THIS TRIAL. EVIDENCE OF OTHER
4 CRIMES, WRONGS OR ACTS IN GENERAL, EXCUSE ME, OR ACTS IS
5 GENERALLY NOT ADMISSIBLE TO PROVE THE CHARACTER OF A PERSON
6 IN ORDER TO SHOW HIS ACTION IN CONFORMITY THEREWITH;
7 HOWEVER, SUCH EVIDENCE MAY BE ADMISSIBLE TO SHOW MOTIVE,
8 IDENTITY, THE EXISTENCE OF A COMMON SCHEME OR PLAN, THE
9 ABSENCE OF MISTAKE OR ACCIDENT, OR INTENT.

10 YOU MAY CONSIDER THIS EVIDENCE ONLY TO PROVE
11 MOTIVE, IDENTITY, THE EXISTENCE OF A COMMON SCHEME OR PLAN,
12 THE ABSENCE OF MISTAKE OR ACCIDENT, OR INTENT.

13 NECESSARILY, YOU MUST DETERMINE THE CREDIBILITY
14 OF THE WITNESSES WHO HAVE TESTIFIED IN THIS CASE.
15 CREDIBILITY SIMPLY MEANS BELIEVABILITY. IT BECOMES YOUR
16 DUTY AS JURORS TO ANALYZE AND EVALUATE THE EVIDENCE AND
17 DETERMINE WHICH EVIDENCE CONVINCES YOU OF ITS TRUTH.

18 IN DETERMINING THE BELIEVABILITY OF WITNESSES WHO
19 HAVE TESTIFIED IN THE CASE, YOU MAY BELIEVE ONE WITNESS
20 OVER SEVERAL OR SEVERAL WITNESSES OVER ONE WITNESS. YOU
21 MAY BELIEVE A PART OF THE TESTIMONY OF A WITNESS AND REJECT
22 THE REMAINING PART OF THE TESTIMONY OF THAT SAME WITNESS.
23 YOU MAY BELIEVE THE TESTIMONY OF A WITNESS IN ITS ENTIRETY
24 OR REJECT THE TESTIMONY OF A WITNESS IN ITS ENTIRETY. YOU
25 MAY CONSIDER WHETHER ANY WITNESS HAS EXHIBITED TO YOU ANY

1 INTEREST, PREJUDICE, BIAS, OR OTHER MOTIVE IN THIS CASE.
2 YOU MAY ALSO CONSIDER THE APPEARANCE AND MANNER OF A
3 WITNESS WHILE ON THE WITNESS STAND SOMETIMES REFERRED TO
4 THAT AS A WITNESSES DEMEANOR.

5 A STATEMENT ALLEGED TO HAVE BEEN MADE BY THE
6 DEFENDANT HAS BEEN ADMITTED INTO EVIDENCE IN THIS CASE.
7 WHILE THE COURT HAS DETERMINED THAT THE STATEMENT IS
8 ADMISSIBLE, I INSTRUCT YOU THAT YOU MAKE THE ULTIMATE
9 DECISION OF WHETHER OR NOT THE DEFENDANT MADE THE
10 STATEMENT. IF THE DEFENDANT DID MAKE THE STATEMENT YOU
11 MUST DETERMINE WHETHER THE STATEMENT WAS MADE BY THE
12 DEFENDANT VOLUNTARILY AND OF HIS OWN FREE WILL. THIS MEANS
13 THAT THE STATEMENT WAS NOT CAUSED BY PRESSURE, FORCE, FEAR,
14 THREATS, COERCION OR INTIMIDATION, OR BY HOPE OR A PROMISE
15 OF REWARD OR LENIENCY OF ANY KIND. IN DETERMINING WHETHER
16 THE STATEMENT WAS VOLUNTARILY, VOLUNTARY, YOU SHOULD
17 CONSIDER BOTH THE CHARACTERISTICS OF THE DEFENDANT AND THE
18 DETAILS OF THE QUESTIONING. SOME OF THE FACTORS THAT YOU
19 MUST CONSIDER ARE: THE AGE OF THE DEFENDANT; THE
20 DEFENDANT'S EDUCATION OR LACK OF EDUCATION; THE DEFENDANT'S
21 MENTAL ABILITY OR CAPACITY; THE DEFENDANT'S I.Q. OR
22 INTELLIGENCE; THE DEFENDANT'S BACKGROUND AND ENVIRONMENT;
23 (6) PLACE AND LENGTH OF DETENTION; THE NATURE OF THE
24 QUESTIONING; AND THE ADVICE, OR LACK THEREOF, TO THE
25 DEFENDANT OF HIS CONSTITUTIONAL RIGHTS INCLUDING, BUT NOT

1 LIMITED TO, THE RIGHT TO REMAIN SILENT; THAT ANY STATEMENT
2 COULD BE USED AGAINST HIM IN A COURT OF LAW; THE RIGHT TO
3 HAVE A LAWYER PRESENT; THAT IF HE COULD NOT AFFORD A
4 LAWYER, A LAWYER WOULD BE APPOINTED TO REPRESENT HIM
5 WITHOUT ANY COST; AND THAT HE COULD STOP MAKING A STATEMENT
6 AT ANY TIME. YOU MUST CAREFULLY CONSIDER ALL OF THE
7 SURROUNDING CIRCUMSTANCES BEFORE YOU GIVE ANY WEIGHT TO AN
8 ALLEGED STATEMENT.

9 THE STATE HAS THE BURDEN OF PROVING BEYOND A
10 REASONABLE DOUBT THAT THE ALLEGED STATEMENT WAS VOLUNTARY.
11 IF YOU DETERMINE THAT IT WAS, YOU MAY GIVE THE STATEMENT
12 ANY FURTHER CONSIDERATION THAT YOU DEEM PROPER. YOU MUST
13 DECIDE WHAT WEIGHT, IF ANY, SHOULD BE GIVEN TO THE ALLEGED
14 STATEMENT. IF YOU DETERMINE THE ALLEGED STATEMENT WAS NOT
15 A FREE AND VOLUNTARY STATEMENT OF THE DEFENDANT, YOU SHOULD
16 NOT CONSIDER THE STATEMENT AT ALL.

17 NOW THE RULES OF EVIDENCE ORDINARILY DO NOT
18 PERMIT WITNESSES TO TESTIFY TO OPINIONS OR CONCLUSIONS. AN
19 EXCEPTION TO THIS RULE EXISTS FOR A WITNESS WE CALL AN
20 EXPERT WITNESS. A WITNESS WHO BY EDUCATION AND EXPERIENCE,
21 HAS BECOME EXPERT IN SOME ART, SCIENCE, PROFESSION, OR
22 CALLING MAY STATE AN OPINION TO A RELEVANT AND MATERIAL
23 MATTER, IN WHICH THE WITNESS CLAIMS TO BE AN EXPERT, AND
24 MAY ALSO STATE THE REASONS FOR THE OPINION.

25 YOU SHOULD CONSIDER ANY EXPERT OPINION RECEIVED

1 IN EVIDENCE AND, LIKE ANY OTHER EVIDENCE, GIVE IT THE
2 WEIGHT YOU THINK IT DESERVES. IF YOU DECIDE THAT THE
3 OPINION OF AN EXPERT WITNESS IS NOT BASED ON SUFFICIENT
4 EDUCATION AND EXPERIENCE, OR IF YOU CONCLUDE THAT THE
5 REASONS GIVEN IN SUPPORT OF THE OPINION ARE NOT SOUND, OR
6 THAT THE OPINION IS OUTWEIGHED BY OTHER EVIDENCE, YOU MAY
7 DISREGARD THE OPINION COMPLETELY AND ENTIRELY.

8 AN EXPERT'S, EXPERT WITNESS' TESTIMONY IS TO BE
9 GIVEN NO GREATER WEIGHT THAN THAT OF OTHER WITNESSES SIMPLY
10 BECAUSE THE WITNESS IS AN EXPERT. FURTHER, YOU ARE NOT
11 REQUIRED TO ACCEPT AND EXPERT'S OPINION, EVEN THOUGH IT IS
12 NOT CONTRADICTED.

13 THERE HAS BEEN EVIDENCE PRESENTED THAT WITNESSES
14 HAVE MADE PRIOR STATEMENTS WHICH ARE NOT CONSISTENT WITH
15 THE WITNESSES' PRESENT STATEMENT OR TESTIMONY. YOU MAY USE
16 THIS EVIDENCE TO DECIDE WHETHER TO BELIEVE THE WITNESS.
17 YOU MAY ALSO USE THE EVIDENCE OF THE EARLIER CONTRADICTORY
18 STATEMENT TO DETERMINE THE TRUTH OF THOSE STATEMENTS. IT
19 IS UP TO YOU TO DECIDE WHETHER TO BELIEVE THE EARLIER
20 STATEMENTS OR THE TESTIMONY GIVEN AT TRIAL.

21 IF A WITNESS IS SHOWN TO HAVE KNOWINGLY TESTIFIED
22 UNTRUTHFULLY CONCERNING ANY MATERIAL MATTER, YOU MAY
23 CONSIDER THIS IN DETERMINING WHETHER TO TRUST THE WITNESS'
24 TESTIMONY AS TO OTHER MATTERS. YOU MAY REJECT ALL THE
25 TESTIMONY OF THAT WITNESS OR GIVE ALL OR PART OF THE

1 TESTIMONY THE WEIGHT YOU THINK IT DESERVES.

2 IF A CRIME IS COMMITTED BY TWO OR MORE PEOPLE WHO
3 ARE ACTING TOGETHER IN COMMITTING A CRIME, THE ACT OF ONE
4 IS THE ACT OF ALL. A PERSON WHO JOINS WITH ANOTHER TO
5 COMMIT AN UNLAWFUL ACT IS CRIMINALLY RESPONSIBLE FOR
6 EVERYTHING DONE BY THE OTHER PERSON WHICH HAPPENS AS A
7 PROBABLE OR NATURAL CONSEQUENCE OF THE ACTS DONE IN
8 CARRYING OUT THE COMMON PLAN AND PURPOSE. IF TWO OR MORE
9 PEOPLE ARE TOGETHER, ACTING TOGETHER, ASSISTING EACH OTHER
10 IN COMMITTING THE OFFENSE, THE ACT OF ONE IS THE ACT OF
11 ALL.

12 PRIOR KNOWLEDGE OF THAT CRIME IS GOING TO BE,
13 EXCUSE ME, PRIOR KNOWLEDGE THAT A CRIME IS GOING TO BE
14 COMMITTED, WITHOUT MORE, IS NOT SUFFICIENT TO MAKE A PERSON
15 GUILTY OF THAT CRIME. MERE KNOWLEDGE THAT ANOTHER PERSON
16 IS GOING TO COMMIT A CRIME, EVEN IF THE DEFENDANT IS
17 PRESENT WHEN THE CRIME IS COMMITTED, IS NOT SUFFICIENT TO
18 CONVICT THE DEFENDANT AS A PRINCIPAL, GUILTY AS A PRINCIPAL
19 AS SHOWN BY ACTUAL OR CONSTRUCTIVE PRESENCE AT THE SCENE,
20 OR EXCUSE ME, GUILT AS A PRINCIPAL AS SHOWN BY ACTUAL OR
21 CONSTRUCTIVE PRESENCE AT THE SCENE AS A RESULT OF PRIOR
22 ARRANGEMENT. THEREFORE, A FINDING OF A PRIOR ARRANGED PLAN
23 OR COMMON SCHEME IS NECESSARY FOR A FINDING OF GUILT AS A
24 PRINCIPAL. THE STATE MUST PROVE BEYOND A REASONABLE DOUBT
25 BY COMPETENT EVIDENCE THE THEORY OF ACCOMPLICE LIABILITY.

1 A PRINCIPAL IN A CRIME IS ONE WHO EITHER ACTUALLY
2 COMMITTS THE CRIME OR WHO IS PRESENT AIDING, ABETTING, OR
3 ASSISTING IN COMMITTING THE CRIME. WHEN A PERSON DOES AN
4 ACT IN THE PRESENCE OF AND WITH THE ASSISTANCE OF ANOTHER,
5 THE ACT IS DONE BY BOTH. WHERE TWO OR MORE ACTING WITH A
6 COMMON PLAN OR INTENT ARE PRESENT AT THE COMMISSION OF THE
7 CRIME, IT DOES NOT MATTER WHO ACTUALLY COMMITTS THE CRIME.
8 ALL ARE GUILTY. PRESENCE AT THE COMMISSION OF A CRIME
9 MEANS TO BE SUFFICIENTLY NEAR TO AID AND ABET AND ASSIST IN
10 THE COMMISSION OF THE CRIME. HOWEVER, MERE PRESENCE AT THE
11 SCENE OF A CRIME IS NOT SUFFICIENT TO CONVICT ONE AS A
12 PRINCIPAL ON THE THEORY OF AIDING AND ABETTING. INTENT IS
13 ALSO A NECESSARY ELEMENT FOR THERE MUST HAVE BEEN A COMMON
14 DESIGN OR INTENT TO COMMIT THE CRIME AND THE CRIME MUST
15 HAVE BEEN COMMITTED PURSUANT THERETO WITH THE PERSON'S
16 AIDING AND ABETTING BY SOME OVERT ACT. INTENT MEANS
17 INTENDING THE RESULT WHICH ACTUALLY OCCURS, NOT
18 ACCIDENTALLY OR INVOLUNTARY. INTENT MAY BE SHOWN BY ACTS
19 AND CONDUCT OF THE DEFENDANT AND OTHER CIRCUMSTANCES FROM
20 WHICH YOU MAY NATURALLY AND REASONABLY INFER INTENT. THE
21 STATE MUST PROVE THESE ELEMENTS BEYOND A REASONABLE DOUBT.

22 AS I SAID, MERE PRESENCE AT A SCENE IS NOT
23 SUFFICIENT TO PROVE SOMEONE GUILTY OF A CRIME. A
24 DEFENDANT'S PRESENCE WHERE A CRIME IS BEING COMMITTED OR
25 MERE ASSOCIATION WITH A PERSON WHO COMMITTS A CRIME DOES NOT

1 MAKE A DEFENDANT AN ACCOMPLICE OR AN AIDER AND AN ABETTOR
2 OF THE PERSON COMMITTING THE CRIME.

3 THE BURDEN IS ON THE STATE TO PROVE EVERY ELEMENT
4 OF THE CRIME CHARGED. IF YOU FIND, AFTER REVIEWING ALL THE
5 EVIDENCE, THAT THE STATE HAS PROVED THAT THE DEFENDANT WAS
6 ONLY PRESENT AT THE SCENE OF A CRIME, AND THEY HAVE NOT
7 PROVED BEYOND A REASONABLE DOUBT, ANY OTHER PARTICIPATION
8 IN THE CRIME, THEN YOU MUST FIND THE DEFENDANT NOT GUILTY.
9 THE LAW IS THAT PROOF OF PRESENCE AT THE SCENE OF A CRIME
10 IS NOT SUFFICIENT TO FIND SOMEONE GUILTY.

11 NOW, THE DEFENDANT IS CHARGED WITH MURDER. THE
12 STATE MUST PROVE BEYOND A REASONABLE DOUBT THAT THE
13 DEFENDANT KILLED ANOTHER PERSON WITH MALICE AFORETHOUGHT.

14 MALICE IS HATRED, ILL-WILL, OR HOSTILITY TOWARDS
15 ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL
16 ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO
17 INFLICT AN INJURY OR UNDER CIRCUMSTANCES THAT THE LAW WILL
18 INFER AN EVIL INTENT.

19 MALICE AFORETHOUGHT DOES NOT REQUIRE THAT MALICE
20 EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS COMMITTED,
21 BUT MALICE MUST EXIST IN THE MIND OF THE DEFENDANT JUST
22 BEFORE AND AT THE TIME THE ACT IS COMMITTED. THEREFORE,
23 THERE MUST BE A COMBINATION OF THE PREVIOUS ILL INTENT AND
24 THE ACT.

25 MALICE AFORETHOUGHT MAY BE EXPRESSED OR INFERRED.

1 THESE TERMS, "EXPRESSED" AND "INFERRED" DO NOT MEAN
2 DIFFERENT KINDS OF MALICE BUT MERELY THE MANNER IN WHICH
3 SUCH MALICE MAY BE SHOWN TO EXIST. THAT IS EITHER BY
4 DIRECT EVIDENCE OR BY INFERENCE FROM THE FACTS AND
5 CIRCUMSTANCES WHICH ARE PROVED. EXPRESSED MALICE IS SHOWN
6 WHEN A PERSON SPEAKS WORDS WHICH EXPRESS HATRED OR ILL WILL
7 FOR ANOTHER OR WHEN THE PERSON PREPARED BEFOREHAND TO DO
8 THE ACT WHICH WAS LATER ACCOMPLISHED, FOR EXAMPLE, LYING IN
9 WAIT FOR A PERSON OR ANY OTHER ACT OF PREPARATION GOING TO
10 SHOW THAT THE DEAD WAS WITHIN THE DEFENDANT'S MIND WOULD BE
11 EXPRESSED MALICE. MALICE MAY BE INFERRED FROM CONDUCT
12 SHOWING A TOTAL DISREGARD FOR HUMAN LIFE.

13 NOW THE DEFENDANT HAS ALSO BEEN CHARGED WITH
14 ASSAULT AND BATTERY WITH INTENT TO KILL. IN ORDER TO PROVE
15 ASSAULT AND BATTERY WITH INTENT TO KILL, THE STATE MUST
16 PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT
17 COMMITTED AN UNLAWFUL ACT OF A VIOLENT NATURE TO THE PERSON
18 OF ANOTHER WITH MALICE AFORETHOUGHT.

19 AN ASSAULT OCCURS WHEN A PERSON UNLAWFULLY
20 ATTEMPTS OR OFFERS TO COMMIT A VIOLENT INJURY UPON ANOTHER
21 PERSON AND HAD THE PRESENT ABILITY TO COMPLETE THE ATTEMPT.
22 AN ASSAULT IS THE INTENTIONAL CREATION OF A REASONABLE FEAR
23 OF IMMEDIATE BODILY HARM. IT IS NOT NECESSARY THAT THE
24 ATTEMPTED INJURY OR HARM TAKE PLACE. FOR EXAMPLE, IF I
25 WALK UP TO YOU, AND WHEN WE ARE WITHIN ARM'S REACH, I DRAW

1 BACK TO HIT YOU, THAT IS AN ASSAULT.

2 A BATTERY IS THE UNLAWFUL TOUCHING OF ANOTHER
3 PERSON BY A PERSON WHO HAS COMMITTED THE ASSAULT. AN
4 UNLAWFUL TOUCHING CAN BE CAUSED BY A PART OF THE ACCUSED'S
5 BODY OR BY ANY OBJECT THAT THE ACCUSED PUTS INTO MOTION. A
6 BATTERY IS THE COMPLETION OF THE ASSAULT BY USING OR
7 APPLYING FORCE TO ANOTHER PERSON HOWEVER SLIGHT, IN A RUDE,
8 ANGRY, OR RESENTFUL MANNER WITHOUT LEGAL JUSTIFICATION FOR
9 DOING SO. USING MY EARLIER EXAMPLE, IF I CARRY THROUGH
10 WITH THE ASSAULT BY HITTING YOU, THEN THAT IS A BATTERY.

11 MALICE IS HATRED, ILL-WILL, OR HOSTILITY TOWARDS
12 ANOTHER PERSON. IT IS THE INTENTIONAL DOING OF A WRONGFUL
13 ACT WITHOUT JUST CAUSE OR EXCUSE AND WITH AN INTENT TO
14 INFLICT AN INJURY OR UNDER CIRCUMSTANCES THE LAW WILL INFER
15 EVIL INTENT.

16 MALICE AFORETHOUGHT DOES NOT REQUIRE AGAIN THAT
17 MALICE EXISTS FOR ANY PARTICULAR TIME BEFORE THE ACT IS
18 COMMITTED, BUT MALICE MUST EXIST IN THE MIND OF THE
19 DEFENDANT JUST BEFORE AND AT THE TIME OF THE ACT OR THE ACT
20 IS COMMITTED. THEREFORE, THERE MUST A COMBINATION OF THE
21 PREVIOUS EVIL INTENT AND THE ACT.

22 MALICE AFORETHOUGHT MAY BE EXPRESSED OR INFERRED.
23 THESE TERMS, EXPRESSED AND INFERRED DO NOT MEAN DIFFERENT
24 KINDS OF MALICE AGAIN BUT MERELY THE MANNER IN WHICH THE
25 MALICE MAY BE SHOWN TO EXIST. THAT IS EITHER BY DIRECT

1 EVIDENCE OR BY INFERENCE FROM THE FACTS AND CIRCUMSTANCES
2 WHICH ARE PROVED. EXPRESSED MALICE IS SHOWN WHEN A PERSON
3 SPEAKS WORDS WHICH EXPRESS HATRED OR ILL WILL FOR ANOTHER
4 OR WHEN THE PERSON PREPARED BEFOREHAND TO DO THE ACT WHICH
5 WAS LATER ACCOMPLISHED; FOR EXAMPLE, LYING IN WAIT FOR A
6 PERSON OR ANY OTHER ACT OF PREPARATION GOING TO SHOW THAT
7 THE DEED WAS WITHIN THE DEFENDANT'S MIND WOULD BE EXPRESSED
8 MALICE.

9 AND MALICE MAY BE INFERRED FROM CONDUCT SHOWING A
10 TOTAL DISREGARD FOR HUMAN LIFE.

11 IF FACTS ARE PROVED BEYOND A REASONABLE DOUBT
12 SUFFICIENT TO RAISE AN INFERENCE OF MALICE TO YOUR
13 SATISFACTION, THEN THIS INFERENCE WOULD SIMPLY, WOULD BE
14 SIMPLY AN EVIDENTIARY FACT TO BE CONSIDERED BY YOU ALONG
15 WITH OTHER EVIDENCE IN THE CASE, AND YOU MAY GIVE IT SUCH
16 WEIGHT AS YOU DECIDE IT SHOULD RECEIVE.

17 A SPECIFIC INTENT TO KILL IS NOT AN ELEMENT OF
18 ASSAULT AND BATTERY WITH INTENT TO KILL, BUT THERE MUST BE
19 A GENERAL INTENT TO COMMIT SERIOUS BODILY INJURY. INTENT
20 MEANS INTENDING THE RESULT WHICH ACTUALLY OCCURS; NOT
21 ACCIDENTALLY OR INVOLUNTARILY. INTENT MAY BE SHOWN BY ACTS
22 AND CONDUCT OF THE DEFENDANT AND OTHER CIRCUMSTANCES FROM
23 WHICH YOU MAY NATURALLY AND REASONABLY INFER INTENT.
24 EVIDENCE OF THE CHARACTER OF THE ASSAULT, THE CHARACTER OF
25 THE INSTRUMENT USED, THE MANNER IN WHICH IT WAS USED, THE

1 PURPOSE TO BE ACCOMPLISHED, AND THE RESULTING WOUNDS OR
2 INJURIES MAY BE CONSIDERED IN DETERMINING THE INTENT WITH
3 WHICH THE ASSAULT WAS COMMITTED. INTENT MAY BE INFERRED
4 WHEN IT IS DEMONSTRATED THAT THE DEFENDANT VOLUNTARILY AND
5 WILLFULLY COMMITS AN ACT, THE NATURAL TENDENCY OF WHICH IS
6 TO DESTROY ANOTHER'S LIFE.

7 AND FINALLY, IF THE DEFENDANT, WITH MALICE
8 AFORETHOUGHT, ATTEMPTS TO KILL ANOTHER PERSON, BUT BY
9 MISTAKE, INJURES OR KILLS A DIFFERENT PERSON, THE DEFENDANT
10 STILL HAS THE INTENT TO KILL. THE INTENT TO KILL IS MERELY
11 TRANSFERRED FROM THE ORIGINAL PERSON THE DEFENDANT
12 ATTEMPTED TO KILL TO THE ACTUAL PERSON KILLED OR INJURED.
13 THE DEFENDANT WOULD BE GUILTY OF ASSAULT AND BATTERY WITH
14 INTENT TO KILL JUST AS IF THE ATTEMPT HAD RESULTED IN THE
15 DEATH OR INJURY OF THE PERSON THE DEFENDANT ATTEMPTED TO
16 KILL.

17 NOW, LADIES AND GENTLEMEN OF THE JURY, THERE ARE
18 TWO POSSIBLE VERDICTS WHICH YOU MAY FIND ON EACH INDICTMENT
19 IN THIS CASE, AND I HAVE PREPARED FOUR INDICTMENTS. THOSE
20 VERDICTS ARE GUILTY OR NOT GUILTY, AND AGAIN THERE'S NO
21 SIGNIFICANCE WHATSOEVER IN THE ORDER THAT I STATE THESE
22 POSSIBLE VERDICTS. IT IS SIMPLY THAT ONE MUST BE STATED
23 FIRST.

24 LET ME TELL YOU THAT YOUR VERDICT MUST BE A
25 UNANIMOUS ONE. NOW, MR. FOREPERSON, WHEN YOUR JURY AGREES

1 UPON A VERDICT, I WANT YOU TO CIRCLE THE VERDICT THAT HAS
2 BEEN REACHED. AGAIN, THE VERDICT THAT HAS BEEN REACHED IS
3 THE ONE YOU WILL CIRCLE, AND THEN I WILL ASK YOU TO SIGN
4 YOUR NAME AND KNOCK ON THE DOOR.

5 NOW I'M GOING TO ASK YOU TO RETURN TO YOUR JURY
6 ROOM. I MAY HAVE AN ADDITIONAL INSTRUCTION; I DON'T THINK
7 SO, I'VE ALREADY GONE OVER THIS WITH THE JURY. IF I DO, I
8 MEAN THE ATTORNEYS, IF I DO HAVE TO INSTRUCT FURTHER I WILL
9 BRING YOU BACK OUT. I DON'T WANT YOU TO BEGIN YOUR
10 DELIBERATIONS YET. I WANT THE TWO ALTERNATES PLACED IN A
11 SEPARATE ROOM BECAUSE THEY CANNOT BE IN ON THE PROCESS AT
12 THIS POINT ANYWAY. I WANT YOU TO GO IN YOUR ROOM, DON'T
13 BEGIN YOUR DELIBERATIONS UNTIL I TELL YOU TO DO SO, AND LET
14 ME TELL YOU HOW I WILL DO THAT.

15 IF I SEND MR. ROPP IN AND HE HAS THE EXHIBITS IN
16 THIS CASE AND THE VERDICT FORMS AND THIS COPY OF MY CHARGE,
17 WHICH I AM HAVING THE COURT REPORTER MARK AS COURT'S
18 EXHIBIT NUMBER 4, AS I SAID THE CHARGE IN THIS CASE, AS IN
19 MANY CASES, IS VERY COMPLEX AND THAT'S WHY I DO A
20 TRANSCRIPT OF IT SO THAT YOU'LL HAVE A VERBATIM TRANSCRIPT
21 OF WHAT I'VE INSTRUCTED YOU. IF I SEND THOSE MATTERS TO
22 YOU THAT IS YOUR SIGNAL TO BEGIN YOUR DELIBERATIONS, IS
23 THAT CLEAR? OKAY, AND UNTIL I DO THAT DON'T BEGIN. I WILL
24 NOT SEND THEM UNTIL I AM PREPARED FOR YOU TO GO FORWARD,
25 ALL RIGHT. ALL RIGHT, MR. ROPP, IF YOU WOULD TAKE THEM

1 BACK AND MAKE SURE THEY HAVE SOME REFRESHMENTS. THEY'VE
2 BEEN HERE FOR QUITE SOME TIME AND I KNOW THEY'RE VERY
3 TIRED.

4 (WHEREUPON, COURT'S EXHIBIT NUMBER 4 MARKED FOR
5 IDENTIFICATION.)

6 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
7 2:31 P.M.)

8 THE COURT: LADIES, DO YOU WANT TO LOOK AT THE
9 VERDICT FORMS?

10 (WHEREUPON, COUNSEL REVIEWED THE VERDICT FORMS
11 AND AGREED TO THEIR CONTENT.)

12 THE COURT: ALL RIGHT, NOW ARE THERE ANY
13 ADDITIONS TO OR DELETIONS TO THE CHARGE?

14 MS. ELDER: NO, SIR, NONE FROM THE STATE, YOUR
15 HONOR.

16 THE COURT: ALL RIGHT, FROM THE DEFENSE?

17 MS. PRATT: NO, YOUR HONOR.

18 THE COURT: ALL RIGHT, VERY WELL, WOULD YOU,
19 LADIES, PLEASE COME FORWARD AND GET THE VERDICT FORMS AND
20 YOUR EXHIBITS AND LET'S GET EVERYTHING TOGETHER, MAKE SURE
21 WE'RE ALL IN THE RIGHT TRACK AND GET THIS STUFF READY TO
22 SEND INTO THE JURY.

23 (WHEREUPON, THE VERDICT FORMS AND EXHIBITS WERE
24 DELIVERED TO THE JURY ROOM WITH INSTRUCTIONS TO BEGIN
25 DELIBERATIONS AT 2:36 P.M.)

1 THE COURT: ALL RIGHT, I DON'T THINK THERE'S
2 ANYTHING WE CAN DO. I AM GOING TO, IT'S MY POLICY THAT IF
3 WE GET ALL THE WAY THROUGH THE TRIAL AND I SEND THEM OUT I
4 DON'T BRING AN ALTERNATE IN HALFWAY THROUGH THE
5 DELIBERATIONS. I'M GOING TO SET, OR RELEASE THE ALTERNATES
6 AT THIS TIME, OKAY, ALL RIGHT.

7 (WHEREUPON, THE ALTERNATES WERE EXCUSED.)

8 THE COURT: MS. PRATT?

9 MS. PRATT: YES, YOUR HONOR, I JUST WANTED TO
10 PUT ON THE RECORD MY REASONS FOR MY OBJECTIONS DURING THE
11 SOLICITOR'S CLOSING ARGUMENT.

12 THE COURT: ALL RIGHT.

13 MS. PRATT: THE FIRST OBJECTION, AND I KNOW THEY
14 WERE OVERRULED, I JUST NEEDED TO PUT MY REASONS IN. THE
15 FIRST OBJECTION I MADE WAS WHEN SHE MADE THE STATEMENT HAND
16 OF ONE IS THE HAND OF ALL AND THROUGHOUT THIS TRIAL I'VE
17 MAINTAINED THAT THE LAW IN HAND OF ONE IS SLIGHTLY
18 DIFFERENT FROM THE LAW OF ACCOMPLICE LIABILITY. I'VE
19 ALREADY GIVEN THE COURT ON ANOTHER REASON THE SAME CASE
20 STATE V. CURRY ---

21 THE COURT: YES.

22 MS. PRATT: --- WHICH SPEAKS TO THAT. AND THE
23 SECOND OBJECTION THAT I MADE WAS WHEN SHE CALLED THE
24 ADDITION A TEARDROP. MY OBJECTION IS THAT SHE WAS ARGUING
25 FACTS NOT IN EVIDENCE BECAUSE IT WAS NOT TESTIFIED TO AS

1 BEING A TEARDROP.

2 THE COURT: I UNDERSTAND AND THERE HAS BEEN
3 TEARDROP TESTIMONY IN HERE ABOUT WHAT A TEARDROP MAKES --
4 MEANS. I THINK IT'S A FAIR COMMENT. WE TALKED ABOUT IT IN
5 THE TRIAL AND AS TO HER USE OF THE WORDS THE HAND OF ONE IS
6 THE HAND OF ALL AT THE BEGINNING OF THIS TRIAL AND I THINK
7 I MADE IT VERY CLEAR DURING MY INSTRUCTION THAT I WAS THE
8 SOLE JUDGE OF THE LAW IN THIS CASE AND I WAS VERY CAREFUL
9 TO REFER TO IT AS ACCOMPLICE LIABILITY OR THINGS OF THAT
10 NATURE AND I STRUCK FROM MY CHARGE THAT REFERENCE THAT YOU
11 MADE JUST AS AN ACCOMMODATION TO THE DEFENDANT. I DON'T
12 THINK IT MAKES A WHOLE LOT OF DIFFERENCE, BUT AT ANY RATE
13 THAT'S WHAT I DID, OKAY.

14 MS. PRATT: THANK YOU, YOUR HONOR.

15 THE COURT: YOU'RE WELCOME. OKAY, ANYTHING
16 FURTHER?

17 MS. PRATT: NO, YOUR HONOR.

18 THE COURT: OKAY, LET'S WAIT FOR A VERDICT.

19 (WHEREUPON, THE JURY KNOCKED WITH A QUESTION AT
20 4:06 P.M.)

21 THE COURT: ALL RIGHT, LET'S LET THE RECORD
22 REFLECT THAT THE DEFENDANT IS IN THE COURTROOM AS WELL AS
23 THE ATTORNEYS FOR BOTH SIDES.

24 I HAVE A NOTE FROM THE FOREMAN. THE NOTE SAYS WE
25 NEED TO HEAR THE TESTIMONY OF BRIAN SPEARS AND JEFFREY

1 BETHEA AGAIN, SO, OF COURSE, WE'RE GOING TO LET THEM HEAR
2 THAT. I THINK THAT PROBABLY IT'S GOING TO BE EASIER FOR
3 MS. BABB IF WE DO IT IN THE ORDER THAT THE TESTIMONY WAS
4 RECEIVED, JEFFREY BETHEA FIRST AND THEN WE'LL FOLLOW THAT
5 WITH BRIAN SPEARS.

6 THERE WAS A BREAK IN THE TESTIMONY, OR A COUPLE
7 OF BREAKS IN THE TESTIMONY OF JEFFREY BETHEA, AND WE'RE
8 GOING TO, WE'RE GETTING THE NUMBERS NOW SO THAT WE CAN EDIT
9 THAT OUT, OKAY.

10 MS. PRATT: AND THAT WOULD INCLUDE CROSS
11 EXAMINATION AND REBUTTAL?

12 THE COURT: YES.

13 MS. PRATT: THANK YOU.

14 THE COURT: WELL THE WAY, I USUALLY DO IT, MS.
15 PRATT, IS IF AT ANY TIME THE JURY DECIDES THAT THEY HAVE
16 HEARD THAT PORTION OF THE TESTIMONY THAT THEY WANTED TO
17 HEAR AND THEY DO NOT CARE TO HEAR ANYMORE I WILL CUT IT
18 OFF. I USUALLY TELL THEM THAT IF THEY REACH THE POINT THAT
19 THEY HAVE HEARD WHAT THEY WANT TO HEAR CAUSE SOMETIMES THEY
20 JUST WANT TO HEAR SOMETHING VERY SPECIFIC, OTHER TIMES THEY
21 MAY WANT TO LISTEN TO ALL OF IT, BUT THEY'RE CERTAINLY
22 GOING TO HAVE THE OPPORTUNITY TO LISTEN TO EVERYTHING.

23 MS. PRATT: THANK YOU, YOUR HONOR.

24 (WHEREUPON, COURT'S EXHIBIT NUMBER 5 MARKED FOR
25 IDENTIFICATION.)

1 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
2 4:26 P.M. AND THE FOLLOWING PROCEEDINGS WERE HAD.)

3 THE COURT: YOUR JURY WISHES TO HEAR THE
4 TESTIMONY OF THE DEFENDANT BRIAN SPEARS AND JEFFREY BETHEA
5 AS WELL; IS THAT CORRECT?

6 MR. FOREMAN: THAT IS CORRECT, YOUR HONOR.

7 THE COURT: OKAY, AND WE HAVE MADE PREPARATIONS
8 FOR THAT TO OCCUR, SORRY THAT IT TOOK QUITE SO LONG, BUT WE
9 HAVE TO GO BACK THROUGH THE TAPES AND FIND WHERE EACH ONE
10 STARTS BUT WE HAVE DONE THAT.

11 NOW WE'RE GOING TO, TO START I BELIEVE WITH MR.
12 BETHEA FIRST; IS THAT CORRECT?

13 MADAM COURT REPORTER: YES, SIR.

14 THE COURT: WE'RE GOING TO START WITH MR.
15 BETHEA. IF AT ANY TIME, OF COURSE WE'RE HERE TO PLAY THE
16 ENTIRE TESTIMONY DIRECT AND CROSS EXAMINATION FOR YOU, BUT
17 IF THERE WAS ANYTHING SPECIFIC, AND SOMETIMES JURORS ARE
18 LOOKING FOR A SPECIFIC SPOT, IF YOU REACH A POINT THAT YOU,
19 YOU'VE HEARD WHAT WAS IN DISPUTE OR WHAT YOU WANTED TO HEAR
20 JUST RAISE YOUR HAND LET ME KNOW AND WE'LL GO TO THE NEXT
21 ONE. FEEL FREE TO LISTEN TO ALL OF IT, THOUGH, IF THAT'S
22 WHAT YOU WISH, OKAY.

23 (WHEREUPON, THE TESTIMONY OF JEFFREY BETHEA WAS
24 PLAYED IN OPEN COURT FOR THE JURY.)

25 THE COURT: OKAY, GO TO THE JURY ROOM.

1 (WHEREUPON, AT 5:03 P.M. THE JURY RETIRED TO THE
2 JURY ROOM TO PERMIT THE COURT REPORTER TO LOCATE THE
3 REMAINING TESTIMONY OF MR. BETHEA.)

4 THE COURT: GET THE JURY.

5 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
6 5:09 P.M. AND THE FOLLOWING PROCEEDINGS WERE HAD)

7 THE COURT: ALL RIGHT, LADIES AND GENTLEMEN OF
8 THE JURY, LET ME ASK YOU NOT TO TAKE NOTES. IT'S NOT
9 PROPER IN SOUTH CAROLINA.

10 (WHEREUPON, THE REMAINING TESTIMONY OF JEFFREY
11 BETHEA WAS PLAYED FOR THE JURY IN OPEN COURT.)

12 THE COURT: DO YOU NEED A BREAK BEFORE WE PLAY
13 THE TESTIMONY OF MR. SPEARS?

14 MR. FOREMAN: YES, SIR.

15 (WHEREUPON, THE JURY RETIRED TO THE JURY ROOM AT
16 5:55 P.M.)

17 THE COURT: WE'RE AT BREAK.

18 (WHEREUPON, A RECESS WAS TAKEN AT THIS TIME AND
19 THE FOLLOWING TAKES PLACE ON THE RECORD AFTER THE BREAK.)

20 THE COURT: ARE WE READY?

21 MADAM COURT REPORTER: YES, SIR.

22 THE COURT: SAM, GET THE JURY.

23 (WHEREUPON, THE JURY RETURNS TO THE COURTROOM AT
24 6:20 P.M.)

25 THE COURT: ALL RIGHT, WE HAVE THE JURY BACK IN

1 AND WE'RE GOING TO LISTEN NOW TO THE TESTIMONY OF THE
2 DEFENDANT.

3 (WHEREUPON, THE TESTIMONY OF BRIAN SPEARS PLAYED
4 FOR THE JURY IN OPEN COURT.)

5 THE COURT: ALL RIGHT, MR. ROPP, TAKE THE JURY
6 TO THE JURY ROOM.

7 (WHEREUPON, AT 7:22 P.M. THE JURY AGAIN RETIRED
8 TO THE JURY ROOM AND RESUMED THEIR DELIBERATIONS.)

9 THE COURT: OKAY, WE'RE AT EASE.

10 (WHEREUPON, THE JURY KNOCKED WITH A QUESTION AT
11 7:46 P.M.)

12 THE COURT: LET THE RECORD REFLECT THAT THE
13 DEFENDANT IS PRESENT WITH HIS ATTORNEY AS WELL AS COUNSEL
14 FOR THE STATE. I HAVE A MESSAGE FROM THE, OR A REQUEST
15 FROM THE FOREPERSON, IT READS "COULD WE, PLEASE, SEE THE
16 LETTERS WAS (A) WRITTEN BY MR. SPEARS?" OF COURSE THAT'S
17 NOT IN EVIDENCE. I COULD BRING THE JURY IN IF YOU REQUEST
18 AND TELL THEM THAT THEY CAN ONLY CONSIDER THE EVIDENCE THAT
19 HAS BEEN PRESENTED TO THEM IN THE TRIAL, OR IF NO ONE HAS
20 AN OBJECTION I CAN WRITE THAT ON THIS NOTE AND RETURN THE
21 NOTE TO THEM. IT MIGHT SAVE A LITTLE BIT OF TIME.

22 MS. ELDER: YOUR HONOR, MY REQUEST WOULD BE THAT
23 I HAVE NO OBJECTION TO YOUR WRITING IT ON A NOTE BUT MY
24 REQUEST WOULD BE THAT YOU WOULD INCLUDE LANGUAGE ON THAT
25 NOTE THAT SAYS THEY CAN BE, THE PORTIONS THAT ARE ADMITTED

1 INTO EVIDENCE CAN BE REREAD TO THEM IF THAT IS WHAT THEY
2 WANT BECAUSE I DON'T KNOW IF THEY'RE ASKING TO SEE THE
3 ACTUAL WRITING OR IF THEY'RE ASKING TO HEAR WHAT THE
4 CONTENT IS.

5 THE COURT: NO, THEY WANT TO SEE IT ALL, THEY
6 WANT TO SEE, I KNOW THEY'RE TALKING ABOUT THE RAP LYRICS
7 AND THE LETTERS.

8 MS. ELDER: SO, I MEAN I, I, I THINK WE NEED TO
9 AT LEAST TELL THEM THAT THAT IS AVAILABLE THAT IF THEY WANT
10 TO HEAR THE PORTION THAT'S IN EVIDENCE THAT THEY CAN HEAR
11 THAT AGAIN.

12 THE COURT: THIS JURY I'M A LITTLE AFRAID TO,
13 BUT WE'LL SEE.

14 MS. PRATT: AND MY CONCERN WAS I DON'T WANT TO
15 SUGGEST TO THEM THAT THAT IS WHAT THEY NEED TO BE DOING AND
16 MAKE THEM THINK THAT THEY HAVE TO DO THAT. I DON'T KNOW
17 HOW YOU GOING TO WORD IT.

18 MS. ELDER: THEY ASKED FOR THEM.

19 THE COURT: WELL WHAT I'M GOING TO DO IS WRITE
20 HERE THAT, I'LL DO IT THIS WAY, THE LETTERS WERE NOT
21 INTRODUCED INTO EVIDENCE AND THEY MAY NOT SEE THEM. THEY
22 MAY ONLY CONSIDER THE EVIDENCE THAT WAS PRESENTED.

23 MS. ELDER: YOUR HONOR, I UNDERSTAND WHAT YOU'RE
24 SAYING, YOUR HONOR, BUT IT WAS IN FACT, PORTIONS OF THOSE
25 WERE IN FACT ADMITTED.

1 THE COURT: BUT ALL THEY'VE ASKED IS TO SEE,
2 THEY WANT TO SEE.

3 MS. ELDER: I THINK THAT IS MISLEADING.

4 THE COURT: I DON'T THINK THEY'RE TRYING TO
5 MISLEAD ME.

6 MS. ELDER: NO, I THINK THAT THAT IS MISLEADING
7 TO TELL THEM THAT THAT IS NOT IN EVIDENCE BECAUSE THAT IN
8 FACT THOSE PORTIONS OF IT ARE IN EVIDENCE, THE AGREEMENT
9 THAT WE ---

10 THE COURT: ALL RIGHT, WELL THEN I'LL SAY THAT
11 YOU MAY ONLY CONSIDER THE EVIDENCE THAT HAS BEEN ADMITTED
12 IN THIS TRIAL.

13 MS. PRATT: THAT'S FAIR.

14 MS. ELDER: YOUR HONOR ---

15 THE COURT: AND WE WILL REVIEW ANY PART OF THE
16 TESTIMONY THAT YOU WISH.

17 MS. ELDER: THAT'S FINE.

18 THE COURT: OKAY, THIS IS WHAT I'VE WRITTEN,
19 "YOU MAY CONSIDER THE TESTIMONY AND EVIDENCE AND EXHIBITS
20 INTRODUCED DURING THE TRIAL. WE WILL ALLOW YOU TO HEAR ANY
21 OF THE TESTIMONY YOU DESIRE."

22 MS. ELDER: YES, SIR.

23 THE COURT: OKAY, MS. PRATT?

24 MS. PRATT: YES, YOUR HONOR.

25 THE COURT: OKAY, ALL RIGHT, LET'S SEND IT.

1 MIKE, IF YOU WOULD TAKE THAT BACK TO THEM.

2 (WHEREUPON, COURT'S EXHIBIT NUMBER 6 MARKED FOR
3 IDENTIFICATION.)

4 (WHEREUPON, THE COURT'S RESPONSE TO THE QUESTION
5 FROM THE JURY WAS DELIVERED TO THE JURY AT 7:59 P.M.)

6 THE COURT: ALL RIGHT, STAY CLOSE JUST IN CASE
7 THEY HAVE ANOTHER QUESTION.

8 MS. ELDER: YES, SIR.

9 (WHEREUPON, THE JURY KNOCKED WITH A QUESTION AT
10 8:50 P.M.)

11 THE COURT: ALL RIGHT, WE HAVE ANOTHER QUESTION.
12 "COULD WE, PLEASE, LISTEN TO NATHANIEL DOUGLAS TESTIMONY?"
13 CAN YOU LOCATE THAT, MS. BABB?

14 MADAM COURT REPORTER: YES, SIR. NO, YOUR
15 HONOR, THE TAPE IS NOT HERE.

16 MS. ELDER: I ASSUME THAT WE'LL HAVE TO SUSPEND
17 THE DELIBERATIONS THIS EVENING AND HAVE THEM COME BACK IN
18 THE MORNING?

19 MS. PRATT: I AGREE, YOUR HONOR.

20 THE COURT: I'M GOING TO TELL THEM THAT TAPE IS
21 NOT HERE AND IF IT'S NECESSARY FOR THEIR DELIBERATIONS AND
22 LET THEM MAKE THE CALL.

23 MS. ELDER: YES, SIR.

24 (WHEREUPON, COURT'S EXHIBIT NUMBER 7 MARKED FOR
25 IDENTIFICATION.)

1 THE COURT: BRING THEM IN.

2 MS. PRATT: WILL YOU INFORM THEM, YOUR HONOR,
3 THAT IF THEY DO TAKE A BREAK THEY'LL GO HOME AND THEY'LL
4 COME BACK IN THE MORNING TO HEAR IT?

5 MADAM COURT REPORTER: I FOUND IT.

6 THE COURT: OKAY, THAT'S GOOD.

7 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
8 9:14 P.M. AND THE TESTIMONY OF NATHANIEL DOUGLAS WAS PLAYED
9 FOR THE JURY IN OPEN COURT.)

10 THE COURT: OKAY, TAKE THE JURY TO THE JURY
11 ROOM.

12 (WHEREUPON, THE JURY EXITED THE COURTROOM AT
13 10:02 P.M.)

14 THE COURT: WE'RE AT EASE.

15 (WHEREUPON, THE JURY KNOCKED WITH A VERDICT AT
16 10:25 P.M..)

17 THE COURT: BRING IN THE JURY.

18 (WHEREUPON, THE JURY ENTERED THE COURTROOM AT
19 10:28 P.M. TO DELIVER ITS VERDICT AS TO DEFENDANT
20 SPEARS.)

21 THE COURT: ALL RIGHT, MR.FOREMAN, I UNDERSTAND
22 THAT YOU HAVE REACHED A VERDICT; IS THAT CORRECT?

23 MR. FOREPERSON: YES, WE HAVE, YOUR HONOR.

24 THE COURT: AND WAS IT A UNANIMOUS VERDICT?

25 MR. FOREPERSON: YES, IT WAS, YOUR HONOR.

1 THE COURT: WAS IT A VERDICT AS TO EACH COUNT?

2 MR. FOREPERSON: YES, IT WAS.

3 THE COURT: ALL RIGHT, LET ME ADVISE ALL THOSE
4 WHO ARE IN THE COURTROOM THAT I WILL TOLERATE NO OUTBURSTS
5 AND NO SHOW OF EMOTION ONE WAY OR THE OTHER. I HAVE NO
6 IDEA WHAT THIS VERDICT MAY BE BUT I WILL NOT TOLERATE ANY
7 EMOTIONAL SHOWS OR SHOWS OF EMOTION. I'M GOING TO HAVE THE
8 DEPUTIES PLACE YOU IN JAIL IF YOU DO.

9 MADAM CLERK, WOULD YOU RECEIVE THE VERDICT?

10 MADAM CLERK: YES, SIR.

11 THE COURT: THANK YOU VERY MUCH.

12 MADAM CLERK, PUBLISH THE VERDICT.

13 MADAM CLERK: INDICTMENT NUMBER 2007-GS-26-3388,
14 THE STATE OF SOUTH CAROLINA V. BRIAN KENDRICK SPEARS AS TO
15 THE CHARGE OF MURDER OF AARON HAMMONDS WE THE JURY
16 UNANIMOUSLY FIND THE DEFENDANT GUILTY.

17 INDICTMENT NUMBER 2007-GS-26-3387, THE STATE OF
18 SOUTH CAROLINA V. BRIAN KENDRICK SPEARS AS TO THE CHARGE OF
19 ASSAULT AND BATTERY WITH INTENT TO KILL KRYSTAL FOWLER WE
20 THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY.

21 INDICTMENT NUMBER 2007-GS-26-3389, THE STATE OF
22 SOUTH CAROLINA V. BRIAN KENDRICK SPEARS AS TO THE CHARGE OF
23 ASSAULT AND BATTERY WITH INTENT TO KILL DJUAN QUINTELL
24 MONROE WE THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY.

25 INDICTMENT NUMBER 2007-GS-26-3390, THE STATE OF

1 SOUTH CAROLINA V. BRIAN KENDRICK SPEARS AS TO THE CHARGE OF
2 ASSAULT AND BATTERY WITH INTENT TO KILL LASHEIKA FELTON WE
3 THE JURY UNANIMOUSLY FIND THE DEFENDANT GUILTY.

4 ALL DATED MAY 13TH, 2010, SIGNED BY FOREPERSON
5 293 RICHARD PALUZZI.

6 LADIES AND GENTLEMEN OF THE JURY, IF THIS IS YOUR
7 VERDICT SO SIGNIFY BY RAISING YOUR RIGHT HAND.

8 (WHEREUPON, ALL JURORS RESPONDED AFFIRMATIVELY.)

9 MADAM CLERK: THANK YOU.

10 THE COURT: POLL INDIVIDUALLY, PLEASE.

11 MADAM CLERK: WHEN I CALL YOUR NAME IF YOU WILL,
12 PLEASE STAND.

13 112, MICAH FREEMAN, IS THIS YOUR VERDICT?

14 JURY PANEL MEMBER: YES, MA'AM.

15 MADAM CLERK: IS THIS STILL YOUR VERDICT?

16 JURY PANEL MEMBER: YES, MA'AM.

17 MADAM CLERK: THANK YOU, 368, BILLY STICKLES, IS
18 THIS YOUR VERDICT?

19 JURY PANEL MEMBER: YES, MA'AM.

20 MADAM CLERK: IS THIS STILL YOUR VERDICT?

21 JURY PANEL MEMBER: YES, MA'AM.

22 MADAM CLERK: THANK YOU, 281, ESTHER MURPHY, IS
23 THIS YOUR VERDICT?

24 JURY PANEL MEMBER: YES, MA'AM.

25 MADAM CLERK: IS THIS STILL YOUR VERDICT?

1 JURY PANEL MEMBER: YES, MA'AM.

2 MADAM CLERK: THANK YOU, 50, SHARON HEDRICK, IS
3 THIS YOUR VERDICT?

4 JURY PANEL MEMBER: YES, MA'AM.

5 MADAM CLERK: IS THIS STILL YOUR VERDICT?

6 JURY PANEL MEMBER: YES, MA'AM.

7 MADAM CLERK: THANK YOU, 338, LORIANNE SELLERS,
8 IS THIS YOUR VERDICT?

9 JURY PANEL MEMBER: YES, MA'AM.

10 MADAM CLERK: IS THIS STILL YOUR VERDICT?

11 JURY PANEL MEMBER: YES, MA'AM.

12 MADAM CLERK: THANK YOU, 165, JEFFREY HOLMES, IS
13 THIS YOUR VERDICT?

14 JURY PANEL MEMBER: YES, MA'AM.

15 MADAM CLERK: IS THIS STILL YOUR VERDICT?

16 JURY PANEL MEMBER: YES, MA'AM.

17 MADAM CLERK: THANK YOU, 255, MICHAEL MCGRIFF,
18 IS THIS YOUR VERDICT?

19 JURY PANEL MEMBER: YES, MA'AM.

20 MADAM CLERK: IS THIS STILL YOUR VERDICT?

21 JURY PANEL MEMBER: YES, MA'AM.

22 MADAM CLERK: THANK YOU, 257, KENNETH MCMURRAIN,
23 IS THIS YOUR VERDICT?

24 JURY PANEL MEMBER: YES, MA'AM.

25 MADAM CLERK: IS THIS STILL YOUR VERDICT?

1 JURY PANEL MEMBER: YES, MA'AM.

2 MADAM CLERK: THANK YOU, 383, JOEL TURNER, IS
3 THIS YOUR VERDICT?

4 JURY PANEL MEMBER: YES, MA'AM.

5 MADAM CLERK: IS THIS STILL YOUR VERDICT?

6 JURY PANEL MEMBER: YES, MA'AM.

7 MADAM CLERK: THANK YOU, 407, LINDSEY WHELAN, IS
8 THIS YOUR VERDICT?

9 JURY PANEL MEMBER: YES, MA'AM.

10 MADAM CLERK: IS THIS STILL YOUR VERDICT?

11 JURY PANEL MEMBER: YES, MA'AM.

12 MADAM CLERK: THANK YOU, 342, IRA SHELLEY, IS
13 THIS YOUR VERDICT?

14 JURY PANEL MEMBER: YES, MA'AM.

15 MADAM CLERK: IS THIS STILL YOUR VERDICT?

16 JURY PANEL MEMBER: YES, MA'AM.

17 MADAM CLERK: THANK YOU, 293, RICHARD PALUZZI,
18 IS THIS YOUR VERDICT?

19 JURY PANEL MEMBER: YES, MA'AM.

20 MADAM CLERK: IS THIS STILL YOUR VERDICT?

21 JURY PANEL MEMBER: YES, MA'AM.

22 MADAM CLERK: THANK YOU.

23 THE COURT: ALL RIGHT, ANYTHING FROM THE
24 DEFENSE?

25 MS. PRATT: NO, YOUR HONOR.

1 THE COURT: ARE YOU READY FOR SENTENCING?

2 MS. PRATT: YES, YOUR HONOR, I WOULD HAVE
3 OBVIOUSLY SOME MOTIONS.

4 THE COURT: THAT'S WHAT I MEANT.

5 MS. PRATT: I'M SORRY, YOUR HONOR, I WAS NOT
6 AWARE THAT YOU WOULD HAVE ME DO MOTIONS IN FRONT OF THE
7 JURY.

8 THE COURT: THE JURY HAS COMPLETED THEIR WORK.
9 I'M GOING TO LET YOU MAKE YOUR MOTIONS RIGHT HERE.

10 MS. PRATT: THANK YOU, YOUR HONOR, I'M SORRY I
11 WASN'T AWARE OF THE PROCEDURE.

12 YOUR HONOR, AT THIS TIME I WOULD MAKE, FIRST OF
13 ALL I WOULD RENEW EVERY MOTION THAT I HAVE MADE THROUGHOUT
14 THE TRIAL INCLUDING MY MOTION FOR A DIRECTED VERDICT AND MY
15 MOTION AT THE END OF THE CASE AS IT WENT TO THE JURY.

16 I WILL BE AT THIS POINT ASKING FOR A MOTION IN
17 ARREST OF JUDGMENT. WHILE I UNDERSTAND THAT WE HAVE BEEN
18 IN DELIBERATIONS FOR SOME EIGHT HOURS, FOUR HOURS OF THAT
19 WAS LISTENING TO TESTIMONY MUCH OF WHAT CAME IN IN THE
20 TRIAL, WAS EMOTIONAL AND APPEALED TO THE SENSES AND THERE
21 WERE THINGS THAT WOULD, WOULD CAUSE A PERSON TO BE
22 EMOTIONAL THAT MAY HAVE HAD NOTHING TO DO WITH THE ACTUAL
23 CRIME SINCE THEY HAPPENED AFTERWARDS. BECAUSE OF THAT,
24 YOUR HONOR, AND BECAUSE I BELIEVE THAT THERE MAY HAVE BEEN
25 AN EMOTIONAL APPEAL AND EMOTIONAL INVOLVEMENT IN THIS I

1 WOULD ASK THAT THE JUDGE, THAT YOU SET ASIDE THIS VERDICT
2 AND DIRECT A VERDICT OF NOT GUILTY.

3 THE COURT: YES, MA'AM, AND, MS. PRATT, LET ME
4 COMMEND YOU ON YOUR ZEALOUS REPRESENTATION OF YOUR CLIENT.
5 YOU HAVE DONE AN EXCELLENT JOB. I DON'T THINK ANYONE CAN
6 FAULT YOU, HOWEVER THE EVIDENCE IN THIS CASE CERTAINLY
7 SUPPORTS THE VERDICT THAT HAS BEEN RENDERED AND I WOULD
8 RESPECTFULLY DENY YOUR MOTIONS, THANK YOU.

9 MS. PRATT: THANK YOU, YOUR HONOR.

10 THE COURT: ALL RIGHT, MR. SPEARS, MS. PRATT?

11 MS. PRATT: THANK YOU, YOUR HONOR. YOUR HONOR,
12 I DON'T KNOW THE BASIS BUT THE JURY HAS MADE THEIR
13 DECISION. I DON'T KNOW WHETHER THEY THOUGHT HE WAS THE
14 SHOOTER OR WAS AN ACCOMPLICE. WHAT I KNOW IS THAT THIS IS
15 A MAN WHO IS A YOUNG MAN WHO HAS COME FROM A BACKGROUND
16 WHERE HE HAS JUST A 9TH GRADE EDUCATION. HIS PARENTS WERE
17 SEPARATED. HE GREW UP IN A VERY DIFFICULT AREA. HE WAS
18 SENT TO, HE SPENT SOME OF HIS TIME IN PRISON BECAUSE OF GUN
19 CHARGES. THINGS ARE DIFFERENT IN NORTH CAROLINA, THINGS
20 THAT PROBABLY WE WOULD CHANGE OR DO DIFFERENTLY IN HORRY
21 COUNTY. THE SUPPORT SYSTEMS AREN'T THERE THAT THE
22 SITUATIONS THAT MIGHT HAVE HELPED THIS YOUNG MAN IN GETTING
23 INVOLVED WITH THIS GROUP AND DOING THE THINGS THAT HE WAS.

24 I THINK THAT THE GANG INVOLVEMENT THAT HE HAD WAS
25 HIS WAY OF SEEKING FOR FAMILY AND HIS WAY OF SEEKING A

1 GROUP. I DON'T KNOW THAT WHEN HE GOT INVOLVED WITH THEM AT
2 THE AGE OF 13 OR 14 THAT HE HAD ANY IDEA WHERE IT WOULD
3 LEAD HIM OR THE KINDS OF THINGS THAT MIGHT BECOME NORMAL
4 FOR HIM.

5 I THINK THAT THE WRITINGS THAT HE HAD THAT
6 PROBABLY SHOCKED THE CONSCIOUS OF ALL OF US WERE THINGS
7 THAT THEY TALKED ABOUT ON A REGULAR WAY SO THAT IT DIDN'T
8 SEEM TO BE A DIFFICULT THING. I DON'T THINK THAT THIS IS
9 AN EVIL MAN. I HAVE KNOWN HIM NOW FOR THREE YEARS. I'VE
10 MET WITH HIM REGULARLY. I'VE TALKED TO HIM. HE'S
11 INTELLIGENT. HE IS HARD WORKING. HE IS ABLE TO
12 COMMUNICATE IN SUCH A BEAUTIFUL FASHION. HE HAS ART. HE'S
13 JUST NOT A LIFE TO THROW AWAY AND I WOULD ASK THE COURT IN
14 DEFERENCE TO THAT EVEN THOUGH THIS WAS A DANGEROUS CRIME,
15 AND I UNDERSTAND -- I'VE LIVED IN MYRTLE BEACH FOR 30 YEARS
16 NOW, THAT'S ALMOST BEING A LOCAL -- AND I UNDERSTAND THAT
17 WE DON'T LIKE THE KINDS OF THINGS THAT CAN HARM SO MANY
18 PEOPLE AS THIS ONE COULD HAVE. BUT AS I SAY WITH THIS
19 YOUNG MAN AND THE INCIDENT AND THE WAY IT CAME DOWN AND THE
20 FACT THAT, THAT HE COMES FROM A BACKGROUND THAT HE DOES I
21 ASK THAT THE COURT IN DEFERENCE TO THAT AND ALSO IN
22 DEFERENCE TO THE VERY LOW SENTENCE THAT THE CODEFENDANT WHO
23 VERY LIKELY MAY HAVE BEEN THE ACTUAL SHOOTER RECEIVED THAT
24 THE COURT CONSIDER NOTHING MORE THAN 30 YEAR LIFE ON THE
25 SITUATION.

1 THE COURT: MS. ELDER?

2 MS. ELDER: THANK YOU, YOUR HONOR. AS YOUR
3 HONOR KNOWS MR. SPEARS HAS NOT HAD A LONG TIME TO GET A
4 RECORD AS AN ADULT BUT HE DOES IN FACT HAVE A CONVICTION IN
5 2002 FOR CARRYING A CONCEALED WEAPON. HE ALSO HAS ANOTHER
6 CONVICTION FOR A WEAPONS OFFENSE IN 2006. HE WAS ON ACTUAL
7 PROBATION AT THE TIME OF THIS MURDER. HE SHOULDN'T HAVE
8 BEEN IN SOUTH CAROLINA AT ALL.

9 HE COMMITTED THE, YOU HEARD EVIDENCE ABOUT THE
10 SHOOTING AT WALMART. YOU HEARD THAT FROM HIS SISTER. YOU
11 ALSO HAD AN OPPORTUNITY, AND IT'S A COURT'S EXHIBIT OF THE
12 POLICE INCIDENT REPORT WHEN THEY RESPONDED TO THAT
13 INCIDENT, THE I.D. ON THE VIDEO WAS SUCH THAT WE, THAT THEY
14 COULD NOT CHARGE MR. SPEARS AT THAT TIME.

15 YOU'RE ALSO, YOUR HONOR HAS HAD A UNIQUE
16 OPPORTUNITY THAT THIS JURY DID NOT GET TO HEAR THE GANG
17 LYRICS THAT HE WROTE WHILE HE WAS IN JAIL AND THIS BOOK IS
18 ONLY A PIECE OF THOSE.

19 THE COURT: I HAVE SEEN MANY OF THEM.

20 MS. ELDER: AND AS YOUR HONOR CAN RECALL WHEN WE
21 WERE DOING THOSE MOTIONS OUTSIDE THE PRESENCE OF THE JURY
22 EVERYTHING I READ TALKED ABOUT A COMPLETE DISREGARD FOR
23 LIFE. IT TALKED ABOUT KILLING. IT TALKED ABOUT MURDER.
24 IT TALKED ABOUT ROBBERY. IT TALKED ABOUT GUNS, ALMOST
25 EVERY SINGLE LINE WAS ABOUT THAT. HE HAS GLORIFIED

1 VIOLENCE. HE HAS GOT THOSE TATTOOS SINCE HE'S BEEN
2 INCARCERATED.

3 YOUR HONOR, MR. SMITH TESTIFIED THAT HE CAME
4 FORWARD BECAUSE OF HIS CHILDREN. WHAT HE DIDN'T, WASN'T
5 ABLE TO TESTIFY TO IN FRONT OF THE JURY WAS THE REASON WE
6 WERE ABLE TO INTERCEPT THAT LETTER IN NORTH CAROLINA IS
7 BECAUSE HE GAVE US THAT INFORMATION TO INTERCEPT IT.
8 THAT'S WHY WE CALLED NORTH CAROLINA DEPARTMENT OF
9 CORRECTIONS. HE CAME FORWARD BECAUSE HE SAID HE COULD NOT
10 LIVE WITH HIMSELF BECAUSE OF ALL THE THREATS THAT BRIAN
11 SPEARS MADE WHILE HE WAS IN JAIL TO THE LIFE OF NOT ONLY
12 JEFFREY BETHEA BUT OF JEFFREY BETHEA'S WIFE, HIS CHILDREN,
13 THE PEOPLE IN THIS CASE, INVOLVED IN THIS CASE, THE VILE
14 THINGS THAT MR. SPEARS INDICATED THAT HE WAS GOING TO DO TO
15 THE PEOPLE INVOLVED IN THIS CASE.

16 YOUR HONOR, IN ADDITION TO THAT THAT'S NOT ENOUGH
17 MR. SPEARS SINCE HE'S BEEN OUT AT THE JAIL HE GOT SOMETHING
18 RIGHT, HE WAS MOVED AROUND QUITE A BIT BECAUSE HE CAN'T
19 EVEN BE MAINTAINED INSIDE A JAIL.

20 YOUR HONOR, I KNOW HE IS YOUNG BUT YOU HAVE SEEN
21 SOME OF THE THINGS HE'S CAPABLE OF, SOME OF THE THINGS HE
22 GLORIFIES AND BELIEVES IN, AND I THINK IF ANY CASE DESERVES
23 A LIFE SENTENCE THIS IS THE CASE FOR THAT.

24 THE COURT: THANK YOU, MS. ELDER, AND AGAIN I
25 WANT TO THANK YOU AND MR. FILIBERTO FOR THE JOB THAT YOU

1 HAVE DONE HERE THIS WEEK AS WELL.

2 MS. ELDER: THANK YOU, YOUR HONOR.

3 THE COURT: YOU ARE IN THE SAME CATEGORY IN MY
4 VIEW AS, AS MS. PRATT. YOU'RE EXCELLENT ATTORNEYS AND YOU
5 HAVE ZEALOUSLY REPRESENTED THE STATE.

6 MR. SPEARS, DO YOU WANT TO TELL ME ANYTHING?

7 DEFENDANT SPEARS: YOUR HONOR, I JUST ASK YOU
8 FOR YOUR MERCY, THANK YOU.

9 THE COURT: ALL RIGHT, MR. SPEARS, LET ME, LET
10 ME SAY THIS. I DON'T KNOW THE BASIS FOR THE JURY'S FINDING
11 OF GUILT, WHETHER IT BE THAT THE JURY FELT THAT YOU WERE
12 THE SHOOTER OR YOU WERE AN ACCOMPLICE. IT REALLY DOESN'T
13 MAKE ANY DIFFERENCE. THE JURY HAS DETERMINED THAT YOU ARE
14 GUILTY OF THE MOST SERIOUS CRIME THAT WE HAVE IN THIS STATE
15 AND THAT IS MURDER.

16 I BELIEVE, MR. SPEARS, THAT YOU ARE A SERIOUSLY
17 MISGUIDED YOUNG MAN. I HAVE READ SOME OF YOUR LYRICS. I
18 HAVE HEARD ABOUT, ABOUT YOUR LIFESTYLE. MR. SPEARS, THAT'S
19 NOT LIFE. THAT'S NOT THE WAY IT SHOULD BE IN ANY SOCIETY.
20 YOUR ACTIONS, YOUR THOUGHTS, YOUR FRIENDS ARE NOT WHAT WE
21 CAN TOLERATE. I THINK IN GREAT PART THAT'S BECAUSE OF YOUR
22 IMMATURITY.

23 PERHAPS YOU BELIEVE THAT BY HAVING A FIREARM OR
24 HAVING A GUN AND CARRYING ABOUT A GUN AND TAKING LIFE SO
25 CHEAPLY AS YOU AND YOUR ASSOCIATES SEEM TO DO THAT IT MAKES

1 YOU A MAN, IT MAKES YOU AN ADULT. LET ME TELL YOU IT
2 DOESN'T. I'VE WATCHED MANY DOCUMENTARIES. I'VE BEEN TO
3 MANY SEMINARS ABOUT GANGS AND I CAN TELL YOU THAT IN MOST
4 CASES AS THESE MEMBERS FINALLY MATURE THEY LEAVE IT AND
5 THEY REALIZE WHAT A DESTRUCTIVE INFLUENCE THAT IS ON THEIR
6 COMMUNITY AND THEIR SOCIETY.

7 YOU CALL YOURSELF GROWTH AND DEVELOPMENT BUT YOU
8 ALL CARRY GUNS, YOU SHOOT AT EACH OTHER, YOU QUARREL AND
9 YOU FIGHT. YOU'RE BASED IN VIOLENCE. THAT IS SO CONTRARY
10 TO WHAT YOU TRY TO TELL PEOPLE YOU ARE. THAT'S NOT HOW IT
11 IS.

12 I HOPE, MR. SPEARS, THAT YOU'LL BE ABLE TO, TO
13 MAKE SOMETHING OUT OF YOUR LIFE. YOU HAVE TO HAVE A
14 SUBSTANTIAL PERIOD OF INCARCERATION. YOUR LAWYER KNOWS
15 THAT. YOUR LAWYER KNOWS THAT THERE'S A 30-YEAR MINIMUM
16 MANDATORY INVOLVED HERE. SHE KNOWS THAT.

17 YOU WILL BE AN OLD MAN WHEN YOU ARE RELEASED FROM
18 PRISON OR ON THE WAY TO BEING ONE. I HOPE THAT YOU CAN
19 TURN YOURSELF AROUND AND THAT YOU CAN CONTRIBUTE TO
20 SOCIETY. IN SENTENCING YOU I PLACE GREAT EMPHASIS ON THE
21 FACT THAT YOUR CODEFENDANT, AND AS I SAID I DON'T KNOW
22 WHICH ONE OF YOU WERE THE TRIGGER MAN, I JUST KNOW THAT
23 THIS JURY HAS TOLD ME THAT YOU WERE INVOLVED IN IT, AND I
24 BELIEVE THAT YOU AND MR. BETHEA SET OUT TO AND DID MURDER
25 THE VICTIM IN THIS CASE.

1 I'VE CONSIDERED THE FACT THAT HE'S WALKING AWAY
2 WITH A RELATIVELY MINOR SENTENCE. I'VE CONSIDERED THE FACT
3 THAT HE'S OLDER THAN YOU. I'VE CONSIDERED THE FACT THAT HE
4 HAS TESTIFIED THAT HE INITIATED THIS WHOLE INCIDENT, THAT
5 HE WAS THE ONE WHO TOLD YOU TO COMMIT THIS MURDER. I'VE
6 CONSIDERED THE FACT THAT YOU ARE JUST A YOUNG MAN, THAT YOU
7 WERE ONLY 19 I THINK WHEN THIS OCCURRED. WHAT A WAY TO
8 START YOUR LIFE. WHAT A WAY TO WASTE, WASTE YOUR
9 PRODUCTIVE ADULthood. I AM SORRY TO HAVE TO SENTENCE YOU,
10 MR. SPEARS, BUT I MUST.

11 THE SENTENCE OF THIS COURT AS TO THE OFFENSE OF
12 MURDER IS THAT YOU BE INCARCERATED AT THE STATE DEPARTMENT
13 OF CORRECTIONS FOR A PERIOD OF 30 YEARS.

14 AS TO EACH COUNT OF ASSAULT AND BATTERY WITH
15 INTENT TO KILL IT'S MY SENTENCE THAT YOU BE INCARCERATED
16 FOR A PERIOD OF 20 YEARS. THESE SENTENCES ARE TO RUN
17 CONCURRENTLY. GOOD LUCK TO YOU, MR. SPEARS. ANYTHING
18 FURTHER FROM THE STATE?

19 MS. ELDER: NO, YOUR HONOR, IF I CAN GET A
20 SENTENCING SHEET?

21 THE COURT: ANYTHING FURTHER FROM THE DEFENSE?

22 MS. PRATT: NO, YOUR HONOR.

23 THE COURT: LADIES AND GENTLEMEN OF THE JURY, I
24 WANT TO THANK YOU FOR THE HARD WORK YOU DID. THIS WAS NOT
25 AN EASY CASE I CAN TELL YOU. I DID NOT KNOW HOW YOU WERE

1 GOING TO, TO VOTE. I DID NOT KNOW WHEN THIS CASE BEGAN
2 WHAT THE OUTCOME WOULD BE AND I'LL BE QUITE HONEST WITH YOU
3 I COULD HAVE SEEN YOU GOING EITHER WAY, BUT YOUR COLLECTIVE
4 LOGIC IS MUCH BETTER THAN MINE. I'M JUST ONE PERSON.
5 THAT'S THE REASON WE HAVE THE 12 JURORS. YOU LISTENED
6 INTENTLY. I HAVE NEVER HAD A JURY COME BACK AND WANT TO
7 HEAR FIVE MORE HOURS OF TESTIMONY, NEVER HAD THAT HAPPEN.
8 THAT TELLS ME HOW DILIGENT YOU WERE IN PERFORMING YOUR
9 DUTY. I WANT TO THANK YOU FOR WHAT YOU'VE DONE. AS I SAID
10 IT IS A DIFFICULT PROCESS TO, TO JUDGE ANOTHER HUMAN BEING
11 BUT YOU HAVE STEPPED UP TO THE PLATE. YOU ACCEPTED YOUR
12 RESPONSIBILITY. YOU FULFILLED YOUR DUTY.

13 I HOPE THAT IN THE FUTURE YOU'LL HAVE AN
14 OPPORTUNITY OR I'LL HAVE AN OPPORTUNITY TO RUN INTO YOU OR
15 SEE YOU. I MIGHT NOT RECOGNIZE YOU BUT IF YOU RECOGNIZE ME
16 PLEASE DON'T HESITATE TO STOP ME WHEREVER I AM AND REMIND
17 ME THAT YOU WERE ON MY JURY. I'D LOVE TO TALK WITH YOU
18 ABOUT YOUR EXPERIENCE AND NOT ABOUT THE CASE JUST JURY
19 SERVICE AND, AND WHAT YOU LEARNED OR WHAT YOU THOUGHT ABOUT
20 THIS PROCESS. IT'S A GREAT PROCESS. IT'S THE ONLY PROCESS
21 THAT I KNOW OF IN THE WORLD THAT GIVES THE DEFENDANT THE
22 PROTECTION OF 12 OF HIS FELLOW CITIZENS.

23 THANK YOU AGAIN, I APPRECIATE YOU BEING HERE.
24 YOU MAY DISCUSS THIS CASE WITH ANYONE YOU PLEASE. YOU MAY
25 DECIDE YOU DON'T WANT TO DISCUSS THIS CASE WITH ANYONE.

1 THAT IS YOUR PREROGATIVE BUT IF YOU ARE PRESSED BY ANYONE
2 AND YOU TELL THEM YOU DO NOT WANT TO DISCUSS THIS CASE OR
3 YOU'RE BOTHERED ABOUT THIS CASE OR CONTACTED ABOUT THIS
4 CASE AND YOU ASK THAT PERSON NOT TO CONTACT YOU AND THEY
5 PERSIST YOU BRING IT TO MY ATTENTION. YOU CONTACT SHERIFF
6 PHILLIP THOMPSON AND WE'LL TAKE CARE OF IT FOR YOU. OKAY.
7 THANK YOU VERY MUCH. MR. ROPP, WOULD YOU PLEASE ESCORT THE
8 JURY OUT OF THE COURTROOM?

9 OFFICERS, COULD YOU MAKE SURE THAT WE HAVE
10 SECURITY FOR THESE JURORS GOING TO THEIR AUTOMOBILES.
11 THANK YOU VERY MUCH, IT'S BEEN A PLEASURE.

12 (WHEREUPON, THE JURY WAS EXCUSED AT 10:47 P.M.)
13 END OF REQUESTED TRANSCRIPT- - - -

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED BRENDA R. BABB, OFFICIAL COURT REPORTER THE SOUTH CAROLINA COURT ADMINISTRATION, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF ALL PROCEEDINGS HAD AND EVIDENCE INTRODUCED IN THE HEARING OF THE CAPTIONED CASE, RELATIVE TO APPEAL, IN THE COURT OF GENERAL SESSIONS FOR HORRY COUNTY, SOUTH CAROLINA.

I DO FURTHER CERTIFY THAT I AM NEITHER KIN, COUNSEL NOR INTEREST TO ANY PARTY HERETO.

August 6, 2010
Brenda R. Babb
BRENDA R. BABB, CVR

OFFICIAL REPORTER

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K SPEARS,

APPELLANT

FINAL BRIEF OF APPELLANT

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
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ATTORNEY FOR APPELLANT.

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STATEMENT OF ISSUE ON APPEAL

Whether the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE?

STATEMENT OF THE CASE

Appellant was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr. on May 10-13, 2010, in Horry County. Appellant was sentenced to thirty (30) years for murder and to twenty (20) years each on the remaining charges.

This appeal follows.

ARGUMENT

The trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE.

Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a gang from the southside of Lumberton, North Carolina. The victim was in a competing gang from the eastside of Lumberton. On May 27, 2007, the victim, his girlfriend, and several others decided to drive down to Myrtle Beach to see bike weekend. Appellant, Bethea and Douglas were also in Myrtle Beach that weekend. The victim was shot and killed that evening and three bystanders were hit by stray bullets. The State's theory of the case was one of accomplice liability and that the shooting was done by appellant, Douglas and Bethea. The killing was thought to have been done in retaliation because the victim had killed a member in appellant's gang. Nathaniel Douglas testified for the State and implicated Bethea. Bethea testified for State in exchange for more lenient treatment and implicated appellant. Appellant's defense was that Bethea was the (1) one shooter.

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's sister that appellant shot the victim at a Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach.

At an in camera hearing, Danyell Hammonds, the victim's sister, testified that the victim came home one night in April of 2007 with blood on his shirt and said that he got shot at Walmart by "Bos" who is appellant's nickname. She also said her brother was in a rival gang and gotten out of prison about a month prior to this shooting. He had been

convicted of accessory after the fact of murder. The victim in that case was in the gang appellant belonged to. (R. p. 141, line 6 – p. 144, line 17).

After much discussion, the trial court held that the victim's sister could testify to what her brother told her because it was an excited utterance under Rule 803(2), SCRE. (R. p. 183, line 11 – p. 184, line 14). Defense counsel had argued earlier that the evidence should not come in under Rule 403, SCRE because of unfair prejudice. (R. p. 182, lines 7-10; p. 159, line 20 – p. 160, line 1). Later, the trial court allowed the solicitor the opportunity to put on the record that she was also putting in this evidence as a prior bad act under Rule 404, SCRE. She said it went to motive, intent, common scheme of plan, continuous scheme of plan and identity. The trial judge found there was clear and convincing evidence of the prior bad act. (R. p. 186, line 18 – p. 187, line 14). The decision to admit this evidence was in error.

Rule 403, SCRE provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” “Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). If we assume that the victim's sister is telling the truth about what her brother told her,¹ there is still the danger that the jury will conclude that, if appellant shot the victim once, he must also be the one who shot him a second time.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) the Court wrote:

Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial

¹ In “most cases, proof that the event occurred is furnished either by testimony other than the declarant, or by circumstantial evidence that something out of the ordinary occurred.” Weinstein's Federal Evidence §803. 04 [2][a] at p 803-20-21 (March, 1977 ed).

rather than prior criminal or immoral acts. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, this Court has limited the State's use of evidence. State v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). (Appellant's lover improperly related instance of the appellant's unconvicted sexual battery upon her in his trial for murder of another woman); State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). (In trial for criminal sexual conduct with the prosecutrix, the court erred in receiving testimony from the appellant's wife regarding his prior unconvicted acts of sexual misconduct on her). State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977). (Allegations that the appellant poisoned her first husband not admissible because the evidence was not clear and convincing); State v. Drew, 316 S.E.2d 367 (S.C. 1984). (Cross-examination and reply testimony regarding unconvicted act of burning a combine not proper in criminal conspiracy trial for burning a business.)

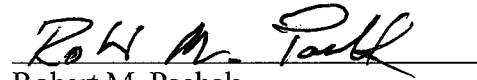
The Court went on to conclude that "when, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."

The trial court in this case failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect. See, State v. Colf, 337 S.E.2d 622, 525 S.E.2d 246 (2000); Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). At the end of the case the trial court remarked that , "I don't know the basis for the jury's finding of guilt, whether it be that the jury felt that you were the shooter or you were an accomplice." (R. p. 577, lines 10-12). Appellate counsel would suggest that the basis was the unfair prejudice of the prior bad act.

CONCLUSION

Appellant's conviction should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "R. M. Pachak", is written over a horizontal line.

Robert M. Pachak
Appellate Defender

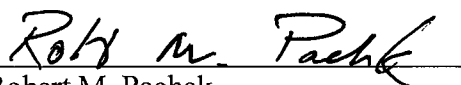
ATTORNEY FOR APPELLANT.

This 12th day of September, 2011.

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 August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

September 12th, 2011


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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

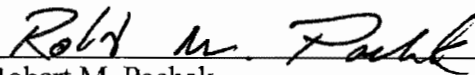
V.

BRIAN K SPEARS,

APPELLANT

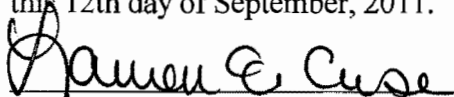
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Donald J. Zelenka, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 12th day of September, 2011.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT.

SUBSCRIBED AND SWORN TO before me
this 12th day of September, 2011.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: August 23, 2014.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

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APPELLANT'S QUESTION PRESENTED

Whether the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCORE?

RESPONDENTS' COUNTER QUESTION PRESENTED

Whether the argument presented on appeal is preserved for appellate review where trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial.

INTRODUCTION

On May 27, 2007, gunfire rang out near the intersection of 11th Ave. North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). The ensuing investigation led to the indictment and subsequent conviction of Brian “Bos” Spears (“Appellant”). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390, R. 669-70).

STATEMENT OF THE CASE

Appellant was indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill (“ABWIK”). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Appellant’s case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Appellant was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Appellant was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

STATEMENT OF THE FACTS

On May 26, 2007, Appellant, Nathaniel “June” Douglas, Ishmael “Ish” Douglas,¹ and Thomas “T.C.” Shaw (collectively Appellant’s group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.² (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Appellant’s group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on

¹ Ishmael “Ish” Douglas is also known as Wa-Gee. (R. 214).

² Appellant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

Ocean Boulevard, Appellant's group was joined by Jeffrey "Bird" Bethea, who, like Appellant and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Appellant was wearing a white t-shirt and a black t-shirt underneath a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.³ (App. 288-89, 299). Bethea, who did not know Appellant's group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (App. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Appellant's group stated they had observed Aaron Hammonds ("Victim"), a high-ranking member of Lumberton's East Side Bloods who had previously been implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.⁴ (App. 365, 273-75, 290-91, 572). Following this comment, Lemark Irons, another member of Lumberton's East Side Bloods, crossed Ocean Boulevard and approached Appellant's group to compliment them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group, and crossed Ocean Boulevard once again joining Victim, Hammonds and others on the opposite side of the street. (R. 219, 115-16).

³ Danyell Hammonds, who was the victim, Aaron Hammonds' younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 279-80). Additionally, Appellant's former cellmate in the detention center, Timothy Smith, testified that Appellant told him he received a phone call that Aaron Hammonds was in Myrtle Beach for bike week prompting Appellant's and his friends to come to Myrtle Beach. (R. 426-27).

⁴ Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

Immediately after the initial altercation, Bethea, who was a high-ranking member of 41-Curve, became angry and began talking to Appellant who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). Specifically, Appellant expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill someone in Appellant's group, unless Appellant and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At the crime scene, authorities interviewed multiple witnesses and were able to produce a composite sketch matching Bethea's description. (R. 272-73). After interviewing Bethea, authorities also spoke with Appellant in Lumberton on June 4, 2007. (R. 273). In the June 4th interview, Appellant repeatedly denied being in Myrtle Beach on the date in question instead claiming he was in Lumberton all weekend. (R. 276-77, 279). Additionally, Appellant informed authorities that he did not hang around Bethea. (R. 277). Following the first interview Appellant was charged with one count of Murder and three counts of ABWIK. (R. 281-82).

After waiving extradition, Appellant was transported back to Myrtle Beach where he was interviewed a second time on June 7, 2007. (R. 281-82). In his second statement, Appellant admitted he was in Myrtle Beach on the date in question, but insisted that after the altercation between Bethea and Irons he walked away with Nathaniel Douglas and, when he heard gunshots, fled the scene. (R. 285-86).

At trial, the State presented testimony that there were eight (8) shell casings recovered from the crime scene and three bullets recovered from Victim's body during the autopsy. (R. 79-81, 91-92). SLED Agent Suzanne Cromer then testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (R. 349-50).

The State also introduced eyewitness testimony from Brittney Maynor, who was dating Victim and had accompanied Irons and Victim to Myrtle Beach. (R. 111). Maynor testified that the shooter was a black male who was approximately five-foot-seven (5'7) and was wearing a red shirt, a red bandana over his face, and a red fitted hat with another red bandana on his wrist.⁵ (R. 121-22, 127, 129). She further noted that the shooter crossed the road and was right in front of her when she saw him begin shooting. (R. 112, 121, 124). Maynor then told the jury that she turned and began running when she heard "five or six" shots. (R. 125, 128). Maynor described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (R. 129).

Additionally, the State presented testimony from Appellant's co-defendants, Nathaniel Douglas and Jeffrey Bethea. (R. 205-268, 355-417). Nathaniel Douglas testified that after Irons' initial dispute with Bethea, he walked off while Appellant remained with the rest of the group. Continuing, Nathaniel Douglas informed the jury that approximately ten minutes after he left Appellant's group, he heard gunfire and saw Appellant and the other members of his group running up the street. (R. 220, 222-23). Nathaniel Douglas also confirmed that Appellant had a medium black and titanium handgun in his waistband on the night in question, which was around the size of a .380, while also noting that Bethea did not appear to be carrying a gun. (R. 220-22). Meanwhile, Bethea confirmed that Nathaniel Douglas left the group and explained that he and Appellant subsequently approached Irons' and Victim's group and attacked them. (R. 367). Specifically, Bethea told the jury that Appellant pulled out a small caliber handgun from his waistband and began shooting. (R. 368-69).

To corroborate Bethea's version of the shooting, the State also introduced rap lyrics written by Appellant which indicated Appellant had killed Victim to avenge Eric Floyd's death.

⁵ A South Carolina Department of Corrections incarcerated inmate search lists Appellant's height at five-foot-nine (5'9).

(R. 211-13, 324-25, 333). There was also testimony from Appellant's former cellmate Timothy Smith, who shared a cell with Appellant while he was awaiting trial. (R. 417-40). Smith told the jury that Appellant informed him he had pushed through the crowd and shot Victim because he believed Bethea would not do it. (R. 424-25). Smith further added that Appellant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him. (R. 424-25).

Following the close of the State's case, the defense presented testimony from eyewitness Alexis Brown who was part of Irons' and Victim's group on the night of the shooting. (R. 448). Brown testified that the composite generated by authorities was Bethea, but confirmed that the shooter was wearing a red bandana over his face and pulled a gun from his waistband. (R. 449-50, 452-53).

Finally, Appellant testified in his own defense. (R. 467-513). Specifically, Appellant explained he had walked off following the dispute between Irons and Bethea, heard gunshots and ran back to the K-Mart parking lot to meet with the rest of his group. (R. 477-78). He added that he did not shoot anyone. (R. 468). On cross-examination, Appellant admitted he brought a gun to Myrtle Beach, but left it in the car. (R. 491). Appellant also admitted he owned a .380, but gave it away. (R. 502).

PRESENTATION OF ISSUE ON APPEAL

At trial, the State proceeded under the theory that either Appellant or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Appellant had shot and grazed Victim outside of a Wal-Mart in Lumberton. (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and

Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who Danyell described as "shocked[,]," explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Appellant had shot him and further informed her that he and Appellant did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Appellant was a member of 41-Curve (R. 143); (3) Victim was previously "locked up" for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve (R. 144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, defense counsel argued Danyell's testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The State then responded arguing Danyell's testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued

discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185). After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Appellant] is facing." (R. 186). Finally, the State noted that outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence. (R. 187).

STANDARD OF REVIEW

In criminal cases, appellate courts sit only to review errors of law and are bound by the factual findings of the trial court unless they are found to be clearly erroneous. State v. Hernandez, 386 S.C. 655, 659, 690 S.E.2d 582, 584 (Ct. App. 2010). The materiality, relevance and admissibility of evidence are within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. State v. Rosemond, 335 S.C. 593, 596, 518 S.E.2d 588, 589 (1999). “An abuse of discretion occurs when the conclusions of the trial court lack evidentiary support or are controlled by an error of law.” State v. Anderson, 386 S.C. 120, --, 687 S.E.2d 35, 38 (2009). Moreover, the trial court is afforded considerable latitude in ruling on the admissibility of evidence and its rulings will not be disturbed absent a showing of probable prejudice. State v. Kornahrens, 290 S.C. 281, 288, 350 S.E.2d 180, 185 (1986).

ARGUMENTS

- I. The argument presented on appeal is not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial

Appellant contends the trial court erred in admitting Danyell’s testimony that Appellant shot Victim approximately one month before Victim’s murder because it was unfairly prejudicial under Rule 403, SCRE. Br. of App. p. 3. Specifically, Appellant argues this evidence was unfairly prejudicial because the jury could have concluded, “if appellant shot the victim once, he must also be the one who shot him a second time.” Br. of App. p. 6. To that end, Appellant notes the trial court “failed to conduct a balancing test to determine whether the probative value

of the prior bad act substantially outweighed its prejudicial effect.” Br. of App. p. 7. In response, the State notes an on-the-record Rule 403, SCRE, balancing test was not performed because defense counsel never requested the trial court exclude the prior bad act evidence on the basis that it was too similar to the charged offense as Appellant now argues. Accordingly, the State submits this issue is not preserved for appellate review. See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an issue unless the issue was raised to and ruled upon by the trial court).

In I’On, the Supreme Court of South Carolina explained the preservation requirement placed on an appellant stating, the “preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*” 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I’On Court found, “the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case.” Id.

While defense counsel admittedly cited Rule 403, SCRE and its balancing test as a rationale for exclusion of the prior bad act evidence, defense counsel’s intent in doing so was clearly not rooted in concerns related to the similarity between the prior bad act and the offense

for which Appellant was charged. Specifically, as noted above, defense counsel submitted her Rule 403, SCRE objection twice. (R. 159-60, 182).

In her first objection, counsel stated:

It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The following day, after thoroughly discussing whether Victim's statement to Danyell amounted to an excited utterance, defense counsel, when asked whether she had anything else to add, alerted the trial court to her prior objection stating:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

The State submits defense counsel's rationale for exclusion in this objection was clearly not related to a concern that the jury would conclude Appellant shot Victim on this occasion, because he had previously shot him a month prior. Rather, the objection is obviously based upon defense counsel's belief that the prior bad act had not been proven by clear and convincing evidence, and as such, the introduction of the prior bad act would unfairly prejudice her client. Indeed, both opposing counsel and the trial court clearly came away with the same impression in light of their subsequent responses. Specifically, the State responded to defense counsel's argument stating that the clear and convincing evidence standard only applied to exceptions under Lyle and clarified that the clear and convincing standard did not apply to an excited utterance. (R. 182). Similarly, the trial court indicated, "we may be looking at Lyles (sic)

because this is a prior bad act. It may have to come in under that analysis.” (R. 183). At no point did the State or the trial court interpret defense counsel’s objection in the way that Appellant is now interpreting the objection. Accordingly, the States asks this Court to find Appellant’s current argument is not preserved for appellate review. See State v. Smith, 391 S.C. 353, 365, 705 S.E.2d 491, 497 (Ct. App. 2011) (concluding appellant did not preserve for review arguments that trial court conducted an improper analysis under Rule 403, SCRE, where the arguments were never presented to the trial judge).

II. Even assuming the question presented on appeal is preserved for appellate review, the record demonstrates that Appellant’s prior bad act is admissible pursuant to Rule 403, SCRE as the probative value of the prior bad act testimony is not substantially outweighed by the danger of unfair prejudice

Assuming this Court finds the argument advanced by Appellant is available for appellate review, the State submits the trial court did not abuse its discretion in admitting the testimony regarding the prior shooting.⁶ Specifically, the testimony, along with the supporting video and incident report, all of which prove the prior shooting by clear and convincing evidence, establish Appellant’s motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd’s death. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime).

Appellant maintains the trial court came down on the wrong side of the Rule 403, SCRE, analysis because the jury could have concluded, “if appellant shot the victim once, he must also

⁶ Moreover, the State notes the two cases which Appellant cites to for the proposition that the trial court is required to conduct a balancing test to determine whether the probative value of a prior bad act is substantially outweighed by its prejudicial effect do not stand for such a proposition. Specifically, State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000) and Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000) deal with Rule 609(b), SCRE (Colf) and Rule 609(a)(1), SCRE (Green) and make no reference to when a trial court is required to employ a Rule 403 balancing test.

be the one who shot him a second time.” Br. of App. p. 6. In support of this proposition, Appellant cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, the South Carolina Supreme Court reversed a voluntary manslaughter and arson conviction in which appellant burnt down a trailer containing his ex-girlfriend when the State cross-examined appellant on a previous incident which was strikingly similar to the charged offense. 283 S.C. at 119-21, 322 S.E.2d at 12-13. However, despite reversing appellant’s convictions, the Gore Court clearly noted in footnote one, that had the prior bad act been proven, the evidence of the prior misconduct could have been admissible under a Lyle exception. See Gore, 283 S.C. at 121 n.1, 322 S.E.2d at 13 n.1 (“If provable, evidence of this prior misconduct could have been admissible under Lyle to show motive or common scheme or plan. However, the State properly concedes that the proof was insufficient to connect appellant to the setting of the previous trailer fire.”).

Here, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Thus, the only question left for this Court to consider is whether the trial court abused its discretion in admitting the prior bad acts testimony under Rule 403, SCRE where the prior bad act was proven by clear and convincing evidence and went to both motive and intent.

“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” Wiles, 383 S.C. at 157-58, 679 S.E.2d at 175-76. Furthermore, “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Wiles, 383 S.C. at 158, 679 S.E.2d at 176 (internal quotations

omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.” Id.

Nevertheless, otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. Pursuant to Rule 403, SCRE, “the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.” Smith, 391 S.C. at 361, 705 S.E.2d at 496. In other words, “[u]nfair prejudice means an undue tendency to suggest decision on an improper basis.” Wiles, 383 S.C. at 158, 679 S.E.2d at 176. Similarly, “[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

At the outset, the State notes that appellate courts must give “great deference to the trial court’s judgment under Rule 403 and . . . should be reversed only in exceptional circumstances.” Smith, 391 S.C. at 364, 705 S.E.2d at 497 (citing State v. Holland, 385 S.C. 159, 171-72, 682 S.E.2d 898, 904 (Ct. App. 2009)). Quite simply, this case is not one of those exceptional circumstances. Indeed, the State submits the prior shooting did not go to show Appellant’s general propensity to shoot people, which also would be at odds with the general rule expressed in the first portion of Rule 404(b), but was instead extremely probative as it provided the jury with Appellant’s motive for killing Victim—seeking vengeance for his friend and fellow 41-Curve member, Eric Floyd. Likewise, the prior shooting was clearly probative of Appellant’s intent in shooting Victim, namely malice.

Furthermore, while this evidence may be prejudicial to Appellant in that it makes it more likely that Appellant shot Victim, such prejudice is not “unfair prejudice” as the prior bad act was proven by clear and convincing evidence. (R. 187). Similarly, any unfair prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) (concluding evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide). Specifically, the same motive that existed during the prior shooting—revenge—still existed when Appellant fired and fatally shot Victim in Myrtle Beach. The same can be said for Appellant’s intent, he obviously wanted to kill Victim the first time he shot him and nothing within the record demonstrated that this changed within the month prior to the second shooting. To the contrary, the record clearly reflects that many members of 41-Curve wanted revenge against Victim. This was expressed throughout the record, including Appellant’s co-defendant Nathaniel Douglas’ statement to Danyell that he and his fellow 41-Curve members were going to get Victim. (R. 154-55). In fact, this was evident even in the minutes leading up to the shooting where Bethea, Appellant’s co-defendant, got into an argument with Irons after Irons suggested the two groups “stop beefing and get money together.” (R. 219). In response, Appellant and Bethea, rather than shaking Irons’ hand and calling an end to the violence, promptly walked across the street to kill them. (R. 365-66).

CONCLUSION

For the aforementioned reasons, the State respectfully requests this Court affirm the rulings of the trial court as it did not abuse its discretion in admitting the evidence now at issue.

Respectfully Submitted,

ALAN WILSON
Attorney General

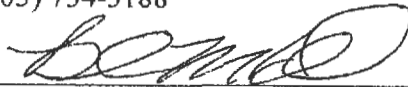
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September 12, 2011.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. The undersigned also certifies that the Final Brief is in compliance with the South Carolina Supreme Court's Order of August 13, 2007.

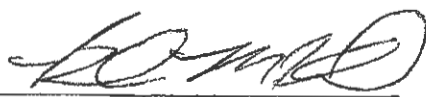
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September 12, 2011.
Columbia, South Carolina.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Brian K. Spears, Appellant.

Appellate Case No. 2010-162287

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Published Opinion No. 5119
Heard January 17, 2013 – Filed April 17, 2013

REMANDED

Appellate Defender Robert M. Pachak, of Columbia, for
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Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Assistant Attorney General
Brendan Jackson McDonald, all of Columbia, and J.
Gregory Hembree, of Conway, for Respondent.

PIEPER, J.: Brian K. Spears appeals his convictions for murder and three counts of assault and battery with intent to kill (ABWIK). On appeal, Spears argues the trial court improperly admitted evidence of a prior shooting incident between Spears and Aaron Hammonds (Victim) that occurred one month before Victim was killed. Spears contends the trial court failed to conduct a balancing test to determine if the probative value of the prior shooting testimony was substantially outweighed by the danger of unfair prejudice to Spears. We remand.

FACTS

On May 27, 2007, Victim was fatally shot on Ocean Boulevard in Myrtle Beach. Upon responding to the scene, Detective Michael Hull interviewed eyewitnesses. Detective Hull created a composite of the suspected shooter that resembled Jeffrey Bethea. After seeing the composite on the news, Bethea turned himself in to the police. Bethea told Detective Hull that Spears and Nathaniel Douglas were responsible for Victim's death. Thereafter, Bethea, Spears, and Douglas were each charged with murder and three counts of ABWIK. As part of an agreement with the State, Bethea pled guilty to voluntary manslaughter. As a result of Bethea's plea, Douglas and Spears became codefendants in the case.

During pretrial motions, the solicitor argued Victim's death was a gang-related revenge killing. The solicitor contended that Victim's death was connected to the murder of Eric Floyd. Prior to his murder, Victim pled guilty to accessory after the fact in connection with Floyd's murder and served a four-year sentence. Approximately one month after Victim was released from prison, Spears allegedly shot Victim in a Wal-Mart parking lot in North Carolina. Spears argued any introduction of gang evidence would be prejudicial under Rule 403, SCRE. The trial court asked the solicitor "what about the shooting the month before, was, is there some way to connect that with this gang as well. . . I'm just wondering are you going to be able to get that in." The solicitor responded that she would not know if she could lay the foundation for the Wal-Mart shooting until Danyell Hammonds' testimony was proffered. Spears then argued testimony about the Wal-Mart shooting should be excluded because it was hearsay and because there was not clear and convincing evidence of the shooting as required by Rule 404(b), SCRE. Upon completion of the arguments, the trial court found the gang affiliation evidence was relevant and the probative value of the gang affiliation evidence was not substantially outweighed by any danger of unfair prejudice it might have caused. Spears then questioned whether the trial court ruled on the admissibility of the shooting incident at Wal-Mart. The trial court, in response to Spears' question about the Wal-Mart shooting, took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

After the trial began, the court held an in camera hearing to proffer the testimony of Hammonds, Victim's sister, who intended to testify regarding Victim's statements about the Wal-Mart shooting. Hammonds testified that one month before Victim was fatally shot, Victim told her "Bos" shot him outside of a Wal-

Mart in North Carolina. Hammonds indicated she knew Bos to be Spears.¹ According to Hammonds, Victim and Lemark Irons came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained that she believed the shooting had just occurred because the blood in Victim's hand was still wet. Hammonds testified that Spears was a member of the 41-Curve gang and Victim was a member of the East Side Blood gang. Hammonds also testified a group of 41-Curve members told her that they were "going to get" Victim.

The trial court expressed its concerns that Hammonds' testimony was hearsay and questioned the solicitor about how she would get Hammonds' testimony regarding the Wal-Mart shooting admitted into evidence. Before the solicitor responded, Spears argued against introducing Hammonds' testimony of the prior shooting incident, stating "it's a 4[04](B) issue. My client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it." Spears also argued that the testimony was hearsay and "taking it together with the whole more prejudicial than probative thing and you've got my argument." The solicitor then argued Victim's testimony fell under the excited utterance hearsay exception.

Before adjourning for the night, the trial court discussed with Spears and the solicitor whether Hammonds' testimony was hearsay. The next day, Spears renewed his Rule 403, SCRE, argument. After further discussion on whether Hammonds' testimony was hearsay, the trial court admitted Hammonds' testimony about the Wal-Mart shooting under the excited utterance exception to hearsay. Next, the solicitor proffered the video of the Wal-Mart shooting to introduce Hammonds' testimony as prior bad act evidence pursuant to Rule 404(b), SCRE. The trial court asked the solicitor the purpose for which she was offering the prior shooting evidence under Rule 404(b). The solicitor responded the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected and argued the evidence was not clear and convincing. Spears also renewed all of his previous objections. The trial court found clear and convincing evidence existed to support admission of the Wal-Mart shooting testimony and admitted Hammonds' testimony of the Wal-Mart shooting as a prior bad act.

A jury found Spears guilty. The trial court sentenced Spears to thirty years' imprisonment for murder and twenty years' imprisonment for each ABWIK count, to be served concurrently. This appeal followed.

¹ Bos is Spears' street name.

STANDARD OF REVIEW

In criminal cases, an appellate court sits to review only errors of law, and it is bound by the trial court's factual findings unless the findings are clearly erroneous. *State v. McEachern*, 399 S.C. 125, 135, 731 S.E.2d 604, 609 (Ct. App. 2012). "The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Black*, 400 S.C. 10, 16, 732 S.E.2d 880, 884 (2012). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Jennings*, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

LAW/ANALYSIS

Spears' sole issue on appeal is that the trial court erred by failing to conduct an on-the-record balancing test to determine whether the probative value of the prior bad act testimony was substantially outweighed by the danger of unfair prejudice. We agree.

South Carolina law precludes evidence of a defendant's prior crimes or other bad acts to prove the defendant's guilt for the crime charged, except to establish: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other; or (5) the identity of the perpetrator. Rule 404(b), SCRE. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Rule 403, SCRE. "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Gilchrist*, 329 S.C. 621, 627, 496 S.E.2d 424, 427 (Ct. App. 1998). "Once bad act evidence is found admissible under Rule 404(b), the trial court must then conduct the prejudice analysis required by Rule 403, SCRE." *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) (emphasis added). The court may exclude the 404(b) evidence if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*

This court has held if "an on-the-record Rule 403 analysis is required, [we] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647

(Ct. App. 2002). In *King*, this court determined the trial court's ruling was "a compressed Rule 403/404(b) analysis" with "some indicia of his consideration of whether admission of the testimony was fair to King (*i.e.*, more probative than prejudicial)." *Id.* at 157, 561 S.E.2d at 647.

Here, the trial court ruled Hammonds could testify as to Victim's statements about the Wal-Mart shooting pursuant to the excited utterance exception to hearsay. Immediately thereafter, the solicitor proffered the video of the Wal-Mart shooting. The trial court indicated it understood the solicitor was offering the evidence of the prior shooting "under 404 or evidence of a prior bad act." The solicitor argued testimony regarding the prior shooting was necessary to show motive, intent, common scheme or plan, and identity. Spears objected, arguing the evidence was not clear and convincing and renewed all of his previous objections, including his earlier objection that the unfair prejudice of the Wal-Mart shooting testimony substantially outweighed its probative value. The trial court found clear and convincing evidence existed to support the prior bad act, but the trial court made no further findings. We recognize the trial court did spend time expressing its concerns and questioned the solicitor on the prior shooting. However, other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice.²

Furthermore, we find it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice. Unlike the trial court in *King*, here, the trial court made no indication that it considered Rule 403. Thus, if the trial court did consider the unfair prejudice of the Wal-Mart shooting testimony, it is not readily implicit or apparent from the record. For the foregoing reasons, we find the trial court erred by failing to conduct an on-the-record Rule 403 balancing test.

Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy. South Carolina has not addressed the procedure for when an appellate court is unable to determine from the record whether the trial court considered Rule 403 in admitting

² Admission under an excited utterance theory would also be subject to a 403 objection and balancing analysis. *See* Rule 403, SCRE.

a prior bad act under Rule 404(b). However, our courts have discussed the procedure for when the trial court fails to include a Rule 609, SCRE, balancing test on the record. See *State v. Colf*, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000). In *Colf*, the court of appeals undertook its own Rule 609(b) balancing test. *Id.* On appeal, the supreme court held that this court should have remanded the question to the trial court instead of conducting the balancing test itself. *Id.* The court reasoned that "[i]t is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision." *Id.* Furthermore, the supreme court explained, "[t]he balancing test required by Rule 609(b) must be conducted by the trial court." *Id.* (emphasis added).

Similarly, in *State v. Scriven*, this court was unable to determine whether the trial court "conducted a meaningful analysis to balance the impeachment value of these prior convictions, if any, against the prejudicial impact, as clearly required under Rule 609(a)(1)." 339 S.C. 333, 344, 529 S.E.2d 71, 76 (Ct. App. 2000). Because the court was unable to ascertain whether the error was harmless, we remanded to the trial court with instructions to hold a hearing on the admissibility of the prior convictions and to carefully weigh the probative value of impeachment of the prior convictions against the prejudice to the defendant. *Id.* at 344, 529 S.E.2d at 77. We further instructed that in "the event the State does not carry its burden, or the court determines that the prejudicial impact to Scriven outweighed the probative value for impeachment, the court shall order a new trial. Otherwise, subject to further appellate review, the conviction is affirmed." *Id.*

More recently, this court found that the trial court erred by not conducting a proper Rule 609(b) balancing test because it provided no analysis of the prejudicial impact of admitting the defendant's prior conviction. *State v. Howard*, 384 S.C. 212, 223, 682 S.E.2d 42, 48 (Ct. App. 2009). We followed the procedure set forth in *Scriven*, and remanded for an on-the-record balancing test. *Id.*

We have reviewed other jurisdictions and found that when appellate courts cannot ascertain whether the trial court conducted a Rule 403 balancing test on the record, these courts have either: (1) determined whether the error was harmless; (2) conducted a de novo review and made a balancing decision; or (3) remanded for an on-the-record Rule 403 balancing test.

As indicated, some courts have ascertained whether the trial court's failure to conduct a Rule 403 balancing test is harmless. In *Wardlow v. State*, the Alaska Court of Appeals found the trial court committed error when it failed to conduct a

balancing test under Rule 403 in admitting a witness' testimony as evidence pursuant to Rule 404. 2 P.3d 1238, 1248 (Alaska Ct. App. 2000). However, the court determined the defendant failed to establish he was unfairly prejudiced. *Id.* Therefore, the court held the trial court's error in failing to conduct a Rule 403 balancing test was harmless. *Id.* Similarly, the Mississippi Supreme Court has held the failure to apply a Rule 403 balancing test on the record could be harmless error. *McKee v. State*, 791 So.2d 804, 805 (Miss. 2001). In *McKee*, the trial court admitted testimony regarding the defendant's prior use of crack cocaine over the defendant's objection. *Id.* at 806. The court found the trial court erred by not applying the Rule 403 balancing test on the record. *Id.* at 810. However, the court also found the error was harmless based on the overwhelming evidence of the defendant's guilt. *Id.*

Other courts have found the trial court's failure to conduct an on-the-record Rule 403 balancing test is not reversible error when the appellate court can undertake a de novo review of the record and conduct its own balancing test. The Tenth Circuit held it had authority to "conduct a *de novo* balancing where the trial court failed to make explicit findings to support a Rule 403 ruling" on the admission of Rule 404(b) evidence. *United States v. Lazcano-Villalobos*, 175 F.3d 838, 847 (10th Cir. 1999).³ Additionally, the Ninth Circuit explained that it reviews "for

³ Rule 403 of the Federal Rules of Evidence is worded differently than the South Carolina rule and provides: "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 404(b) further provides:

(b) Crimes, Wrongs, or Other Acts.

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of

abuse of discretion a district court's decision to exclude evidence at trial." *United States v. Leo Sure Chief*, 438 F.3d 920, 925 (9th Cir. 2006). "However, when the district court excludes evidence under Federal Rule of Evidence 403 but does not engage in explicit balancing, we review such a determination de novo." *Id.* (footnote omitted).

Finally, other courts have determined that remand is appropriate when the appellate court is unable to determine from the record whether the trial court implicitly made a Rule 403 finding. In *State v. Taylor*, the Arizona Supreme Court reversed and remanded for a Rule 403 determination. 817 P.2d 488, 492-93 (Ariz. 1991). The *Taylor* court recognized that even though the trial court did not specifically mention Rule 403 or prejudice in its analysis, "the record indicates that the court *may have been* weighing the prejudice against the probative value." *Id.* at 492. However, the court also found it could not determine whether the trial court excluded the prior conviction because it was irrelevant or because the prejudice outweighed the probative value. *Id.* The court noted that "[a] remand with instructions to conduct a Rule 403 determination may be ordered when uncertainty in a trial court's ruling might be removed." *Id.* (quoting *Shows v. M/V Red Eagle*, 695 F.2d 114, 118 (5th Cir. 1983)). Accordingly, the court remanded this issue with instructions to the trial court "to make an on-the-record finding based on specific facts and circumstances." *Id.* at 493.

Likewise, in *State v. McFarland*, the West Virginia Supreme Court held that because "the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit" the prior bad act evidence in question. 721 S.E.2d 62, 73 (W. Va. 2011). Therefore, the *McFarland* court held that the circuit court

accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial -- or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404(b).

erred in failing to conduct an on-the-record balancing test required by Rule 403. *Id.* The court reversed and remanded to the trial court for a new trial. *Id.*⁴

Having discussed the options considered by other courts, we decline to conduct a de novo Rule 403 balancing test. This decision is consistent with our supreme court's prior decision that an appellate court should not conduct its own balancing process when the trial court does not perform a Rule 609(b), SCRE, balancing test in admitting a prior conviction. *See Colf*, 337 S.C. at 629, 525 S.E.2d at 249 (noting an appellate court should not undertake the Rule 609(b) balancing test itself, but should remand the question to the trial court).

⁴ In the absence of on-the-record prejudice versus probative value findings as to the admission of a Rule 404(b) evidence, the Fifth Circuit has found it is "obliged to remand unless the factors upon which the probative value/prejudice evaluation were made are readily apparent from the record, and there is no substantial uncertainty about the correctness of the ruling." *United States v. Robinson*, 700 F.2d 205, 213 (5th Cir. 1983). In *Robinson*, the court determined that its review of the record led to uncertainty concerning the admissibility of the extrinsic offense testimony and remanded the case to the trial court for an on-the-record balancing test. *Id.* at 214. Additionally, the Seventh Circuit recognizes the district court's deference in admitting Rule 404(b) evidence, but also recognizes the appellate court's authority to "reverse if the district court failed to consider the prejudicial nature of the Rule 404(b) evidence before allowing it to be admitted." *United States v. Ciesiolka*, 614 F.3d 347, 357 (7th Cir. 2010). "A 'perfunctory' analysis is insufficient." *Id.* In *Ciesiolka*, the court held that:

[T]he district court abused its discretion in failing to propound reasons for its conclusion that the probative value of [defendant's prior bad acts] was not substantially outweighed by the risk of unfair prejudice. We have reviewed the transcript of the district court's Rule 404(b) hearing, but could find no portion within it where the court explained its bare-bones conclusion that "the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."

Id.

We note the potential prejudice to Spears upon the introduction of this evidence. Spears was tried for shooting and killing Victim. The prior bad act testimony involved Spears shooting the Victim a month before the incident herein. Based upon these similarities, the jury could have determined Spears was guilty on an improper basis by relying on the Wal-Mart testimony as propensity evidence. *See State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) ("Unfair prejudice means an undue tendency to suggest decision on an improper basis."); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E.2d 317, 319 (1987) ("[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity."); *State v. Gore*, 283 S.C. 118, 121, 322 S.E.2d 12, 13 (1984) (stating when a "previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced"); *State v. Taylor*, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Ct. App. 2011) (recognizing the prejudicial effect of admitting "evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime"). Moreover, based upon the record herein, we are unable to say that the admission of the prior bad act testimony was harmless error. *See Black*, 400 S.C. at 27, 732 S.E.2d at 890 ("In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt."); *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77 ("On the basis of this record, we are unable to say that the admission of these prior convictions was harmless error."). Accordingly, we find it appropriate to remand for an on-the-record Rule 403 balancing test.

CONCLUSION

Based on the trial court's failure to conduct a Rule 403 balancing test to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, we remand with instructions for the trial court to conduct an on-the-record balancing test. If upon remand the trial court determines the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears, the court should order a new trial. If the trial court determines the probative value of the prior shooting testimony is not substantially outweighed by the danger of unfair prejudice to Spears, the conviction shall be affirmed subject to the right of appellate review.

REMANDED.

FEW, C.J., and WILLIAMS, J., concur.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County

Larry B. Hyman Jr., Circuit Court Judge

Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

APPELLANT

PETITION FOR REHEARING *EN BANC*

Comes now Respondent, above named, by and through the Attorney General of South Carolina, and pursuant to Rule 221(a), SCACR, hereby respectfully petitions this Court for rehearing *en banc*.

INTRODUCTION

On May 27, 2007, gunfire rang out near the intersection of 11th Ave. North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds ("Victim") and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). Appellant, Brian "Bos" Spears ("Appellant") was subsequently indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWIK"). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Appellant's case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8).

At trial, Appellant was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Appellant was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

Following his conviction, Appellant, represented by Robert M. Pachak, sought review in this Court contending “the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE[.]” Br. of App. at 3. In response, the State argued: (1) Appellant’s argument was “not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial;” and (2) even if the argument was preserved, the record demonstrates the evidence was admissible under Rule 403. Br. of Resp. at 11; Br. of Resp. at 14.

Ruling on the issue, the appellate panel issued a published opinion remanding the case to the trial court because of its “*failure to conduct a Rule 403 balancing test* to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of unfair prejudice to Spears[.]” State v. Spears, Op. No. 5119 (Ct. App. filed April 17, 2013) (emphasis added). The State now seeks rehearing *en banc* as the panel clearly overlooked or misapprehended the State’s preservation argument and in so doing, turned a blind-eye to South Carolina’s preservation rules, ignoring decades of precedent, all of which require, at a minimum, *that an issue be both raised to and ruled upon by the trial court in order to preserve the issue for appellate review*. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640 (2011) (“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.”); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724

(2000) (holding South Carolina’s preservation rules require “that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). The State further seeks rehearing as the appellate panel, after finding error in the trial court’s failure to conduct a Rule 403 analysis, overlooked the fact that it was required by the standard of review to determine whether such an error was prejudicial. See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A trial judge’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.”); see also Synder’s Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (“The burden is on the Appellant to show not only error, but also prejudice.”).

BACKGROUND

On May 26, 2007, “Appellant,” Nathaniel “June” Douglas, Ishmael “Ish” Douglas,¹ and Thomas “T.C.” Shaw (collectively Appellant’s group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.² (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Appellant’s group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on Ocean Boulevard, Appellant’s group was joined by Jeffrey “Bird” Bethea, who, like Appellant and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Appellant was wearing a red t-shirt along with a black and red New

¹ Ishmael “Ish” Douglas is also known as Wa-Gee. (R. 214).

² Appellant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.³ (App. 288-89, 299). Bethea, who did not know Appellant's group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (App. 295-96, 441, 297, 298).

Shortly after Bethea's arrival, a member of Appellant's group stated they observed Victim, a high-ranking member of Lumberton's East Side Bloods who was previously implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.⁴ (App. 365, 273-75, 290-91, 572). After seeing Victim, Appellant's group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached Appellant's group, and complimented them on their clothes and jewelry stating "we need to stop beefing and get money together." (R. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group and crossed Ocean Boulevard once again joining Victim and others on the opposite side of the street. (R. 219, 115-16).

Immediately after the initial altercation, Bethea, who was a high-ranking 41-Curve member, became angry and began talking to Appellant who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). Specifically, Appellant expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill

³ Danyell Hammonds, who was Victim's younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R. 279-80). Additionally, Appellant's former cellmate in the detention center, Timothy Smith, testified that Appellant told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Appellant and his friends to come to Myrtle Beach. (R. 426-27).

⁴ Eric Floyd was also known as "G-Black" or "Turk." (R. 193).

someone in Appellant's group, unless Appellant and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At trial, the State proceeded under the theory that either Appellant or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Appellant had shot and grazed Victim outside of a Wal-Mart in Lumberton.⁵ (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who Danyell described as "shocked[.]" explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Appellant had shot him and further informed her that he and Appellant did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Appellant was a member of 41-Curve (R. 143); (3) Victim was previously "locked up" for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve

⁵ Prior to trial, defense counsel made a motion *in limine* regarding the Wal-Mart incident arguing it was inadmissible hearsay and the video taken from the Lumberton Wal-Mart "cannot identify that it was my client." (R. 14-15). Notably, defense counsel, in her pre-trial motions, *never argued that the Wal-Mart incident was inadmissible under Rule 403, SCRE*. Rather, the only pre-trial, Rule 403 objection raised by defense counsel was whether the State could refer to the gang element of the crime. (R. 9) ("I believe that any introduction of gang evidence would be more prejudicial than probative under Rule 403."); see also R. at 10-11.

(R. 144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, the State argued Victim's statement to his sister identifying the shooter was admissible as an excited utterance. (R. 161). Meanwhile defense counsel argued Danyell's testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

It's a 4(B) (sic) issue; my client has not been convicted of it. It's a prior bad act. It's not clear and convincing evidence of his guilt of it. There is a video, but you can't identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you've got my argument.

(R. 159-60). The State then responded arguing Danyell's testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

Responding to defense counsel' argument, the State first noted the clear and convincing evidence standard applied only to evidence admitted pursuant to Rule 404(b), SCRE, but maintained that because they were initially seeking admission under an excited utterance theory, Rule 404(b)'s clear and convincing evidence standard did not apply. (R. 182). After the State noted this distinction, the trial court observed that the proffered testimony may also need to be analyzed under Rule 404(b), SCRE. (R. 183). Following this comment, the trial court ruled that the statement made by Victim to his sister regarding the identity of the Wal-Mart shooter was admissible as an excited utterance.⁶ (R. 183-84). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185).

After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Appellant] is facing." (R. 186). Finally, the State noted that

⁶ Appellant did not appeal from the trial court's ruling on this issue thereby making it law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence.⁷ (R. 187). At no point did defense counsel ever argue that *the admission of the prior bad act evidence required a Rule 403, SCRE balancing test*. Likewise, defense counsel *never argued the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence*.

ARGUMENTS

- I. The appellate panel overlooked or misapprehended the State's preservation argument, and South Carolina's preservation requirement, when it found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test

In the statement of issues on appeal, Appellant argued the trial court erred in admitting Danyell's testimony that Appellant shot Victim approximately one month before Victim's murder claiming the testimony was unfairly prejudicial under Rule 403, SCRE. Br. of App. p. 3. Within his brief, Appellant elaborated on this argument reasoning the evidence was unfairly prejudicial because the jury could have concluded, "if appellant shot the victim once, he must also be the one who shot him a second time." Br. of App. p. 6. Near the conclusion of his brief, Appellant changed course noting the trial court "failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." Br. of App. p. 7.

⁷ Appellant also did not appeal whether evidence of the Wal-Mart incident was admissible under Rule 404(b), SCRE or whether the Wal-Mart incident was proven by clear and convincing evidence meaning these issues, like the excited utterance ruling, are law of the case. See M.L.-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (holding an unappealed ruling, right or wrong, becomes law of the case).

In response, the State argued Appellant's claims that the trial court erred in terms of the application of Rule 403 were not preserved because defense counsel never registered a contemporaneous Rule 403 objection on the basis of propensity (i.e. that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value because it was improper propensity evidence), and even if it did, the trial court never ruled upon such an objection. Br. of Resp. at 13-14. Similarly, in addressing Appellant's contention that the trial court failed to conduct a Rule 403 analysis, the State noted defense counsel never requested such a ruling, and even if it did, never argued the trial court was *required* to do so after analyzing the issue under Rule 404(b), SCRE, meaning the trial court could not have ruled on such an argument. Br. of Resp. at 12. Accordingly, the State reasoned that because defense counsel failed to present these arguments to the trial court, but instead argued them for the first time on appeal, the issues were not preserved for appellate review. Br. of Resp. at 12-14.

In its ruling, the appellate panel neglected to address the State's preservation argument, further characterized Appellant's argument as a claim that the trial court erred in failing to conduct a Rule 403 analysis, and remanded the case to the trial court to consider the propensity argument that Appellant advanced, for the first time, in his appeal. See State v. Spears, Op. No. 5119 (Ct. App. filed April 17, 2013). In so holding, the State submits the appellate panel, by failing to even address the State's preservation argument, or explain its rationale for doing so, clearly overlooked or misapprehended such an argument, and in reaching the underlying issue, ignored South Carolina precedent requiring an argument to be both raised to and ruled upon by the trial court in order to preserve the question for appellate review.

Applicable Law

In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court of South Carolina explained the rationale supporting its' strict preservation rules stating, the "preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments*." 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I'On Court found, "the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

This proposition was reaffirmed in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) when the Supreme Court further stated, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." 395 S.C. at 465, 719 S.E.2d at 642 (quoting Queen's Grant II Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). In Herron, the South Carolina Supreme Court, on remand from the Supreme Court of the United States, who vacated its' previous decision, declined to reach a federal preemption question because "the matter of preemption was not preserved in the South Carolina proceedings." Id. at 465, 719 S.E.2d at 642. Continuing, the Herron Court wrote, "the question Appellant presented to the United States Supreme Court, namely whether the [Federal Arbitration Act] preempted our state's legislative policy as set forth in the Dealers Act, was raised neither to the trial court nor to our Court." Id. at 469, 719 S.E.2d at 644. Continuing, the Herron Court opined:

We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them

meaningless. As this Court observed, issue preservation rules prevent [] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via reversal, give him another opportunity to prove his case.

Id. at 470, 719 S.E.2d at 644-45 (internal quotations omitted) (internal citation omitted).

Thus, both I’On and Herron make it clear that South Carolina’s preservation requirement exists to serve essentially two functions: (1) to require parties to thoroughly research and prepare their case by contemplating their respective legal positions; I’On, 338 S.C. at 422, 526 S.E.2d at 724, and (2) to ensure trial courts and their respective judgments are not reversed for reasons which were never presented to them. Herron, 395 S.C. at 465, 719 S.E.2d at 642. Implicit in both of these positions is the underlying theme of judicial economy, that is, an appellant should not get a second bite at the apple (i.e. a new trial) when, at trial, he simply failed make the argument that is the basis for a potential reversal on appeal. I’On, 338 S.C. at 422, 526 S.E.2d at 724; Herron, 395 S.C. at 470, 719 S.E.2d at 644-45.

Analysis

Understanding the policy behind South Carolina’s preservation requirement, the State submits that if the appellate panel’s ruling goes undisturbed, Appellant will have the opportunity to utilize the “ace card” from I’On and Herron—in this case the trial court’s failure to conduct an on-the record Rule 403-balancing test, an issue which was never mentioned to the trial court—and, via a remand, receive another opportunity to argue against the admission of evidence on a completely different theory than that which was first advanced at trial. This is clearly at odds with South Carolina law since I’On explains the argument presented on appeal, must be first raised to and ruled upon by the trial court. See I’On, 338 S.C. at 422, 526 S.E.2d at 724 (“[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*”) (emphasis added). Thus, because

both the legal issue which constitutes the basis for the remand along with the issue which is to be considered on remand were not preserved for appellate review, the appellate panel overlooked or misapprehended South Carolina law when it found the trial court erred and remanded the case for further proceedings.

A. Defense Counsel's Failure to Object, and the Trial Court's Failure to Rule on Whether Admission of Rule 404(b) Evidence Requires an on-the Record, Rule 403 Balancing Test

The record, as detailed above, clearly demonstrates the trial court was never asked to consider whether the admission of the Wal-Mart incident under Rule 404(b), required an on the record, Rule 403 balancing test.⁸ Similarly, defense counsel never objected to the trial court's failure to conduct a Rule 403 balancing test. As a result, the trial court obviously never ruled on such a question. This was acknowledged by the appellate panel who found "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." Spears, Op. No. 5119 at 5 (emphasis in original). In fact, this argument was not raised until the argument section of Appellant's brief when, for the first time, appellate counsel stated the trial court, "failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect." Br. of App. p. 7. Thus, because the record, and indeed the appellate panel's opinion, reflects that the argument which is now the basis for the

⁸ Furthermore, the State notes this issue, which is now the appellate panel's basis for the remand, was never included in its statement of issues on appeal. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) ("If a question is not presented for our review, we should not answer it no matter how much we may want to do so. For as former Chief Judge Alex Sanders famously wrote, 'appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' ") (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)); see also See Rule 208(b)(1)(B), SCACR, ("[O]rdinarily, no point will be considered which is not set forth in the statement of issues of appeal."); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly raised to it).

remand was never advanced at trial or ruled upon by the trial court, the issue is not preserved.⁹ See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); I’On, 338 S.C. at, 422, 526 S.E.2d at 724 (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court). The State therefore asks this Court to grant rehearing *en banc*, or in the alternative, substitute an opinion affirming Appellant’s conviction and sentence.

B. Defense Counsel’s Failure to Object, and the Trial Court’s Failure to Rule on Whether the Testimony and Evidence Regarding the Wal-Mart Incident was Unfairly Prejudicial Propensity Evidence under Rule 403

Similarly, the record plainly reflects defense counsel never argued the testimony or evidence regarding the Wal-Mart incident constituted unfairly prejudicial propensity evidence under Rule 403. Accordingly, the trial court never ruled on such an issue. In particular, the State notes defense counsel’s rationale for objecting to the admission of the Wal-Mart incident was clearly not related to a concern that the jury would conclude Appellant shot Victim on this occasion, because he had previously shot him a month prior.¹⁰ Rather, the objection was based upon defense counsel’s belief that the prior bad act had not been proven by clear and convincing evidence. Indeed, both opposing counsel and the trial court clearly came away with the same

⁹ The State further notes that because the record is silent as to whether defense counsel was even aware that a Rule 403 balancing test was required pursuant to State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) or State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) and is further silent as to whether defense counsel thought to object or had a strategic reason for failing to do so, this issue is best resolved in post-conviction relief proceedings.

¹⁰ Such an argument would appear to be more of question regarding improper character evidence under Rule 404(b), SCRE. See e.g. Rule 404(b), SCRE (West 2013) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

impression in light of their subsequent responses. Specifically, the State responded to defense counsel's argument stating that the clear and convincing evidence standard only applied to exceptions under Lyle and clarified that the clear and convincing standard did not apply to an excited utterance. (R. 182). Similarly, the trial court indicated, "we may be looking at Lyles (sic) because this is a prior bad act. It may have to come in under that analysis." (R. 183). At no point did the State or the trial court interpret defense counsel's objection as an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of propensity under Rule 403.

Moreover, even if one could argue that defense counsel's "whole more prejudicial than probative thing" objection was an attempt at advancing some sort of Rule 403 concerns, it is abundantly clear defense counsel *never explained why the Wal-Mart incident was unfairly prejudicial* meaning Appellant simply failed to preserve the argument raised in his appellate brief. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*") (emphasis added). In particular, the word "propensity" *never appears in any of defense counsel's objections related to the Wal-Mart incident*. In fact, in order to address the issue under I'On's preservation rules, one would have to assume, "the whole more prejudicial than probative thing" was an argument that the Wal-Mart incident was unfairly prejudicial because it was allegedly improper propensity evidence.¹¹ However, there is simply no support for such an assertion in the record. Therefore, the State submits this issue would be

¹¹ See e.g. State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct. App. 2011) ("Under Rule 403, the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice. If the trial judge determines not to exclude the evidence under this Rule 403 analysis, then the State may admit it.").

better resolved in post-conviction relief where defense counsel could explain the purpose of her objection and the legal theory behind it.

Finally, even if one could assume defense counsel's objection of "the whole more prejudicial than probative thing" was an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence, it is clear the trial court failed to rule on such an argument. Indeed, as described above, the trial court interpreted defense counsel's objection as being premised upon the State's purported failure to prove the Wal-Mart incident by clear and convincing evidence.¹² In fact, the appellate panel actually agreed there was no Rule 403 ruling at all finding, "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." *Spears*, Op. No. 5119 at 5 (emphasis in original). Therefore, because the record clearly shows the argument which was included in Appellant's statement of issues on appeal was never raised to or ruled upon by the trial court, and if not revisited would be the subject considered on remand, the State asks this Court to grant its petition for rehearing *en banc*, or in the alternative, substitute an opinion affirming Appellant's conviction and sentence.

- II. Even if defense counsel somehow preserved the argument that the trial court erred in failing to conduct an on the record, Rule 403 balancing test, and the trial court erred in failing to do so, the appellate panel overlooked the fact that it was required to determine whether such an error was prejudicial, and had it done so, would have determined the admission of the Wal-Mart incident was not prejudicial and therefore, not an abuse of discretion

The State submits the evidence regarding Appellant's prior bad act is admissible pursuant to Rule 403, SCRE and, as a result, even if the trial court's failure to conduct an on the record

¹² See Rule 404(b), SCRE Notes (West 2013) ("The rule does not set forth the burden of proof required for the admission of bad acts not the subject of a conviction and, therefore, case law would control.") (citing *State v. Smith*, 300 S.C. 216, 387 S.E.2d 245 (1989) (explaining that in criminal cases evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction)).

balancing test is error, such an error is not prejudicial meaning the admission of the evidence was not an abuse of discretion.¹³ See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A trial judge’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.”); see also Snyder’s Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (“The burden is on the Appellant to show not only error, but also prejudice.”). As explained above, it is not enough to show the trial court erred in admitting evidence, rather, the Appellant must also show that the admission of such evidence is prejudicial and therefore an abuse of discretion. Id. In this case, the appellate panel overlooked the fact Appellant was required to show not just error, but prejudicial error under Adams. Indeed, a review of the appellate panel’s opinion confirms it failed to consider whether the trial court’s purported error was prejudicial as the standard of review requires. See Spears, Op. No. 5119 at 5 (“Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy.”). Thus, because the record shows the evidence of the Wal-Mart incident was admissible, any error by the trial court in failing to conduct a Rule 403 analysis on the record is not prejudicial. As such, the State now seeks rehearing *en banc*, or in the alternative, asks for a substituted opinion explaining the trial court’s failure to conduct a Rule 403 analysis was not prejudicial.

¹³ While the State recognizes the appellate panel determined a remand was the appropriate remedy for the trial court’s failure to conduct an on the record, Rule 403 analysis, the State questions whether this is consistent with the standard of review. See e.g. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A trial judge’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.”); see also Snyder’s Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (“The burden is on the Appellant to show not only error, but also prejudice.”). In particular, because Adams explains the abuse of discretion standard requires that an error be prejudicial and under Snyder’s Auto World, Inc., the Appellant has the burden of demonstrating prejudice, it seems a reviewing court must first determine whether Appellant has shown prejudice prior to contemplating what remedy, if any, is needed. Understanding this, the appellate panel’s determination that a remand is the proper remedy for an error that was never determined to be prejudicial would seem to be at odds with the abuse of discretion standard of review.

Applicable Law

“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” Wiles, 383 S.C. at 157-58, 679 S.E.2d at 175-76. Furthermore, “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Wiles, 383 S.C.at 158, 679 S.E.2d at 176 (internal quotations omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.” Id.

Nevertheless, otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. Pursuant to Rule 403, SCRE, “the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.” Smith, 391 S.C. at 362, 705 S.E.2d at 496. “Unfair prejudice means an undue tendency to suggest decision on an improper basis” Wiles, 383 S.C.at 158, 679 S.E.2d at 176 and “[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

Discussion

- A. Evidence of the Wal-Mart Incident is Extremely Probative as it Establishes Appellant’s Motive for the Shooting in the Present Case as well as his Intent when he Fired the Weapon

Here, because the testimony, along with the supporting video and incident report, all prove the prior shooting by clear and convincing evidence and establish Appellant's motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd's death, the evidence at issue is extremely probative. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime). In fact, in a homicide prosecution, evidence which relates to previous quarrels, ill feelings or hostile acts between the parties is admissible under the common law, a fact which underscores the probative value of evidence relating to motive and intent.¹⁴

In particular, in State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) the Supreme Court of South Carolina affirmed the trial court's admission of evidence indicating the appellant had previously shot the victim six or seven weeks prior as it was probative of animus. The same is true in State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) where the Supreme Court of South Carolina explained evidence of marital difficulties, including loud altercations and controversial conversations between the appellant and his wife, who he was accused of murdering, were admissible to show "that animus probably existed at the time of the homicide." Likewise, in State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) the Supreme Court of South Carolina determined that a previous encounter between the victim and

¹⁴ See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) ("[E]vidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) ("[I]t is well settled that in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible . . ."); State v. Brooks, 79 S.C. 144, - , 60 S.E. 518, 518 (1908); see also Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); State v. Alford, 264, S.C. 26, 33, 212, S.E.2d 252, 254 (1975) (holding previous threats made against the companion of the victim at the time of assault is also admissible as evidence of malice).

the appellant, which demonstrated the victim was scared of the appellant, was admissible as evidence of the relationship between the parties. Thus, it seems clear that evidence regarding Appellant's motive for the shooting and his intent when he fired the weapon—malice—is obviously extremely probative.

B. The Prejudicial Effect of the Wal-Mart Incident does not Substantially Outweigh its Probative Value

Additionally, because evidence of the Wal-Mart Incident was only admitted for the purpose of proving motive and intent (R. 186-87); was only argued as being evidence of motive and intent (R. 43, 44, 533); and the jury, which is presumed to follow the law,¹⁵ was instructed that the evidence was only admissible pursuant to the Rule 404(b) exceptions and could not be used as character evidence (R. 548); the prejudicial effect of the admission of the Wal-Mart incident did not substantially outweigh its probative value.

Specifically, the State never attempted to cast the evidence now at issue as propensity evidence, but instead presented a theory that the shooting was a revenge killing making it unlikely the jury would have utilized the Wal-Mart incident as propensity evidence. This is most apparent in opening and closing arguments where the State emphasized Appellant was seeking revenge for Floyd's death. (R. 43, 44, 533, 534). Therefore, combining this with the fact the jury was instructed that the evidence related to the Wal-Mart incident could only be admitted pursuant to the Rule 404(b) exceptions and not as character evidence, the risk of unfair prejudice is *de minimus*. (R. 548). This is especially true since the jury took an oath to follow the law and, under South Carolina law, are presumed to do so as detailed in Foye.

¹⁵ See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.")).

Moreover, while Appellant maintains the jury could have concluded, “if appellant shot the victim once, he must also be the one who shot him a second time” both the law and the record refute such a position. In support of this proposition, Appellant cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, the South Carolina Supreme Court reversed a voluntary manslaughter and arson conviction in which appellant burnt down a trailer containing his ex-girlfriend when the State cross-examined appellant on a previous incident which was strikingly similar to the charged offense. 283 S.C. at 119-21, 322 S.E.2d at 12-13. However, despite reversing appellant’s convictions, the Gore Court clearly noted in footnote one, that had the prior bad act been proven, the evidence of the prior misconduct could have been admissible under a Lyle exception. See Gore, 283 S.C. at 121 n.1, 322 S.E.2d at 13 n.1 (“If provable, evidence of this prior misconduct could have been admissible under Lyle to show motive or common scheme or plan. However, the State properly concedes that the proof was insufficient to connect appellant to the setting of the previous trailer fire.”).

In Appellant’s case, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Additionally, because Appellant failed to appeal from the 404(b) ruling, it is law of the case. Thus, while it is true the evidence may be prejudicial to Appellant in that it makes it more likely that Appellant shot Victim, such prejudice is not “unfair prejudice” as the prior bad act was proven consistent with the requirements of Rule 404(b), SCRE. (R. 187).

Similarly, any prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. Specifically, the same motive that existed during the prior shooting—revenge—still existed when Appellant fired and fatally shot Victim in Myrtle Beach. The same can be said for Appellant’s intent, he obviously wanted to kill Victim

the first time he shot him and nothing within the record demonstrated that this changed within the month prior to the second shooting. To the contrary, the record clearly reflects that many members of 41-Curve wanted revenge against Victim. This was expressed throughout the record, including Appellant's co-defendant Nathaniel Douglas' statement to Danyell Hammonds that he and his fellow 41-Curve members were going to get Victim. (R. 154-55). In fact, this was evident even in the minutes leading up to the shooting where Bethea, Appellant's co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Appellant and Bethea, rather than shaking Irons' hand and calling an end to the violence, promptly walked across the street to kill them. (R. 365-66).

In light of these facts, the State submits that because Appellant is required to prove the trial court's error was prejudicial and under the standard of review, the appellate court is required to make such a determination, the appellate panel, by failing to consider whether the failure to conduct a Rule 403 analysis was prejudicial, clearly erred. Therefore, the appellate panel, by failing to consider the requirements of the standard of review, clearly overlooked or misapprehended South Carolina law. Accordingly, rehearing *en banc* is warranted, especially since the record conclusively shows Appellant was not prejudiced by the trial court's failure to conduct a Rule 403 analysis. Indeed, as detailed above, there is simply no risk the jury would have construed the Wal-Mart incident as propensity evidence when it was not offered as such and the jury was instructed it could not consider the evidence as evidence of Appellant's character.

CONCLUSION

For the aforementioned reasons, the State respectfully requests rehearing *en banc* to: (1) correct the appellate panel's misapprehension of South Carolina's preservation requirement and (2) to address the appellate panel's failure to determine whether the trial court's error in not conducting a Rule 403 analysis was prejudicial as is required under the standard of review. In the alternative, the State asks this Court to substitute an opinion consistent with the concerns addressed above.

Respectfully Submitted,

ALAN WILSON
Attorney General

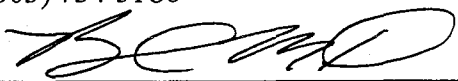
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENTS

April 26, 2013.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BRIAN K SPEARS,

APPELLANT

APPELLATE CASE NO. 2010-162287

Appeal from Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, appellant petitions this Court for rehearing on the following points that may have been overlooked or misapprehended. The solicitor in this case failed to specify why the Wal-Mart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all of the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Counsel has found in the past when a solicitor can not specify the exception, the real motive is to prejudice the defendant with the prior bad act.

This Court found and concluded that it was “unable to say that the admission of the prior bad act at testimony was harmless error.” If the error was not harmless, remanding the case for a Rule 403, SCRE balancing test would lead only to prejudice and confusion, it is respectfully submitted.

CONCLUSION

Appellant's petition for rehearing should be granted and his convictions should be reversed.

Respectfully submitted,

Robt M. Pachak

Robert M. Pachak
Appellate Defender

This 2nd day of May, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

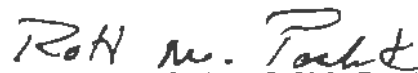
BRIAN K SPEARS,

APPELLANT

APPELLATE CASE NO. 2010-162287

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Brendan J. McDonald, Esquire, Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 2nd day of May, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 2nd day
of May, 2013.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022.



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

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June 14, 2013

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Re: The State v. Spears, Brian
Appellate Case No. 2010-162287

JUN 14

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR. This order will replace the order dated July 13, 2013, which is a clerical error. Time limits begin with the date of the corrected order.

Very truly yours,

V. Claire Allen

DEPUTY CLERK

The South Carolina Court of Appeals

The State, Respondent,

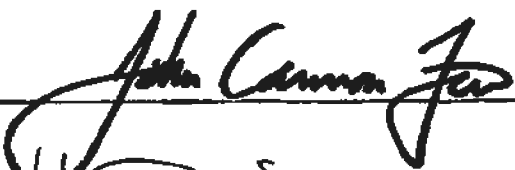
v.

Brian K. Spears, Appellant.

Appellate Case No. 2010-162287

ORDER

Respondent filed a petition for rehearing on April 26, 2013. Appellant filed a petition for rehearing on May 2, 2013. After careful consideration of each party's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, Appellant's petition for rehearing and Respondent's petition for rehearing are denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Brendan Jackson McDonald

Robert M. Pachak

Larry B. Hyman, Jr.

FILED

June 14, 2013

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 2013), Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner, pursuant to Rule 242(d)(1), SCACR, certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals.

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QUESTIONS PRESENTED

- I. Whether the appellate panel erred when it ignored the State's preservation argument, found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test and then remanded the case to the trial court to rule, for the first time, whether the probative value of evidence indicating Spears shot the victim about a month prior to the shooting death for which he was on trial was substantially outweighed by its risk of unfair prejudice.
- II. Whether the appellate panel erred when it declined to determine whether the trial court's failure to conduct an on the record Rule 403 balancing test was prejudicial.

STATEMENT OF THE CASE

On May 27, 2007, gunfire rang out near the intersection of 11th Ave. North and Ocean Boulevard in Myrtle Beach resulting in the death of Aaron Hammonds (“Victim”) and the wounding of Krystal Fowler, Lasheika Felton and Dajuan Monroe. (R. 50, 74-75, 134-45, 89, 107). Brian “Bos” Spears was subsequently indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill (“ABWIK”). (#2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, Spear’s case was called to trial before the Honorable Larry B. Hyman, Jr. and a jury. (R. 8). At trial, Spears was represented by Barbara Pratt, while the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R. 1). Three days later, on May 13, 2010, Spears was convicted of all charges and sentenced to thirty (30) years on the murder charge along with twenty (20) years concurrent on each ABWIK charge. (R. 571-72, 575).

Following his conviction, Spears, represented by Robert M. Pachak, sought review in the South Carolina Court of Appeals contending, “the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE[.]” (App. 6). In response, the State argued: (1) Appellant’s argument was “not preserved for appellate review as trial counsel argued a completely different rationale for exclusion of the evidence at issue during trial;” and (2) even if the argument was preserved, the record demonstrates the evidence was admissible under Rule 403. (App. 23, 26).

Ruling on the issue, the appellate panel issued a published opinion remanding the case to the trial court because of its “*failure to conduct a Rule 403 balancing test* to determine if the probative value of the prior shooting testimony is substantially outweighed by the danger of

unfair prejudice to Spears[.]” (App. 43). The State now seeks certiorari as the panel erred in ignoring the State’s preservation argument and in so doing, turned a blind-eye to South Carolina’s preservation rules, ignoring decades of precedent, all of which require, at a minimum, *that an issue be both raised to and ruled upon by the trial court in order to preserve the issue for appellate review*. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640 (2011) (“At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge.”); I’On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 421-22, 526 S.E.2d 716, 724 (2000) (holding South Carolina’s preservation rules require “that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments.”); Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) (“It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.”). The State further seeks certiorari as the appellate panel, after finding error in the trial court’s failure to conduct a Rule 403 analysis, overlooked the fact that it was required by the standard of review to determine whether such an error was prejudicial. See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) (“A trial judge’s ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant.”); see also Snyder’s Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) (“The burden is on the Appellant to show not only error, but also prejudice.”).

BACKGROUND

On May 26, 2007, Spears, Nathaniel “June” Douglas, Ishmael “Ish” Douglas,¹ and Thomas “T.C.” Shaw (collectively Spears’ group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.² (R. 213-14, 468-69). Upon arriving in Myrtle Beach that night, Spears’ group, who had not made arrangements for a place to stay, parked their car at a nearby K-Mart and proceeded to Ocean Boulevard. (R. 215). Once they were on Ocean Boulevard, Spears’ group was joined by Jeffrey “Bird” Bethea, who, like Spears and Nathaniel Douglas, was from Lumberton and was a member of 41-Curve. (R. 289-90). At the time of the incident, Spears was wearing a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.³ (R. 288-89, 299). Bethea, who did not know Spears’ group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (R. 295-96, 441, 297, 298).

Shortly after Bethea’s arrival, a member of Spears’ group stated they observed Victim, a high-ranking member of Lumberton’s East Side Bloods who was previously implicated in the murder of fellow 41-Curve member Eric Floyd, walking down Ocean Boulevard.⁴ (R. 365, 273-75, 290-91, 572). After seeing Victim, Spears’ group looked on as Lemark Irons, another East Side Blood, crossed Ocean Boulevard, approached the group, and complimented them on their clothes and jewelry stating “we need to stop beefing and get money together.” (R. 195-96, 197-

¹ Ishmael “Ish” Douglas is also known as Wa-Gee. (R. 214).

² Spears, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R. 192-93, 206, 207, 278-79, 283, 357, 486).

³ Danyell Hammonds, who was Victim’s younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R. 197-98). However, Danyell Hammonds further explained that when gang members would “go to do something” they would wear opposite colors. (R. 279-80). Additionally, Spears’ former cellmate in the detention center, Timothy Smith, testified that Spears told him he received a phone call saying Victim was in Myrtle Beach for bike week prompting Spears and his friends to come to Myrtle Beach. (R. 426-27).

⁴ Eric Floyd was also known as “G-Black” or “Turk.” (R. 193).

98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R. 301). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R. 219, 230). Irons then left the group and crossed Ocean Boulevard once again joining Victim and others on the opposite side of the street. (R. 219, 115-16).

Immediately after the initial altercation, Bethea, who was a high-ranking 41-Curve member, became angry and began talking to Spears who was a foot soldier in the gang and did not get along with Victim. (R. 208, 358, 220, 228, 365-67). During the course of their conversation, Spears expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill someone in Spears' group, unless he and Bethea killed someone from Irons and Victim's group first. (R. 365-66). Following this conversation, a shooting occurred resulting in Victim's death. (R. 121-29, 134-36). In addition, three bystanders were wounded. (R. 50, 74-75, 89, 107).

At trial, the State proceeded under the theory that either Spears or Bethea shot Victim to avenge Eric Floyd's death. (R. 12-15, 43-44). To that end, the State proffered testimony from Victim's sister, Danyell Hammonds ("Danyell") that approximately one month before Victim was fatally shot, Spears had shot and grazed Victim outside of a Wal-Mart in Lumberton.⁵ (R. 141-43). Specifically, in her proffer, Danyell explained that "around midnight" Victim and Lemark Irons came into the house and went straight to her room where she observed wet blood on Victim's shirt. (R. 146, 142). She then asked Victim what happened. (R. 142). Victim, who

⁵ Prior to trial, defense counsel made a motion *in limine* regarding the Wal-Mart incident arguing it was inadmissible hearsay and the video taken from the Lumberton Wal-Mart "cannot identify that it was my client." (R. 14-15). Notably, defense counsel, in her pre-trial motions, *never argued that the Wal-Mart incident was inadmissible under Rule 403, SCRE*. Rather, the only pre-trial, Rule 403 objection raised by defense counsel was whether the State could refer to the gang element of the crime. (R. 9) ("I believe that any introduction of gang evidence would be more prejudicial than probative under Rule 403."); see also (R. 10-11).

Danyell described as “shocked[,]” explained he had just been shot at Wal-Mart. (R. 147, 142). Danyell then asked Victim who had shot him. (R. 142). In response, Victim told Danyell that Spears had shot him and further informed her that he and Spears did not get along. (R. 142). Danyell, who was studying to be a nurse at the time, further testified in the proffer that she believed the shooting had just occurred because Victim had blood on his hand and the blood was still wet. (R. 145, 142-43).

Additionally, Danyell testified during the proffer that: (1) Victim was an East Side Blood (R. 143); (2) Spears was a member of 41-Curve (R. 143); (3) Victim was previously “locked up” for his role in the murder of Eric Floyd (R. 144); (4) Floyd was also a member of 41-Curve (R. 144); (5) Victim was released from custody approximately one month before the Wal-Mart shooting (R. 144); and (6) a group of 41-Curve members, including Nathaniel Douglas, had recently told her that they were going to get Victim. (R. 154-155).

Following the proffer, the State argued Victim’s statement to his sister identifying the shooter was admissible as an excited utterance. (R. 161). Meanwhile defense counsel argued Danyell’s testimony regarding the Wal-Mart shooting was inadmissible hearsay. (R. 158). Additionally, defense counsel maintained:

It’s a 4(B) (sic) issue; my client has not been convicted of it. It’s a prior bad act. It’s not clear and convincing evidence of his guilt of it. There is a video, but you can’t identify my client in it so I have a lot of problems as far as that, and put those together and taking it together with the whole more prejudicial than probative thing you’ve got my argument.

(R. 159-60). The State then responded arguing Danyell’s testimony regarding the prior shooting was admissible as an excited utterance; the prior bad act was admissible under State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) and they would proffer the Wal-Mart video which would show the shooting occurred after midnight on April 17, 2007. (R. 160, 165-66). After continued

discussion, the trial court recessed for the day and instructed counsel to research the issue overnight and argument would continue on the objections the next day. (R. 168-69).

The next morning, during additional argument on the issue, defense counsel, when asked by the trial court if she had anything further, stated:

I would just reiterate my 403 argument from yesterday as well with it being a clear and convincing standard if the court looks at that rather than simply a statement, ball statement like what's coming out here and we do not have a conviction and we do not have his face on the video and we don't have a witness that's going to say it was him[.]

(R. 182).

Responding to defense counsel' argument, the State first noted the clear and convincing evidence standard applied only to evidence admitted pursuant to Rule 404(b), SCRE, but maintained that because they were initially seeking admission under an excited utterance theory, Rule 404(b)'s clear and convincing evidence standard did not apply. (R. 182). After the State noted this distinction, the trial court observed that the proffered testimony may also need to be analyzed under Rule 404(b), SCRE. (R. 183). Following this comment, the trial court ruled that the statement made by Victim to his sister regarding the identity of the Wal-Mart shooter was admissible as an excited utterance.⁶ (R. 183-84). Defense counsel again responded stating, "I understand that you've ruled, I would just like to say something that just occurred to me that I just think maybe we need to look at that video before that testimony happens." (R. 184). Continuing, defense counsel noted her belief that the video would show Victim punched the shooter which counsel believed could affect whether the statement was an excited utterance. (R. 184). The trial court then asked the State to play the video from the Wal-Mart shooting. (R. 185).

⁶ Spears did not appeal from the trial court's ruling on this issue thereby making it law of the case. See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding an unappealed ruling, right or wrong, becomes the law of the case).

After reviewing the video, the State proffered additional photographs showing the time stamp on the video and proffered an incident report which noted the date and time at which the incident occurred. (R. 186). The trial court then questioned the State on its' intent in offering the additional proffers. (R. 186). Responding to the trial court's inquiry, the State explained that it was offering the additional proffer as evidence of the prior bad act and stated the entire event went to "motive and intent[.]" (R. 186). Continuing, the State further argued the evidence was "certainly relevant to the charges [Spears] is facing." (R. 186). Finally, the State noted that outside of Lyle, the evidence at issue was admissible pursuant to the excited utterance exception. (R. 187).

Defense counsel then reiterated that under Lyle there must be clear and convincing evidence of the prior bad act. (R. 187). The trial court responded by finding the prior bad act was proven by clear and convincing evidence.⁷ (R. 187). At no point did defense counsel ever argue that *the admission of the prior bad act evidence required a Rule 403, SCRE balancing test*. Likewise, defense counsel *never argued the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence*.

ARGUMENTS

- I. The appellate panel erred when it ignored the State's preservation argument, found the trial court erred in failing to conduct an on-the-record, Rule 403 balancing test and then remanded the case to the trial court to rule, for the first time, whether the probative value of evidence indicating Spears shot the victim about a month prior to the shooting death for which he was on trial was substantially outweighed by its risk of unfair prejudice

In the statement of issues on appeal, Spears argued the trial court erred in admitting Danyell's testimony that he shot Victim approximately one month before Victim's murder

⁷ Spears also did not appeal whether evidence of the Wal-Mart incident was admissible under Rule 404(b), SCRE or whether the Wal-Mart incident was proven by clear and convincing evidence meaning these issues, like the excited utterance ruling, are law of the case. See M.L.-Lee Acquisition Fund, L.P., 327 S.C. at 241, 489 S.E.2d at 472 (holding an unappealed ruling, right or wrong, becomes law of the case).

claiming the testimony was unfairly prejudicial under Rule 403, SCRE. (App. 6). Within his brief, Spears elaborated on this argument reasoning the evidence was unfairly prejudicial because the jury could have concluded, “if appellant shot the victim once, he must also be the one who shot him a second time.” (App. 7). Near the conclusion of his brief, Spears changed course noting the trial court “failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect.” (App. 8).

In response, the State argued Spears’ claims that the trial court erred in terms of the application of Rule 403 were not preserved because defense counsel never registered a contemporaneous Rule 403 objection on the basis of propensity (i.e. that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value because it was improper propensity evidence), and even if it did, the trial court never ruled upon such an objection. (App. 23-25). Similarly, in addressing Spears’ contention that the trial court failed to conduct a Rule 403 analysis, the State noted defense counsel never requested such a ruling, and even if it did, never argued the trial court was *required* to do so after analyzing the issue under Rule 404(b), SCRE, meaning the trial court could not have ruled on such an argument. (App. 23-26). Accordingly, the State reasoned that because defense counsel failed to present these arguments to the trial court, but instead argued them for the first time on appeal, the issues were not preserved for appellate review. (App. 26).

In its ruling, the appellate panel neglected to address the State’s preservation argument, further characterized Spear’s argument as a claim that the trial court erred in failing to conduct a Rule 403 analysis, and remanded the case to the trial court to consider the propensity argument that Spears advanced, for the first time, in his appeal. (App. 34). In so holding, the State submits the appellate panel, by failing to even address the State’s preservation argument, or

explain its rationale for doing so, erred and in reaching the underlying issue, ignored South Carolina precedent requiring an argument to be both raised to and ruled upon by the trial court in order to preserve the question for appellate review.

Applicable Law

In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court explained the rationale supporting its' strict preservation rules stating, the "preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*" 338 S.C. at 422, 526 S.E.2d at 724 (emphasis added). Elaborating, the I'On Court found, "the requirement also serves as a keen incentive for a party to prepare a case thoroughly. It prevents a party from keeping an ace card up his sleeve - intentionally or by chance - in the hope that an appellate court will accept that ace card and, via a reversal, give him another opportunity to prove his case." Id.

This proposition was reaffirmed in Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2011) when the Court further stated, "[i]ssue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." 395 S.C. at 465, 719 S.E.2d at 642 (quoting Queen's Grant II Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006)). In Herron, this Court, on remand from the Supreme Court of the United States, who vacated its' previous decision, declined to reach a federal preemption question because "the matter of preemption was not preserved in the South Carolina proceedings." Id. at 465, 719 S.E.2d at 642. Continuing, the Herron Court wrote, "the question Appellant presented to the United States Supreme Court, namely whether the [Federal Arbitration Act] preempted our state's legislative policy as set forth

in the Dealers Act, was raised neither to the trial court nor to our Court.” Id. at 469, 719 S.E.2d at 644. Continuing, the Herron Court opined:

We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner. Yet, because Appellant can point to no instance where preemption was properly raised or ruled upon, to disregard our issue preservation rules under these circumstances would render them meaningless. As this Court observed, issue preservation rules prevent [] a party from keeping an ace card up his sleeve—intentionally or by chance—in the hope that an appellate court will accept that ace card and, via reversal, give him another opportunity to prove his case.

Id. at 470, 719 S.E.2d at 644-45 (internal quotations omitted) (internal citation omitted).

Thus, both I’On and Herron make it clear that South Carolina’s preservation requirement exists to serve essentially two functions: (1) to require parties to thoroughly research and prepare their case by contemplating their respective legal positions; I’On, 338 S.C. at 422, 526 S.E.2d at 724, and (2) to ensure trial courts and their respective judgments are not reversed for reasons which were never presented to them. Herron, 395 S.C. at 465, 719 S.E.2d at 642. Implicit in both of these positions is the underlying theme of judicial economy, that is, an appellant should not get a second bite at the apple (i.e. a new proceeding) when, at trial, he simply failed to make the argument that is the basis for a potential reversal on appeal. I’On, 338 S.C. at 422, 526 S.E.2d at 724; Herron, 395 S.C. at 470, 719 S.E.2d at 644-45.

Analysis

Understanding the policy behind South Carolina’s preservation requirement, the State submits that if the appellate panel’s ruling goes undisturbed, Spears will have the opportunity to utilize the “ace card” from I’On and Herron—in this case the trial court’s failure to conduct an on-the record Rule 403-balancing test, an issue which was never mentioned to the trial court—and, via a remand, receive another opportunity to argue against the admission of evidence on a completely different theory than that which was first advanced at trial. This is clearly at odds

with South Carolina law since I'On explains the argument presented on appeal, must be first raised to and ruled upon by the trial court. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 (“[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*”) (emphasis added). Thus, because both the legal issue which constitutes the basis for the remand along with the issue which is to be considered on remand were not preserved for appellate review, the appellate panel erred when it remanded the case to the trial court to consider a question which was never ruled upon in Spears trial. Accordingly, the State asks this Court to grant certiorari.

A. Defense Counsel’s Failure to Object, and the Trial Court’s Failure to Rule on Whether Admission of Rule 404(b) Evidence Requires an on-the Record, Rule 403 Balancing Test

The record, as detailed above, clearly demonstrates the trial court was never asked to consider whether the admission of the Wal-Mart incident under Rule 404(b), required an on the record, Rule 403 balancing test.⁸ Likewise, defense counsel never objected to the trial court’s failure to conduct a Rule 403 balancing test. As a result, the trial court obviously never ruled on such a question. This was acknowledged by the appellate panel who found “it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice.” (App. 38). (emphasis in original). In fact, this argument was not raised until the argument section of Appellant’s brief when, for the first time, appellate counsel stated the trial court, “failed to

⁸ Furthermore, the State notes this issue, which is now the appellate panel’s basis for the remand, was never included in Spears’ statement of issues on appeal. See Atlantic Coast Builders and Contractors, LLC v. Lewis, 396 S.C. 323, 331 n.4, 730 S.E.2d 282, 286 n.4 (2012) (“If a question is not presented for our review, we should not answer it no matter how much we may want to do so. For as former Chief Judge Alex Sanders famously wrote, ‘appellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.’”) (quoting Langley v. Boyter, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985)); see also See Rule 208(b)(1)(B), SCACR, (“[O]rdinarily, no point will be considered which is not set forth in the statement of issues of appeal.”); Tobias v. Rice, 379 S.C. 357, 365, 665 S.E.2d 216, 220 (Ct. App. 2008) overruled on other grounds (holding it is error for an appellate court to consider issues not properly raised to it).

conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect.” (App. 8). Thus, because the record, and indeed the appellate panel’s opinion, reflects that the argument which is now the basis for the remand was never advanced at trial or ruled upon by the trial court, the issue is not preserved.⁹ See Staubes v. City of Folly Beach, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (“It is well-settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court to be preserved for appellate review.”); I’On, 338 S.C. at, 422, 526 S.E.2d at 724 (holding an appellant must present both his issues and arguments to the lower court and obtain a ruling before presenting the issues and arguments on appeal); State v. Williams, 303 S.C. 410, 411, 401 S.E.2d 168, 169 (1991) (concluding appellate courts will generally not address an argument unless it was first raised to and ruled upon by the trial court).

B. Defense Counsel’s Failure to Object, and the Trial Court’s Failure to Rule on Whether the Testimony and Evidence Regarding the Wal-Mart Incident was Unfairly Prejudicial Propensity Evidence under Rule 403

Similarly, the record plainly reflects defense counsel never argued the testimony or evidence regarding the Wal-Mart incident constituted unfairly prejudicial propensity evidence under Rule 403. Accordingly, the trial court never ruled on such an issue. In particular, the State notes defense counsel’s rationale for objecting to the admission of the Wal-Mart incident was clearly not related to a concern that the jury would conclude Spears shot Victim on this occasion, because he had previously shot him a month prior.¹⁰ Rather, the objection was based upon defense counsel’s belief that the prior bad act had not been proven by clear and convincing

⁹ The State further notes that because the record is silent as to whether defense counsel was even aware that a Rule 403 balancing test was required pursuant to State v. Wallace, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) or State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) and is further silent as to whether defense counsel thought to object or had a strategic reason for failing to do so, this issue is best resolved in post-conviction relief proceedings.

¹⁰ Such an argument would appear to be more of question regarding improper character evidence under Rule 404(b), SCRE. See e.g. Rule 404(b), SCRE (West 2013) (“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”).

evidence.¹¹ Indeed, both opposing counsel and the trial court clearly came away with the same impression in light of their subsequent responses. Specifically, the State responded to defense counsel's argument stating that the clear and convincing evidence standard only applied to exceptions under Lyle and clarified that the clear and convincing standard did not apply to an excited utterance. (R. 182). Similarly, the trial court indicated, "we may be looking at Lyles (sic) because this is a prior bad act. It may have to come in under that analysis." (R. 183). At no point did the State or the trial court interpret defense counsel's objection as an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of propensity under Rule 403.

Moreover, even if one could argue that defense counsel's "whole more prejudicial than probative thing" objection was an attempt at advancing some sort of Rule 403 concerns, it is abundantly clear defense counsel *never explained why the Wal-Mart incident was unfairly prejudicial* meaning Appellant simply failed to preserve the argument raised in his appellate brief. See I'On, 338 S.C. at 422, 526 S.E.2d at 724 ("[The] preservation requirement on the appellant is meant to enable the lower court to rule properly after it has considered *all relevant facts, law, and arguments.*") (emphasis added). In particular, the word "propensity" *never appears in any of defense counsel's objections related to the Wal-Mart incident.* In fact, in order to address the issue under I'On's preservation rules, one would have to assume, "the whole more prejudicial than probative thing" was an argument that the Wal-Mart incident was unfairly prejudicial because it was allegedly improper propensity evidence.¹² However, there is simply

¹¹ See e.g., State v. Gore, 283 S.C. 118, 119-21, 322 S.E.2d 12 (1984) (reversing a defendant's voluntary manslaughter and arson conviction where the State elicited testimony on cross-examination regarding a strikingly similar incident, but failed to prove the incident by clear and convincing evidence pursuant to Rule 404(b), SCRE).

¹² See e.g., State v. Smith, 391 S.C. 353, 362, 705 S.E.2d 491, 496 (Ct. App. 2011) ("Under Rule 403, the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by

no support for such an assertion in the record. Therefore, the State submits this issue would be better resolved in post-conviction relief where defense counsel could explain the purpose of her objection and the legal theory behind it.

Finally, even if one could assume defense counsel's objection of "the whole more prejudicial than probative thing" was an argument that the prejudicial effect of the Wal-Mart incident substantially outweighed its probative value on the basis of being improper propensity evidence, it is clear the trial court failed to rule on such an argument. Indeed, as described above, the trial court interpreted defense counsel's objection as being premised upon the State's purported failure to prove the Wal-Mart incident by clear and convincing evidence.¹³ In fact, the appellate panel actually agreed there was no Rule 403 ruling at all finding, "it is not implicit or apparent from the record that the trial court considered whether the probative value of the Wal-Mart shooting testimony was substantially outweighed by unfair prejudice." (App. 38) (emphasis in original). Therefore, because the record clearly shows the argument which was included in Appellant's statement of issues on appeal was never raised to or ruled upon by the trial court, and if not revisited would be the subject considered on remand, the State asks this Court to grant certiorari.

- II. Even if defense counsel somehow preserved the argument that the trial court erred in failing to conduct an on the record, Rule 403 balancing test, and the trial court erred in failing to do so, the appellate panel overlooked the fact that it was required to determine whether such an error was prejudicial, and had it done so, would have determined the admission of the Wal-Mart incident was not prejudicial and therefore, not an abuse of discretion

some other form of unfair prejudice. If the trial judge determines not to exclude the evidence under this Rule 403 analysis, then the State may admit it.").

¹³ See Rule 404(b), SCRE Notes (West 2013) ("The rule does not set forth the burden of proof required for the admission of bad acts not the subject of a conviction and, therefore, case law would control.") (citing State v. Smith, 300 S.C. 216, 387 S.E.2d 245 (1989) (explaining that in criminal cases evidence of other crimes or bad acts must be clear and convincing if the acts are not the subject of a conviction)).

The State submits the evidence regarding Spears' prior bad act is admissible pursuant to Rule 403, SCRE and, as a result, even if the trial court's failure to conduct an on the record balancing test is error, such an error is not prejudicial meaning the admission of the evidence was not an abuse of discretion.¹⁴ See State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice."). As explained above, it is not enough to show the trial court erred in admitting evidence, rather, an appellant must also show that the admission of such evidence is prejudicial and therefore an abuse of discretion. Id. In this case, the appellate panel overlooked the fact Spears was required to show not just error, but prejudicial error under Adams. Indeed, a review of the appellate panel's opinion confirms it failed to consider whether the trial court's purported error was prejudicial as the standard of review requires. See App. at 38 ("Having determined that the trial court erred by failing to conduct an on-the-record Rule 403 balancing test, we must next determine the proper remedy."). Thus, because the record shows the evidence of the Wal-Mart incident was admissible, any error by the trial court in failing to

¹⁴ While the State recognizes the appellate panel determined a remand was the appropriate remedy for the trial court's failure to conduct an on the record, Rule 403 analysis, the State questions whether this is consistent with the standard of review. See e.g. State v. Adams, 354 S.C. 361, 377, 580 S.E.2d 785, 793 (Ct. App. 2003) ("A trial judge's ruling on the admissibility of evidence will not be reversed on appeal absent an abuse of discretion or the commission of legal error that results in prejudice to the defendant."); see also Snyder's Auto World, Inc. v. George Coleman Motor Co., Inc., 315 S.C. 183, 186, 434 S.E.2d 310, 312 (Ct. App. 1993) ("The burden is on the Appellant to show not only error, but also prejudice."). In particular, because Adams explains the abuse of discretion standard requires that an error be prejudicial and under Snyder's Auto World, Inc., Spears, as the appellant has the burden of demonstrating prejudice, it seems a reviewing court must first determine whether Spears has shown prejudice prior to contemplating what remedy, if any, is needed. Understanding this, the appellate panel's determination that a remand is the proper remedy for an error that was never determined to be prejudicial would seem to be at odds with the abuse of discretion standard of review.

conduct a Rule 403 analysis on the record is not prejudicial. As such, the State now seeks certiorari on this issue.

Applicable Law

“Evidence is relevant and admissible if it tends to establish or make more or less probable the matter in controversy.” State v. Wiles, 383 S.C. 151, 157-58, 679 S.E.2d 172, 175-76 (2009). Furthermore, “evidence of other crimes, wrongs, or acts is generally not admissible to prove the character of a person in order to show action in conformity therewith; however, such evidence may be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent.” Wiles, 383 S.C.at 158, 679 S.E.2d at 176 (internal quotations omitted) (citing Rule 404(b), SCRE). Additionally, evidence which is “logically relevant to establish a material element of the offense charged is not to be excluded merely because it incidentally reveals the accused’s guilt of another crime.” Id.

Nevertheless, otherwise admissible evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]” Rule 403, SCRE. Pursuant to Rule 403, SCRE, “the trial judge must determine whether the logical connection articulated by the State is sufficiently strong that the probative value found in the connection is not substantially outweighed by the tendency of the evidence to show propensity, or by some other form of unfair prejudice.” Smith, 391 S.C. at 362, 705 S.E.2d at 496. “Unfair prejudice means an undue tendency to suggest decision on an improper basis” Wiles, 383 S.C.at 158, 679 S.E.2d at 176 and “[t]he determination of the prejudicial effect of the challenged evidence must be based on the entire record, and the result will generally turn on the facts of each case.” State v. Holder, 382 S.C. 278, 293, 676 S.E.2d 690, 698 (2009).

Discussion

A. Evidence of the Wal-Mart Incident is Extremely Probative as it Establishes Spears' Motive for the Shooting in the Present Case as well as his Intent when he Fired the Weapon

Here, because the testimony, along with the supporting video and incident report, all prove the prior shooting by clear and convincing evidence and establish Spears' motive and intent in the current action—exacting revenge on Victim for his role in Eric Floyd's death, the evidence at issue is extremely probative. See State v. Wiles, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (concluding evidence which is logically relevant to establish a material element of the offense charged should not be excluded simply because it reveals that the defendant is guilty of another crime). In fact, in a homicide prosecution, evidence which relates to previous quarrels, ill feelings or hostile acts between the parties is admissible under the common law, a fact which underscores the probative value of evidence relating to motive and intent.¹⁵

In particular, in State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) this Court affirmed the trial court's admission of evidence indicating the appellant had previously shot the victim six or seven weeks prior as it was probative of animus. The same is true in State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) where the Court explained evidence of marital difficulties, including loud altercations and controversial conversations between the appellant and his wife, who he was accused of murdering, were admissible to show "that animus probably existed at the time of the homicide." Likewise, in

¹⁵ See State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) ("In homicide cases, evidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Williams, 321 S.C. 327, 336, 468 S.E.2d 626, 631 (1996) ("[E]vidence of previous quarrels and ill feelings or hostile acts between parties is admissible to show that animus probably existed between the parties at the time of the homicide."); State v. Clinkscales, 231 S.C. 650, 654-55, 99 S.E.2d 663, 665 (1957) ("[I]t is well settled that in assault and battery and homicide cases, evidence that the accused and prosecuting witness or the deceased had a previous difficulty is admissible . . ."); State v. Brooks, 79 S.C. 144, - , 60 S.E. 518, 518 (1908); see also Blakely v. State, 360 S.C. 636, 639, 602 S.E.2d 758, 759 (2004) ("It is well-settled that evidence of previous threats by the defendant is admissible to show malice."); State v. Alford, 264, S.C. 26, 33, 212, S.E.2d 252, 254 (1975) (holding previous threats made against the companion of the victim at the time of assault is also admissible as evidence of malice).

State v. Braxton, 343 S.C. 629, 636, 541 S.E.2d 833, 836-37 (2001) this Court determined that a previous encounter between the victim and the appellant, which demonstrated the victim was scared of the appellant, was admissible as evidence of the relationship between the parties. Thus, it seems clear that evidence regarding Appellant's motive for the shooting and his intent when he fired the weapon—malice—is obviously extremely probative.

B. The Prejudicial Effect of the Wal-Mart Incident does not Substantially Outweigh its Probative Value

Additionally, because evidence of the Wal-Mart Incident was only admitted for the purpose of proving motive and intent (R. 186-87); was only argued as being evidence of motive and intent (R. 43, 44, 533); and the jury, which is presumed to follow the law,¹⁶ was instructed that the evidence was only admissible pursuant to the Rule 404(b) exceptions and could not be used as character evidence (R. 548); the prejudicial effect of the admission of the Wal-Mart incident did not substantially outweigh its probative value.

Specifically, the State never attempted to cast the evidence now at issue as propensity evidence, but instead presented a theory that the shooting was a revenge killing making it unlikely the jury would have utilized the Wal-Mart incident as propensity evidence. This is most apparent in opening and closing arguments where the State emphasized Spears was seeking revenge for Floyd's death. (R. 43, 44, 533, 534). Therefore, combining this with the fact the jury was instructed that the evidence related to the Wal-Mart incident could only be admitted pursuant to the Rule 404(b) exceptions and not as character evidence, the risk of unfair prejudice is *de minimus*. (R. 548). This is especially true since the jury took an oath to follow the law and, under South Carolina law, are presumed to do so as detailed in Foye.

¹⁶ See State v. Dunlap, 346 S.C. 312, 319, 550 S.E.2d 889, 893 (Ct. App. 2001), aff'd as modified on writ of cert., 353 S.C. 539, 579 S.E.2d 318 (2003) (quoting Foye v. State, 335 S.C. 586, 590 n.1, 518 S.E.2d 265, 267 n. 1 (1999) ("A jury is presumed to [have followed the trial judge's] instructions.")).

Moreover, while Spears maintains the jury could have concluded, “if appellant shot the victim once, he must also be the one who shot him a second time” both the law and the record refute such a position. In support of this proposition, Spears cites to State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984). In Gore, this Court reversed a voluntary manslaughter and arson conviction in which appellant burnt down a trailer containing his ex-girlfriend when the State cross-examined appellant on a previous incident which was strikingly similar to the charged offense. 283 S.C. at 119-21, 322 S.E.2d at 12-13. However, despite reversing appellant’s convictions, the Gore Court clearly noted in footnote one, that had the prior bad act been proven, the evidence of the prior misconduct could have been admissible under a Lyle exception. See Gore, 283 S.C. at 121 n.1, 322 S.E.2d at 13 n.1 (“If provable, evidence of this prior misconduct could have been admissible under Lyle to show motive or common scheme or plan. However, the State properly concedes that the proof was insufficient to connect appellant to the setting of the previous trailer fire.”).

In Spears’ case, unlike Gore, the State indisputably established motive and intent pursuant to Rule 404(b), SCRE, by clear and convincing evidence. (R. 187). Additionally, because Spears’ failed to appeal from the 404(b) ruling, it is law of the case. Thus, while it is true the evidence may be prejudicial to Spears in that it makes it more likely he shot Victim, such prejudice is not “unfair prejudice” as the prior bad act was proven consistent with the requirements of Rule 404(b), SCRE. (R. 187).

Similarly, any prejudice which may exist as a result of the admission of the prior shooting does not substantially outweigh its probative value. Specifically, the same motive that existed during the prior shooting—revenge—still existed when Spears fired and fatally shot Victim in Myrtle Beach. The same can be said for Spears’ intent, he obviously wanted to kill Victim the

first time he shot him and nothing within the record demonstrated that this changed within the month prior to the second shooting. To the contrary, the record clearly reflects that many members of 41-Curve wanted revenge against Victim. This was expressed throughout the record, including Spears' co-defendant Nathaniel Douglas' statement to Danyell Hammonds that he and his fellow 41-Curve members were going to get Victim. (R. 154-55). In fact, this was evident even in the minutes leading up to the shooting where Bethea, Spears' co-defendant, got into an argument with Irons after Irons suggested the two groups "stop beefing and get money together." (R. 219). In response, Spears and Bethea, rather than shaking Irons' hand and calling an end to the violence, promptly walked across the street to kill them. (R. 365-66).

In light of these facts, the State submits that because Spears is required to prove the trial court's error was prejudicial and under the standard of review, the appellate court is required to make such a determination, the appellate panel, by failing to consider whether the failure to conduct a Rule 403 analysis was prejudicial, clearly erred. Accordingly, granting certiorari is warranted, especially since the record conclusively shows Spears was not prejudiced by the trial court's failure to conduct a Rule 403 analysis. Indeed, as detailed above, there is simply no risk the jury would have construed the Wal-Mart incident as propensity evidence when it was not offered as such and the jury was instructed it could not consider the evidence as evidence of Spears' character.

CONCLUSION

For the aforementioned reasons, the State respectfully asks this Court to grant certiorari in order to: (1) correct the appellate panel's misapprehension of South Carolina's preservation requirement and (2) address the appellate panel's failure to determine whether the trial court's

error in not conducting a Rule 403 analysis was prejudicial as is required under the standard of review.

Respectfully Submitted,

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General

BRENDAN J. McDONALD
Assistant Attorney General
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Brendan J. McDonald
ATTORNEY(S) FOR RESPONDENT

July 12, 2013.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of General Sessions

Larry B. Hyman Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed April 17, 1013), Appellate Case No. 2010-162287

THE STATE,

RESPONDENT,

V.

BRIAN K. SPEARS,

PETITIONER.

CERTIFICATE OF SERVICE

I, Brendan McDonald, counsel for the Respondent, certify that I have served the within *State of South Carolina's Petition for Writ of Certiorari*, on opposing counsel by depositing two (2) copies of the same in the United States mail, first class, postage prepaid, addressed to his attorney:

Robert M. Pachak, Esq.,
SCCID/Division of Appellate Defense
P.O. Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served on this 12th day of July, 2013.



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ATTORNEY FOR RESPONDENT

July 12, 2013.

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Horry County

Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
07-GS-26-3387, 3388, 3389, 3390

THE STATE,

PETITIONER/RESPONDENT,

V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER

APPELLATE CASE NO. 2010-162287

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
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(803) 734-1330

ATTORNEY FOR RESPONDENT/PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on June 14, 2013.

QUESTION PRESENTED

Whether the Court of Appeals erred in remanding petitioner's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless?

STATEMENT OF THE CASE

Petitioner was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr., on May 10 – 13, 2010, in Horry County. A sentence of thirty (30) years was imposed for murder and twenty (20) year sentences were imposed on the remaining charges.

Petitioner appealed his convictions and submitted a final brief on September 12, 2011. Respondent submitted its final brief on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, respondent filed a petition for rehearing. On May 2, 2013, petitioner filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013.

This petition for writ of certiorari follows.

ARGUMENT

The Court of Appeals erred in remanding petitioner's case for the trial court to conduct a balancing test under Rule 403, SCRE on the admissibility of a prior bad act when the Court of Appeals already made a determination that the error was not harmless.

The argument on direct appeal was that the trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE. (BOA p. 5).

The victim was shot and killed in Myrtle Beach while he was visiting there with some of the gang members he was with from Lumberton, North Carolina. Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a rival gang also from Lumberton and they, too, were visiting in Myrtle Beach. No one was really quite sure who did the shooting. The police made a composite of the suspected shooter that resembled Jeffrey Bethea. Nathan Douglas testified for the State and implicated Bethea. Bethea testified for the State in exchange for more lenient treatment and implicated appellant. Appellant's defense was the Bethea was the one (1) shooter.

(R. p. 43, line 12 – p. 46, line 21; R. p. 110, line 13 – p. 111, line 11; R. p. 214, lines 2 – 25).

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim's own sister that appellant shot the victim at the Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach. The trial court allowed the solicitor to put on the record that this was evidence of a prior bad act under Rule 404, SCRE. The solicitor failed to specify why the Walmart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all of the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923) (R. p. 186, line 18 – p. 187, line 14). Counsel has found in the past when a solicitor cannot specify the pertinent exception, the real motive is to prejudice the defendant with the prior bad act.

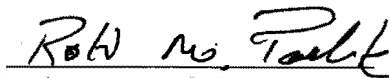
Appellant noted in his brief how the prior bad act was unfairly prejudicial under Rule 403, SCRE as “[e]vidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). A jury in this case could unfairly conclude that if appellant shot the victim once, he must also be the one who shot him a second time. Our case law has taught us that when “the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced.” State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984).

The Court of Appeals found and concluded that it was “unable to say that the admission of the prior bad act testimony was harmless error.” If the error was not harmless, petitioner’s conviction should be reversed. Remanding the case for a Rule 403, SCRE balancing test would only lead to prejudice and confusion. It makes the trial judge sit in judgment of himself.

CONCLUSION

Petitioner's writ should be granted and his convictions should be reversed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Rob M. Pachak", written over a horizontal line.

Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/PETITIONER.

This 15th day of July, 2013

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 5119 (S.C. Ct. App. filed 4/17/2013)
07-GS-26-3387, 3388, 3389, 3390

THE STATE,

PETITIONER/RESPONDENT,

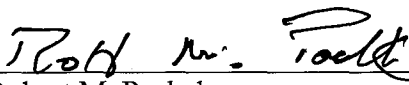
V.

BRIAN K. SPEARS,

RESPONDENT/PETITIONER.

CERTIFICATE OF SERVICE

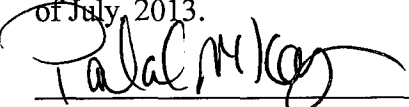
I certify that a true copy of the petition for writ of certiorari and a copy of the appendix, in this case has been served on Brendan J. McDonald, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, 1015 Sumter Street, Columbia, SC 29201, this 15th day of July, 2013.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR RESPONDENT/ PETITIONER

SWORN TO BEFORE ME this 15th day
of July, 2013.



Notary Public for South Carolina

My Commission Expires: July 24, 2022

(L.S.)

The Supreme Court of South Carolina

The State, Petitioner/Respondent,

v.

Brian K. Spears, Respondent/Petitioner.

Appellate Case No. 2013-001504

Lower Court No's. 2007-GS-26-3387, 3388, 3389, 3390

ORDER

Petitioners seek a writ of certiorari to review the Court of Appeals' decision in *State v. Brian Spears*, 403 S.C. 247, 742 S.E. 2d 878 (Ct. App. 2013). The petitions are denied.



C.J.
FOR THE COURT

Kaye G. Hearn, J., not participating.

Columbia, South Carolina

September 11, 2014

cc:

Robert M. Pachak, Esquire

Alan McCrory Wilson, Esquire

John W. McIntosh, Esquire

Donald J. Zelenka, Esquire

Brendan Jackson McDonald, Esquire

Jimmy A. Richardson, II, Esquire

The Honorable Melanie Huggins-Ward

The Honorable Jenny Abbott Kitchings

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1 State of South Carolina) Court of General Sessions
2 County of Horry) 2007-GS-26-03387
3 2007-GS-26-03388
2007-GS-26-03389
2007-GS-26-03390

4 State of South Carolina)
5 vs.) Transcript of Record
6)
7 Brian Kendrick Spears)

8 ORIGINAL

December 8th, 2016
Conway, South Carolina

11 BEFORE:

12 Honorable Larry B. Hyman, Judge.

13 APPEARANCES:

14 Thomas Terrell, Esq.
15 Attorney for the State

16 Barbara Pratt, Esq.
17 Attorney for the Defendant

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Teresa J. F. Bautz, RPR
Official Court Reporter

1 E X H I B I T S

2 NO.	DESCRIPTION	ID	EV
3 Court's-1	Defense Brief	4	--

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21 Exhibits retained by Clerk of Court.

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1 (The hearing commenced at approximately 2:59 p.m.)

2 BRIAN KENDRICK SPEARS, after being duly sworn,

3 testified as follows:

4 MR. TERRELL: Your Honor, this is State of South

5 Carolina versus Brian Kendrick Spears. Your Honor, if

6 you'll remember Mr. Spears, this was a trial from back

7 in 2010. He was charged, tried and convicted on

8 indictments 2007-GS-26-3387, 3388, 3389 and 3390.

9 Those are three counts of assault and battery with

10 intent to kill and one count of murder, Your Honor. He

11 was convicted on all three.

12 Your Honor, sentenced him to three years on the

13 murder and 20 years on the assault charges to run

14 concurrent. Your Honor, this case --

15 THE COURT: Three years on the murder?

16 MS. PRATT: 30 years.

17 MR. TERRELL: 30 on the murder.

18 THE COURT: 30, yes.

19 MR. TERRELL: And 20 on the assault.

20 THE COURT: Yes.

21 MR. TERRELL: This case was appealed by the

22 Defendant. The argument on appeal went up to the Court

23 of Appeals. The Court of Appeals found that a

24 balancing test, 403(b) balancing test, on a prior bad

25 act and then testimony of that prior bad act is

1 necessary on the record. And then any further action
2 will be based on the outcome of that hearing, Your
3 Honor. That's the purpose we're in front of you today.

4 THE COURT: All right. Let me hear from you,
5 Ms. Pratt.

6 MS. PRATT: Your Honor, the first thing I'd like
7 to do is make a copy of the brief that I gave to you
8 and the solicitor this morning as a Court's Exhibit if
9 that's acceptable.

10 THE COURT: It certainly is. Thank you.

11 (WHEREUPON, Court's Exhibit No. 1 was marked for
12 identification.)

13 THE COURT: Yes, ma'am.

14 MS. PRATT: Thank you, Your Honor. Your Honor, as
15 I'm sure you are aware, and you may remember this
16 trial --

17 THE COURT: I do.

18 MS. PRATT: -- it was a hotly contested case that
19 we had. My client was accused of coming here from
20 Lumberton with a couple of his friends and engaging in
21 a shooting incident against some other people from
22 Lumberton who were part of an opposing gang. There was
23 a lot of gang testimony and gang affiliation
24 information that came in in the trial.

25 The issue that the Court of Appeals focused on was

1 about a shooting incident that had happened at the
2 Wal-Mart approximately a month earlier. And if you
3 have read through the transcript, I'm sure you remember
4 that there was a lot of argument between Ms. Elder and
5 I as to whether or not that information should come in.

6 You, yourself on the first day of motions when we
7 were talking about it identified probably the biggest
8 problem that they had which was how were they going to
9 get that shooting incident in. Ms. Elder suggested
10 that it was an excited utterance. You sent us home to
11 do some research.

12 But at this night before we broke for the night,
13 one of the things that I said was that there was a
14 problem with a prejudicial versus probative argument in
15 regards to this particular testimony. The next day the
16 solicitor and I again argued the case.

17 She actually told you, and I have the pages in the
18 transcript, that there were going to be -- there was
19 going to be testimony from LaMark Irons or perhaps from
20 Tim Smith who was the jailhouse snitch. Most notably
21 Tim Smith was the person that she mentioned, and that
22 he was going to say that my client had admitted to him
23 that he was involved in that Wal-Mart shooting.

24 Up until then, from the way I read the transcript,
25 I feel that you were concerned about whether or not

1 there was strong enough evidence and a way to tie my
2 client to it. You may remember that there was a video.

3 THE COURT: I couldn't tell who was on the video.

4 MS. PRATT: Not at all. And it wasn't something
5 that could be copied, we couldn't exchange it. I think
6 that there were --

7 THE COURT: As I recall --

8 MS. PRATT: -- some pictures put in.

9 THE COURT: -- what we actually heard was the
10 victim's sister said that the victim appeared at her
11 home, timeframe shortly after the shooting at Wal-Mart.
12 And he still had wet blood on his shirt and all and
13 said that the Defendant, Boz, whatever, shot him.

14 And that was admitted under an excited utterance
15 theory; right?

16 MS. PRATT: Yes, Your Honor. You started with
17 excited utterance, and there was argument about excited
18 utterance and the cases, Staton and some other cases
19 that the solicitor cited. But then under questioning
20 from you, you asked her questions about whether or not
21 this was going to be coming in as a prior bad act under
22 Lyles and 404(b).

23 THE COURT: Lyles.

24 MS. PRATT: And she said that, yes, she would also
25 be arguing that it belonged under 404(b) based on

1 motive, intent, identity and a common scheme or plan.

2 THE COURT: You know, it was really a hybrid
3 issue. First was, was there enough evidence to tie it
4 to this Defendant, and that issue involved the
5 admission of an excited utterance for that proof. And
6 then beyond that there was the issue of was it
7 admissible -- even if it came in under excited
8 utterance, was it admissible as evidence of a prior bad
9 act, common scheme, design, motive, that sort of stuff,
10 which was a Lyle issue. So it was a two-tiered thing.

11 MS. PRATT: Yes, Your Honor.

12 THE COURT: I had ruled that it came in as an
13 excited utterance. Now, was that addressed in the
14 Court of Appeals, was that appealed, was that ruling
15 appealed? Was it addressed at all in the Court of
16 Appeals opinion?

17 MS. PRATT: The Court of Appeals opinion did not
18 discuss the excited utterance issue at all.

19 THE COURT: Okay.

20 MS. PRATT: The only issue that they discussed was
21 the prior bad acts.

22 THE COURT: So we get to the second tier. So is
23 the excited utterance ruling at issue at all?

24 MR. TERRELL: No, sir. No, sir. The way I
25 understand the opinion taken in conjunction with the

1 transcript is the statement has to come in first, we
2 have to figure out a way to get the statement in. That
3 came in as a hearsay exception as an excited utterance.
4 The Court of Appeals apparently was fine with that
5 because they did not address that issue. The next is
6 was --

7 THE COURT: Well, that's where I want to be.

8 MS. PRATT: Well, I would object to that
9 characterization. We don't know that they are fine
10 with it, because they may have addressed the 404(b) and
11 reached their remand conclusion without deciding about
12 the excited utterance.

13 THE COURT: But we never even got -- would have
14 never even gotten to a 403(b) analysis if they had
15 first said, no, it's not admissible, under excited
16 utterance is an exception to hearsay. I'm not clear as
17 to whether or not that ruling is at issue or not.

18 MS. PRATT: Well, what the Court says in its
19 opinion, it -- and I'm looking at page, I think, it's
20 page six, here the trial Court ruled Hammonds could
21 testify as to the victim's statement about the Wal-Mart
22 shooting pursuant to the excited utterance exception to
23 hearsay.

24 Immediately thereafter, the solicitor proffered
25 the video of the Wal-Mart shooting. The trial Court

1 indicated it understood the solicitor was offering the
2 evidence of the prior shooting under 404 or evidence of
3 a prior bad act. And then they went forward from
4 there.

5 So they did not specifically say that you couldn't
6 have admitted it under excited utterance, but they
7 moved straight to the 404.

8 THE COURT: Well, my point is, am I asked to
9 revisit or address that at this hearing? I think not.
10 I don't think that's what the remand was for.

11 MR. TERRELL: No, sir, Your Honor.

12 THE COURT: I think the remand was for a 403
13 analysis.

14 MS. PRATT: It is, Your Honor. And that's what
15 they've asked you to do is a 403 balancing test to
16 determine if the probative value of the prior shooting
17 testimony is substantially outweighed by the danger of
18 unfair prejudice to Spears.

19 My point would be that you would do that
20 prejudicial versus probative balancing test on the
21 evidence coming in as excited utterance or the evidence
22 coming in under 404(b). I think that you still, no
23 matter what, you have to look at the evidence in --

24 THE COURT: But isn't there two tiers here? You
25 know, we've got to get past excited utterance before we

1 get to -- I mean, it's two different things.

2 MS. PRATT: I agree.

3 THE COURT: She's saying he came in and said that
4 he was shot by the Defendant who was known as Bob, I
5 think, or --

6 MS. PRATT: Boz, Boss.

7 THE COURT: -- Boggs or some street name, okay,
8 that she took to be the Defendant and that's how she
9 knew the Defendant. So we've got that issue here,
10 okay. Here is this piece of evidence, this shooting.
11 Here is this lady who's testifying that that piece of
12 evidence, not that it should come in but it is the
13 evidence itself. Because you see some people getting
14 shot, but you don't have any idea who it is except for
15 the declaration of the victim on that night, which was
16 admitted, okay.

17 Okay. Once it's admitted, we've got evidence of a
18 shooting between the victim and the Defendant at the
19 Wal-Mart. Does the shooting, not the statement, does
20 the shooting come in? That's what's the 403 issue,
21 does this shooting, does the fact that there was a
22 shooting between these parties, does it come in
23 under -- does it meet the 403 test, is it
24 substantially -- does the probative value substantially
25 outweigh the prejudicial value of the act?

1 You know, it's two different things --

2 MS. PRATT: I agree.

3 THE COURT: -- as I see it. It's two different
4 things. Number one, this statement up here which is
5 evidence of this act that happens down here. On one
6 hand, you could talk about the statement, should Judge
7 Hyman have admitted the statement to identify the
8 people that were in this video, okay.

9 And then you've got the issue of even if she has
10 identified them, should the video come in. And I think
11 it's two separate issues, but I don't know that the
12 Court has left it as two separate issues.

13 On the one hand what if the video had been crystal
14 clear and you could be identified, we wouldn't even
15 have needed that statement, we wouldn't have to worry
16 about that first tier. It would have come right in on
17 its face. But now we've got that, the statement.

18 MR. TERRELL: Right.

19 THE COURT: Now, was the statement, was the
20 statement -- my finding that the statement should come
21 in as an excited utterance, was that challenged?

22 MR. TERRELL: That's not on issue here today, no,
23 sir.

24 MS. PRATT: Well, I don't know that you can say
25 that, Mr. Terrell. I understand --

1 THE COURT: Okay. Well, tell me how that comes
2 in.

3 MS. PRATT: Here's the point that I would say
4 about that. And I agree with you that they are two
5 different issues. Because I remember very clearly that
6 you started with excited utterance, and then we
7 progressed to the whole piece, which is the statement
8 plus the shooting information. Because that's the only
9 testimony about the shooting, there's no other person
10 that testifies about the shooting throughout the entire
11 trial except for Danielle Hammonds, the sister of the
12 victim.

13 And it's -- only testimony that she's able to do
14 is the statement that her brother said to her, Boss
15 shot me at the Wal-Mart. And she didn't remember -- if
16 you remember, she didn't know exactly the time,
17 although we knew it was after midnight, and she didn't
18 remember the date.

19 The way that the Court of Appeals states their
20 conclusion, they say, based on the trial Court's
21 failure to conduct a Rule 403 balancing test to
22 determine if the probative value of the prior shooting
23 testimony is substantially outweighed by the unfair
24 prejudice.

25 That leads me to believe that they're talking

1 about the testimony which is Ms. Hammonds because
2 that's the only way it came in.

3 THE COURT: Right. What we have here is two prior
4 findings before we ever get to 403.

5 MS. PRATT: I agree.

6 THE COURT: First, I had to find that her
7 testimony was admissible as excited utterance. Then I
8 had to find that the fact that there was an altercation
9 between them normally would not be admissible but for
10 my finding that it went to show motive or intent, okay.

11 MS. PRATT: I agree.

12 THE COURT: So I've got a ruling on admissibility,
13 I've got a ruling as to the statement. I've got a
14 ruling under that as to whether or not it should come
15 in under a Lyle type exception of a bad act. And I've
16 made a finding that it went to show motive and intent.
17 So we got that.

18 And the Court says, you didn't put on the record a
19 final third tier where you have to decide, well, I'm
20 going to admit it, it's all okay, it comes in normally,
21 but does the probative value substantially outweigh the
22 prejudicial value.

23 So is that third tier what we're arguing about, or
24 are we arguing about whether or not it was proof of
25 motive, intent? Are we arguing about whether or not I

1 should have made a ruling that this was an excited
2 utterance?

3 MR. TERRELL: If I could address --

4 MS. PRATT: Your Honor, I --

5 MR. TERRELL: If I could address that briefly,
6 first, I'd like to draw your attention to the
7 conclusion of the Court of Appeals opinion. And it
8 speaks solely to the balancing test to determine if the
9 probative value of the prior shooting is substantially
10 outweighed by the danger of unfair prejudice.

11 MS. PRATT: Prior shooting testimony, Mr. Terrell,
12 you left out a word.

13 MR. TERRELL: Prior shooting testimony.

14 MS. PRATT: Thank you.

15 MR. TERRELL: Is substantially outweighed by the
16 danger of unfair prejudice to Spears, we remand with
17 instructions for the trial Court to conduct an
18 on-the-record balancing test. That seems very clear to
19 me that the only thing we're here for today to
20 determine is the on-the-record balancing test.

21 THE COURT: The balancing test is a 403 test.

22 MS. PRATT: I agree.

23 MR. TERRELL: Correct. And if I may, Your Honor,
24 I believe, has just misspoken a couple times. The
25 standard is whether the probative value is

1 substantially outweighed by the prejudicial value.

2 THE COURT: I'm sorry, I didn't --

3 MR. TERRELL: And it winds up making a difference.

4 THE COURT: I always do that, but --

5 MR. TERRELL: Yes, sir, yes, sir. I know what you
6 mean.

7 THE COURT: I know what I'm talking about.

8 MR. TERRELL: But for it not -- for Your Honor to
9 rule that it doesn't come in, that testimony, you would
10 have to find that the prejudicial value substantially
11 outweighs the probative value.

12 If I could continue from there, the State's
13 contention in this instance is that this testimony of
14 the prior shooting is incredibly probative which would
15 require the prejudicial value to be that much higher.

16 THE COURT: Okay. Let's go to the basics.

17 MR. TERRELL: Yes, sir.

18 THE COURT: Tell me how it's probative.

19 MR. TERRELL: Your Honor, the testimony of the
20 prior bad act is probative in a number of ways.

21 THE COURT: I thought it was probative to show
22 motive and intent.

23 MR. TERRELL: It's probative to show motive, it's
24 probative to show intent, it's probative to show
25 absence of mistake. It's probative to show common plan

1 or scheme and the continuing plan or scheme. Since
2 it's taken in a broad picture, it's all part of the
3 retaliation having, I'm not sure, also identity of the
4 Defendant and of the parties in this.

5 It speaks directly to all of those factors, which
6 are listed for reasons for a prior bad act to come in.
7 It's not cumulative, it's highly probative of many of
8 the key issues in this case. And because of that --
9 especially in light that the jury never saw the actual
10 video of the Wal-Mart shooting.

11 THE COURT: As I recall, weren't there bystanders
12 also struck in this shootout? It occurred down on the
13 boulevard?

14 MS. PRATT: Yes, Your Honor. Three.

15 MR. TERRELL: Yes, Your Honor. Those are the
16 other three issues of assault with intent to kill.

17 THE COURT: Would intent, identity, that sort of
18 thing, absence of mistake -- the only person actually
19 killed was the victim; right?

20 MR. TERRELL: That's correct.

21 THE COURT: And this was murder, and we're talking
22 about the intentional taking of his life with malice.
23 Isn't it important that we know that this just wasn't a
24 random shootout, isn't it important that the State
25 prove that he went there with a purpose to shoot this

1 victim?

2 MR. TERRELL: Absolutely.

3 MS. PRATT: Well, and Your Honor, I understand, if
4 I may?

5 THE COURT: Yes, ma'am.

6 MS. PRATT: That that is the question that you
7 raised when we were doing the argument back at trial,
8 that you felt that this went to motive and intent to
9 show that this was a vendetta, I think was the word you
10 actually used in the transcript.

11 But in this particular case, this evidence of the
12 shooting is unnecessary to show that there was a
13 vendetta. There was ample testimony from other people
14 that testified, the codefendant, Mr. Bethea Byrd, other
15 people that were State's witnesses, that there had been
16 a vendetta because Eric had been killed -- Floyd, Eric
17 Floyd, had been killed in Lumberton.

18 Mr. Hammonds had gone to prison for four years as
19 an accessory. And then this happened about the
20 shooting at Wal-Mart was about a month after he got
21 out, and then this shooting happened about a month
22 later. This was not necessary. And I think the point
23 about the probative value of this --

24 THE COURT: But doesn't the shooting actually add
25 much to that. I remember that the victim had gone to

1 prison because of some involvement in someone else
2 getting killed. That happens everyday. The fact that
3 this Defendant -- or evidence that this Defendant
4 actually one month earlier sought him out and shot him,
5 doesn't that take it to the level of where this
6 Defendant intended to murder him, he had previously
7 attempted it.

8 MS. PRATT: Well, I'm sure that would be the
9 State's argument. Our position is that while that is
10 certainly probative, is it necessary, and does that
11 value, is that outweighed by the prejudicial effect.

12 THE COURT: Okay.

13 MS. PRATT: Because your prejudicial problem that
14 you have here is that it's exactly the same type of
15 incident, shooting at the guy, then shooting at the guy
16 a month later. So is there not, because of the
17 identity of the style of the action, unfair prejudice,
18 as the Court actually says, because it's the same type
19 of incident.

20 And my argument in the brief and one of the things
21 that I say when I use the word cumulative that the
22 State mentioned, is they didn't need it. They could
23 have done it with Mr. Bethea's testimony which was very
24 clear on that, the gang affiliation, the rap lyrics.
25 You remember the rap situation there?

1 THE COURT: Um-hum.

2 MS. PRATT: You know, all of that was all they had
3 to have for this. To bring this piece of evidence in
4 to add to it simply opens the door for the prejudicial
5 effect problem.

6 THE COURT: Okay, all right. Let's talk about
7 that. How, then, if all that was already there, how
8 then does this -- is the admission of this prejudicial?

9 MS. PRATT: It's prejudicial because of the same
10 facts that --

11 THE COURT: Or unfair prejudice.

12 MS. PRATT: Unfairly prejudice. Because
13 everything is prejudicial. As Judge Floyd told me one
14 time, if it weren't prejudicial, we wouldn't be trying
15 to get it in.

16 THE COURT: They wouldn't even offer it.

17 MS. PRATT: That's right, they wouldn't want it.
18 It's unfairly prejudicial because it is exactly the
19 same pattern of incident. Goes to a location, shoots
20 at him, goes to a location, shoots at him, between the
21 two different incidents. And it would be possible for
22 the jury to say, well, if he shot at him once, then he
23 probably shot at him this time too.

24 And if you remember --

25 THE COURT: That makes it very probative; doesn't

1 it?

2 MS. PRATT: It can make it probative, but it also
3 has the prejudicial component.

4 THE COURT: And how so, how so is it unfairly
5 prejudicial?

6 MS. PRATT: Well, I can quote State v. Alexander,
7 303 South Carolina 377 at 382, 401 S.E.2d 146, a 1991
8 South Carolina case which is attached to my brief.
9 Evidence is unfairly prejudicial if it has an undue
10 tendency to suggest a decision on an improper basis.

11 THE COURT: Improper basis, right.

12 MS. PRATT: Okay. So just because he shot him
13 before doesn't mean that he shot at him this time. And
14 if you remember one of the questions in the case was
15 did Byrd who actually matched the composite, that's
16 Jeffrey Bethea, was he the shooter, or was Mr. Spears,
17 known as Boss, the shooter.

18 And so you've got an improper basis there if they
19 are going to simply believe that the -- because he is
20 accused of doing it once through a hearsay exception,
21 then he did it this time too. This evidence is more
22 than just than undue tendency to suggest a decision on
23 an improper basis.

24 The State went ahead and made this argument in
25 closing. If you look at Donna's closing argument on

1 page 631, Boss went to Wal-Mart in Lumberton, tries to
2 take Aaron Hammonds out there, he does hit him, shoots
3 him but he doesn't kill him. And he gets his
4 opportunity a month later on the boulevard. So she
5 makes it as if it's all one piece, which is the idea of
6 the common scheme and plan or, you know, and also the
7 motive and intent.

8 My problem if I can go back to something right
9 quick, Your Honor, and...

10 THE COURT: How else would you prove it if the
11 State's theory is that it was a common scheme, he was
12 going to get him, and he stalked him for it and he was
13 going to kill him, how else would they prove that?

14 MS. PRATT: The testimony was given by Jeffrey
15 Bethea that -- to all of that. This particular
16 incident didn't have to be in this case at all in order
17 for the State to make their case. And their case
18 wasn't weak when you consider Jeffrey Bethea's
19 testimony.

20 The problem for Jeffrey Bethea was the reason he
21 was testifying, under our theory, is the defense was he
22 matched the composite. Oh, dear, I better turn myself
23 in and pin it on somebody else. And the State had
24 already agreed to give him 20 years on voluntary
25 manslaughter before he even testified. So I guess in

1 their minds, maybe they had to do something to overcome
2 what he testified to.

3 But what he testified to was extremely clear as to
4 the fact that Boss had ordered this to be done because
5 of the incident with Mr. Floyd.

6 THE COURT: But you challenged that, you
7 challenged that.

8 MS. PRATT: Of course I did.

9 THE COURT: Okay.

10 MS. PRATT: But that doesn't mean that they have
11 to put in something else because I challenged this.
12 And they opened the door to this prejudicial issue.

13 I do want to raise one thing that I think's
14 important, and I know you may not want to hear it, but
15 I wanted to have it on the record. In order to have a
16 404(b) Lyles piece of evidence come in, it has to be
17 clear and convincing. You ruled that it was clear and
18 convincing in your argument, at least in your
19 statements in the transcript -- where did you do it.
20 Page 269, lines 17 and 18.

21 But did you that based on something that you said
22 to Donna Elder, I'm going to hold you to this,
23 solicitor, when she said Mr. Irons said certain things,
24 and then also that Tim Smith who was the jailhouse
25 snitch would testify that Boss or Brian had told him he

1 was involved in the Wal-Mart shooting.

2 Your exact words as I remember them and that are
3 in the transcript is something along the lines of,
4 well, if you've got a witness, then clearly it's going
5 to come in. But Mr. Smith never testified to that, and
6 LaMark Irons never testified. So the only evidence
7 that you had of this incident were the excited
8 utterance statement and a video that nobody could read.

9 My argument has to be that that's not clear and
10 convincing evidence, and so you should never even get
11 to Lyles. But if you do, then I think, you know, the
12 403 balancing test that the Court of Appeals wants, you
13 know, also has to be addressed.

14 THE COURT: Okay.

15 MS. PRATT: I just want that clear.

16 THE COURT: All right, okay.

17 MR. TERRELL: I don't think that's properly before
18 the Court at this point. I think it's just for the
19 balancing test is the purpose we're here today on.

20 THE COURT: Okay. All right, I'm going to take it
21 under advisement.

22 MR. TERRELL: If I could also add briefly, Your
23 Honor?

24 THE COURT: Oh, yes.

25 MR. TERRELL: There was a limiting instruction, of

1 course, that you gave to the jury which would limit the
2 prejudicial value. Also, the jury never saw the video
3 which would limit the danger of unfair prejudice.

4 Having the victim's sister come in and say, Boss
5 shot me, would undoubtedly be less prejudicial than
6 having the jury see the actual prior bad act take
7 place. I think both of those in combination with the
8 extremely high probative, extremely probative value of
9 the statement, I think should lead the Court to a
10 conclusion that it was not -- the probative value was
11 not substantially outweighed by the danger of unfair
12 prejudice which is the standard, as Your Honor is
13 aware.

14 THE COURT: Okay. All right, I'm going to take it
15 under advisement. I'll advise you of my ruling. I
16 don't know if I'll get it before the first of the year,
17 but I will try to, okay.

18 MS. PRATT: Thank you very much for hearing from
19 us, Your Honor.

20 (The hearing concluded at approximately 3:28 p.m.)

21 (End of Transcript of Record.)
22
23
24
25

1 CERTIFICATE OF REPORTER

2

3 STATE OF SOUTH CAROLINA)
4 COUNTY OF HORRY)

5

6 I, TERESA J.F. BAUTZ, Official Court
7 Reporter for the Fifteenth Judicial Circuit of the
8 State of South Carolina, do hereby certify that the
9 foregoing is a true, accurate and complete Transcript
10 of Record of the proceedings had and evidence
11 introduced in the trial of the captioned case, relative
12 to appeal, in the Court of General Sessions for Horry
13 County, South Carolina, on the 13th day of June, 2017.

14

15 I FURTHER CERTIFY that I am neither of
16 kin, counsel nor interest to any party hereto.

17

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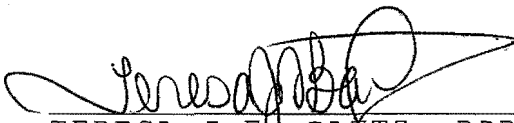
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TERESA J.F. BAUTZ, RPR
Official Court Reporter

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 Horry County
 STATE OF SOUTH CAROLINA
 COURT OF HORRY
 2017 FEB -7 PM 1:20
 COURT OF GENERAL SESSIONS
 Warrant: J735111, J735112, J735113, J735114
 Indictment: 2007GS2603387, 2007GS2603388,
 2007GS2603389, 2007GS2603390
 STATE OF SOUTH CAROLINA
 Horry County, SC
 VS.
 BRIAN SPEARS,
 DEFENDANT
 ORDER ON REMAND FOR
 RULE 403 HEARING

This matter came before the court on December 8, 2016. It was remanded by the South Carolina Court of Appeals for an on-the-record 403 Balancing Test regarding testimony of a prior bad act. For the following reasons, the Court finds the probative value of the testimony is not substantially outweighed by the danger of unfair prejudice.

FACTS

On May 27, 2007, Brian Spears (Defendant) allegedly shot and killed Aaron Hammonds (Victim) on Ocean Boulevard in Myrtle Beach. Police arrived at the scene and, after speaking to witnesses, were able to create a composite sketch of Co-defendant Jeffery Bethea. Upon seeing the sketch on a news broadcast, Bethea turned himself into the police and began to cooperate. Bethea told police Defendant and Nathaniel Douglas were responsible for Victim's death. Both were subsequently arrested.

Evidence presented during pretrial motions and at trial established that Victim was a member of East Side Bloods, a gang in North Carolina. Defendant, codenamed Bos, was a member of another gang variously called 41-Curve, G.D. Folk Nation, and The Growth Development Gangster Site (hereinafter 41-Curve). Prior to his murder, Victim had recently been released from prison after serving a four year sentence. Victim pled guilty to accessory after the fact in connection with the murder of Eric Floyd. Before his murder Eric Floyd had been a high-ranking member of 41-Curve, Defendant's gang. The State argued Victim's death was a gang-related revenge killing for the death of Eric Floyd.

During pretrial motions, the State introduced evidence that on April 17, 2007, approximately one month after Victim was released from prison, Defendant shot Victim in a Walmart parking lot in Lumberton, North Carolina (Walmart shooting). Defendant argued the

prior shooting is not admissible under the South Carolina Rules of Evidence, Rules 403, 404(b), and 801. The Court took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

At trial, the State called Victim's sister, Danyell Hammonds (Hammonds) to the stand. She testified that one month before Victim's murder, Victim told her "Bos" shot him outside of a Walmart. Hammonds stated she knew Bos to be Defendant. According to Hammonds, Victim and Lemark Irons, a friend of Victim who was also with him when Victim was murdered, came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained she believed the shooting had just occurred because the blood in the Victim's hand was still wet. She testified in an in camera hearing that before Victim was released from prison, a group of 41-Curve members told her that they were "going to get" Victim. This particular testimony was not presented to the jury.

Video of the Walmart shooting was shown to the court, however, the video was not published to the jury. The time stamp on the video showed the shooting took place at approximately 12:10 am. Hammonds testified Victim and Irons came running into the house shortly after midnight. While Irons was not with Victim at the time of the shooting, Irons was with Victim when they arrived at Hammonds' house. Hammonds stated, "He just, he just come in, they run to my room cause I'm pretty sure if anybody get shot they're going, you know, panic or whatever, they came to the room and everything and I was like 'what's wrong' and they was like 'I got shot at at Walmart.'" A few questions later she stated, "He told me, all he told me he came in the house, he was like I got shot at at Walmart, I had a little problem, he said I got shot at at Walmart. I was like what happened at Walmart, he was like I got shot at, man, and he was like, I was like well Aaron, who did it. He was like come on, man, you know who did it. I was like who and he was like Bos, man, Bos." Defendant objected to this testimony first as hearsay under Rule 801, then as a prior bad act under Rule 404. S.C. R. Evid. 404 and 801.

In order for hearsay to be admissible it must fit into an exception. The State argued that the testimony fit the excited utterance exception. 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. S.C. R. Evid. 803(2). To fit under the exception for an excited utterance, the statement must be contemporaneous while the declarant was still under the stress and

excitement of the event. The times in which the event took place and the statement was made do not have to be contemporaneous, like a present sense impression exception. S.C. Evid. 803(1). Therefore, to be an excited utterance the statement can be made while the event is still affecting the speaker and the speaker is still under the stress of the event, without having had sufficient time to calm down. (See *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, (SC App. 1997). "The mere fact that a statement was made some time after the incident occurred, as opposed to immediately thereafter, does not mean the statement cannot qualify as an excited utterance, provided the circumstances surrounding the statement indicate its reliability.")

Here, the Court determined Victim was still acting under stress when he made the statement. He ran into the house with fresh blood on his shirt and still bleeding from the gunshot wound. The shooting took place at approximately 12:10 am and Hammonds testified Victim ran into the house near midnight, putting the statement close to the time of the shooting. Considering the totality of the circumstances, the Court found these statements fall under the excited utterance exception to hearsay and are admissible.

Although the Court ruled the statement was admissible under a hearsay exception, the statement described a prior bad act. Therefore, to be admissible a second tier of analysis had to be done under Rule 404. The Court had to determine whether the Walmart shooting, a prior bad act described in the statement, was admissible under a 404(b) and under a 403 balancing tests.

South Carolina Rules of Evidence Rule 404(b) states: evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. S.C. R. Evid. 404. This rule is designed to prevent "propensity" arguments and bias amongst the jury. Evidence of a prior bad act under Rule 404(b) is relevant only to establish the motive, identity of the perpetrator, common plan or scheme, absence of mistake or accident, and intent. *Id.* A prior bad act that has not resulted in a conviction must be established by clear and convincing evidence. *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690. In other words, to be admissible under a *Lyles* exception, a bad act must logically relate to the crime with which the defendant has been charged; if the defendant was not convicted of the prior crime, the prior bad act must be proven by clear and convincing evidence.

As previously noted, the State's theory of the case was that the murder of Victim was not a random gang shooting, but that there was a vendetta against Victim for his involvement in the

murder of Eric Floyd. The State argued it was an intentional taking of Victim's life with malice. Victim was released from prison for only one month before Floyd's fellow gang members shot Victim in the Walmart parking lot. Victim was shot in the arm and drove home where he told Hammonds that Defendant had shot him. A month later, Victim was murdered by members of Floyd's gang in Myrtle Beach. The Court found that these two acts were related. The Walmart shooting and the Boulevard shooting demonstrated there was a common scheme or plan. The prior bad act is admissible to show the intent of Defendant to kill Victim, as well as Defendant's motive, revenge. Hammonds' testimony corroborated this theory as she testified about her personal knowledge that members of 41-Curve wanted to kill Victim for his involvement with Floyd's death.

The Court found Victim's murder was not a random act. Regardless of whether the killing was planned for the night it occurred, there was a hit placed on Victim, and there was a common scheme or plan for his murder. The Court found the prior bad act indicates the absence of mistake—Defendant was targeting Victim in a gang-related revenge killing.

Additionally, the Court found the evidence of the prior bad act was clear and convincing. While there was no police report connecting Defendant to the Walmart shooting, nor was Defendant identified in the video of the shooting, both Hammonds and Tim Smith testified Defendant was involved in the shooting. Victim's statement naming Defendant as his shooter is clear and convincing evidence that Defendant was involved in the Walmart shooting.

Once deemed admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent, such evidence of prior bad acts may be excluded by the Court pursuant to Rule 403 if the danger of unfair prejudice to the defendant substantially outweighs the probative value of the relevant evidence. The Court ruled the statement was admissible in full and allowed the prior bad act to come in without doing a Rule 403 balancing test on the record.

Defendant was found guilty of Murder and three counts of Assault and Battery with Intent to Kill. The Court sentenced Defendant to thirty years' imprisonment for murder and twenty years' imprisonment for each count of Assault and Battery with Intent to Kill count to be served concurrently. An appeal followed.

The South Carolina Court of Appeals stated, "other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice." State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013). The Court of Appeals declined to conduct a de novo Rule 403 balancing test. Thus, the issue was remanded back to the trial court for an on-the-record balancing test pursuant to Rule 403, SCRE, to determine if the probative value of the prior shooting was substantially outweighed by the danger of unfair prejudice to Defendant. A writ of certiorari was denied by Order of the Supreme Court on September 11, 2014. Remittitur was issued September 23, 2014.

At issue on remand is Hammonds' testimony that Victim told her Defendant shot him at Walmart. The sole issue concerning this prior bad act testimony is whether the probative value is substantially outweighed by the unfair prejudice (SCRE 403). The South Carolina Court of Appeals remanded the matter in order for the trial court to do an on-the-record 403 balancing test. Consistent with the Supreme Court's ruling that an appellate court should not conduct its own balancing process, the Court of Appeals declined to conduct a de novo Rule 403 balancing test. State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013) (quoting State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000)) ("It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision."). Therefore, the Court of Appeals remanded the matter for the trial court to conduct a 403 hearing.

Analysis

Rule 403 of the South Carolina Rules of Evidence states: "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." S.C. R. Evid. 403. All relevant evidence will be prejudicial to some effect; however, the test is whether the probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice means an undue tendency to suggest a decision on an improper basis. State v. Stokes, 381 S.C. 390, 673 S.E.2d 434 (2009).

A prior bad act has the potential to cause unfair prejudice to the defendant and bias the jury. The danger is substantially enhanced when the prior bad act is strikingly similar to the one which the defendant is being tried. It is clear the evidence of the Walmart shooting is prejudicial to Defendant. However, the rule does not state that any testimony which brings a danger of prejudice should be excluded, the rule states that the danger of unfair prejudice must substantially outweigh the probative value for the evidence to be excluded.

Defendant was not convicted of the Walmart shooting. The only evidence presented to the jury about the Walmart shooting was from Hammonds, stating that Victim told her Defendant had shot him. The jurors were not shown the video of the Walmart shooting. The jury is able to judge the credibility of each witness, they are free to believe all, some, or none of the testimony of any witness presented. Defendant argues the State is making a propensity argument, suggesting the evidence is being used simply to show he shot him once so it must have been Defendant who shot him again. It is well-settled law that a propensity argument is inadmissible. However, in State v. Dennis the South Carolina Court of Appeals held, "One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with the explanatory of the crime charge against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context, and where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." 402 S.C. 627, 742 S.E.2d 21 (S.C. Ct. App., 2013). The State's theory behind the murder was that the shooting was a gang related revenge-killing. Victim's murder was not a random act of gang violence, instead, the murder was a planned hit on Victim's life. The State did not use the evidence of the Walmart shooting to identify Defendant in the Myrtle Beach shooting. The State was not making the argument that the perpetrator was necessarily Defendant because he shot at Victim in a prior instance. The Walmart shooting was admitted because it was a part of a common scheme or plan to kill Victim, and it went to the motive and intent of Defendant.

Additionally, the danger of unfair prejudice is substantially decreased by other evidence presented at trial. There were multiple eye witnesses and testimony to identify defendant as the shooter in the Myrtle Beach shooting. Tim Smith, a cell mate of Defendant in jail, testified

Defendant admitted to killing Victim. Smith testified Defendant told him of the plan to kill Victim—Defendant was upset because Victim had killed his friend and that when he learned Victim was in Myrtle Beach for Bike week, Defendant and several friends loaded up to "take care of [Victim]." Smith testified, "[Defendant] said that, that they had got up with the guy and this fellow who used to be his partner named Bird said that he was supposed to take care of the guy and he couldn't do it. So he said he run back to the car and said he was parked at the K-Mart parking lot. Said he run back to his car and got his gun come back; and, you know, he said they was going down Ocean Boulevard and said that he was running through the crowd and passed his buddies and caught up with the guy that they had been arguing with, the guy that killed his friend; and he said he did what they called wetting him up, he said he wet him up and evidently, you know, he shot three other people at the time you know."

Co-defendant Jeffrey Bethea testified he was there the night of the shooting. He claimed he and Defendant "hyped" each other up to take out a member of the rival gang. After seeing Victim and speaking to Lemark Irons they decided to attack the East Side Bloods and kill Victim. Bethea testified, "I pulled out a knife. I was, I was looking for Lemark [Irons] and as we walked up, when we was coming up [Defendant] pulled out his gun." Bethea testified Defendant pulled out his small caliber pistol from his right side waistband, which is consistent with other testimony, and shot Victim.

Brittney Maynor, Victim's girlfriend, was at the Boulevard with Victim when he was murdered. She testified that a man dressed in a red shirt and a red hat shot her boyfriend. Bethea said Defendant was wearing a red shirt. Nathaniel Douglas testified Defendant was dressed in three shirts, with a red shirt worn on the outside and a black and red New York Yankees hat. There was over-whelming evidence presented at trial that Defendant was the shooter. The prejudicial effect of the Walmart shooting is thus diminished in light of this evidence. The danger of unfair prejudice and the undue tendency to suggest decision on an improper basis is nullified by the fact that the jury could have found Defendant guilty from the testimony of multiple witnesses stating either the Defendant was the shooter or Defendant admitted to the shooting, even without the introduction of the Walmart shooting.

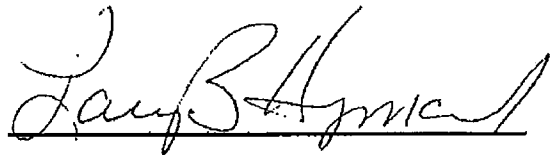
At the hearing, Defendant brought up for the first time his objection under Rule 403 that the testimony, besides being unfairly prejudicial, was cumulative. Defendant admits there is

evidence against him, however, he argues that the introduction of the Walmart shooting is a needless presentation of cumulative evidence. But, in order to exclude the introduction of evidence because it is cumulative, the evidence must be needless. S.C. R. Evid. 403. Again, the testimony of the prior shooting goes to the theory that it was a gang-related revenge killing. It shows that there was an intent and plan to kill Victim. The prior shooting shows the full picture of the theory of the case. Although Defendant could have been convicted without the evidence, the rules of evidence do not prevent a party from presenting other pieces of evidence to bolster its case.

The Court finds the evidence of the Walmart shooting is overwhelmingly probative. It was a necessary part of the evidence to tell the whole story of the events that took place and led up to the killing of Victim. The probative value goes to the motive, intent, common scheme and plan, and the absence of a mistake or accident. The fact that this was a revenge-killing rather than a random act of gang violence is the difference between Murder and Voluntary Manslaughter. The evidence of the prior shooting reveals Defendant's intent was not to scare or inflict injury, but to kill Victim. Moreover, it clarifies that the Boulevard shooting was neither an accident nor mistake. The shooting was a deliberate, planned, and calculated murder of Victim.

I find and conclude the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. Nor, in light of the evidence presented, is there the undue tendency to suggest a decision on an improper basis brought on by a propensity argument. For the foregoing reasons, the Court finds the evidence of the Walmart shooting to be highly probative and the danger of unfair prejudice to be minimal in light of the circumstances.

IT IS SO ORDERED!



The Honorable Larry B. Hyman
Presiding Judge
Fifteenth Judicial Circuit

February 7, 2017

Conway, South Carolina

STATE OF SOUTH CAROLINA
COURT OF HORRY

STATE OF SOUTH CAROLINA

VS.

BRIAN SPEARS,
DEFENDANT

) COURT OF GENERAL SESSIONS
) Warrant: J735111, J735112, J735113, J735114
) Indictment: 2007GS2603387, 2007GS2603388,
) 2007GS2603389, 2007GS2603390
)

) AMENDED ORDER ON REMAND FOR
) RULE 403 HEARING
) (Correcting error on page 4)
)

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FILED

This matter came before the court on December 8, 2016. It was remanded by the South Carolina Court of Appeals for an on-the-record 403 Balancing Test regarding testimony of a prior bad act. For the following reasons, the Court finds the probative value of the testimony is not substantially outweighed by the danger of unfair prejudice.

FACTS

On May 27, 2007, Brian Spears (Defendant) allegedly shot and killed Aaron Hammonds (Victim) on Ocean Boulevard in Myrtle Beach. Police arrived at the scene and, after speaking to witnesses, were able to create a composite sketch of Co-defendant Jeffery Bethea. Upon seeing the sketch on a news broadcast, Bethea turned himself into the police and began to cooperate. Bethea told police Defendant and Nathaniel Douglas were responsible for Victim's death. Both were subsequently arrested.

Evidence presented during pretrial motions and at trial established that Victim was a member of East Side Bloods, a gang in North Carolina. Defendant, codenamed Bos, was a member of another gang variously called 41-Curve, G.D. Folk Nation, and The Growth Development Gangster Site (hereinafter 41-Curve). Prior to his murder, Victim had recently been released from prison after serving a four year sentence. Victim pled guilty to accessory after the fact in connection with the murder of Eric Floyd. Before his murder Eric Floyd had been a high-ranking member of 41-Curve, Defendant's gang. The State argued Victim's death was a gang-related revenge killing for the death of Eric Floyd.

During pretrial motions, the State introduced evidence that on April 17, 2007, approximately one month after Victim was released from prison, Defendant shot Victim in a Walmart parking lot in Lumberton, North Carolina (Walmart shooting). Defendant argued the

prior shooting is not admissible under the South Carolina Rules of Evidence, Rules 403, 404(b), and 801. The Court took the matter under advisement and withheld its ruling pending the presentation of evidence at trial.

At trial, the State called Victim's sister, Danyell Hammonds (Hammonds) to the stand. She testified that one month before Victim's murder, Victim told her "Bos" shot him outside of a Walmart. Hammonds stated she knew Bos to be Defendant. According to Hammonds, Victim and Lemark Irons, a friend of Victim who was also with him when Victim was murdered, came to her house and ran to her room where she saw wet blood on Victim's shirt. Hammonds explained she believed the shooting had just occurred because the blood in the Victim's hand was still wet. She testified in an in camera hearing that before Victim was released from prison, a group of 41-Curve members told her that they were "going to get" Victim. This particular testimony was not presented to the jury.

Video of the Walmart shooting was shown to the court, however, the video was not published to the jury. The time stamp on the video showed the shooting took place at approximately 12:10 am. Hammonds testified Victim and Irons came running into the house shortly after midnight. While Irons was not with Victim at the time of the shooting, Irons was with Victim when they arrived at Hammonds' house. Hammonds stated, "He just, he just come in, they run to my room cause I'm pretty sure if anybody get shot they're going, you know, panic or whatever, they came to the room and everything and I was like 'what's wrong' and they was like 'I got shot at at Walmart.'" A few questions later she stated, "He told me, all he told me he came in the house, he was like I got shot at at Walmart, I had a little problem, he said I got shot at at Walmart. I was like what happened at Walmart, he was like I got shot at, man, and he was like, I was like well Aaron, who did it. He was like come on, man, you know who did it. I was like who and he was like Bos, man, Bos." Defendant objected to this testimony first as hearsay under Rule 801, then as a prior bad act under Rule 404. S.C. R. Evid. 404 and 801.

In order for hearsay to be admissible it must fit into an exception. The State argued that the testimony fit the excited utterance exception. 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. S.C. R. Evid. 803(2). To fit under the exception for an excited utterance, the statement must be contemporaneous while the declarant was still under the stress and

excitement of the event. The times in which the event took place and the statement was made do not have to be contemporaneous, like a present sense impression exception. S.C. Evid. 803(1). Therefore, to be an excited utterance the statement can be made while the event is still affecting the speaker and the speaker is still under the stress of the event, without having had sufficient time to calm down. (*See State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, (SC App. 1997). "The mere fact that a statement was made some time after the incident occurred, as opposed to immediately thereafter, does not mean the statement cannot qualify as an excited utterance, provided the circumstances surrounding the statement indicate its reliability.")

Here, the Court determined Victim was still acting under stress when he made the statement. He ran into the house with fresh blood on his shirt and still bleeding from the gunshot wound. The shooting took place at approximately 12:10 am and Hammonds testified Victim ran into the house near midnight, putting the statement close to the time of the shooting. Considering the totality of the circumstances, the Court found these statements fall under the excited utterance exception to hearsay and are admissible.

Although the Court ruled the statement was admissible under a hearsay exception, the statement described a prior bad act. Therefore, to be admissible a second tier of analysis had to be done under Rule 404. The Court had to determine whether the Walmart shooting, a prior bad act described in the statement, was admissible under a 404(b) and under a 403 balancing tests.

South Carolina Rules of Evidence Rule 404(b) states: evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. S.C. R. Evid. 404. This rule is designed to prevent "propensity" arguments and bias amongst the jury. Evidence of a prior bad act under Rule 404(b) is relevant only to establish the motive, identity of the perpetrator, common plan or scheme, absence of mistake or accident, and intent. *Id.* A prior bad act that has not resulted in a conviction must be established by clear and convincing evidence. *State v. Holder*, 382 S.C. 278, 676 S.E.2d 690. In other words, to be admissible under a Lyles exception, a bad act must logically relate to the crime with which the defendant has been charged; if the defendant was not convicted of the prior crime, the prior bad act must be proven by clear and convincing evidence.

As previously noted, the State's theory of the case was that the murder of Victim was not a random gang shooting, but that there was a vendetta against Victim for his involvement in the

murder of Eric Floyd. The State argued it was an intentional taking of Victim's life with malice. Victim was released from prison for only one month before Floyd's fellow gang members shot Victim in the Walmart parking lot. Victim was shot in the arm and drove home where he told Hammonds that Defendant had shot him. A month later, Victim was murdered by members of Floyd's gang in Myrtle Beach. The Court found that these two acts were related. The Walmart shooting and the Boulevard shooting demonstrated there was a common scheme or plan. The prior bad act is admissible to show the intent of Defendant to kill Victim, as well as Defendant's motive, revenge. Hammonds' testimony corroborated this theory as she testified about her personal knowledge that members of 41-Curve wanted to kill Victim for his involvement with Floyd's death.

The Court found Victim's murder was not a random act. Regardless of whether the killing was planned for the night it occurred, there was a hit placed on Victim, and there was a common scheme or plan for his murder. The Court found the prior bad act indicates the absence of mistake – Defendant was targeting Victim in a gang-related revenge killing.

Additionally, the Court found the evidence of the prior bad act was clear and convincing. While there was no police report connecting Defendant to the Walmart shooting, not was Defendant identified in the video of the shooting, Hammonds testified Defendant was involved in the shooting. Victim's statement naming Defendant as his shooter is clear and convincing evidence that Defendant was involved in the Walmart shooting.

Once deemed admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent, such evidence of prior bad acts may be excluded by the Court pursuant to Rule 403 if the danger of unfair prejudice to the defendant substantially outweighs the probative value of the relevant evidence. The Court ruled the statement was admissible in full and allowed the prior bad act to come in without doing a Rule 403 balancing test on the record.

Defendant was found guilty of Murder and three counts of Assault and Battery with Intent to Kill. The Court sentenced Defendant to thirty years' imprisonment for murder and twenty years' imprisonment for each count of Assault and Battery with Intent to Kill count to be served concurrently. An appeal followed.

The South Carolina Court of Appeals stated, "other than finding there was clear and convincing evidence of the prior shooting and Hammonds' testimony was admissible, the trial court made no specific findings on the record as to why the testimony had probative value, the nature of the unfair prejudice, or whether the probative value of the testimony was substantially outweighed by the danger of unfair prejudice." State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013). The Court of Appeals declined to conduct a de novo Rule 403 balancing test. Thus, the issue was remanded back to the trial court for an on-the-record balancing test pursuant to Rule 403, SCRE, to determine if the probative value of the prior shooting was substantially outweighed by the danger of unfair prejudice to Defendant. A writ of certiorari was denied by Order of the Supreme Court on September 11, 2014. Remittitur was issued September 23, 2014.

At issue on remand is Hammonds' testimony that Victim told her Defendant shot him at Walmart. The sole issue concerning this prior bad act testimony is whether the probative value is substantially outweighed by the unfair prejudice (SCRE 403). The South Carolina Court of Appeals remanded the matter in order for the trial court to do an on-the-record 403 balancing test. Consistent with the Supreme Court's ruling that an appellate court should not conduct its own balancing process, the Court of Appeals declined to conduct a de novo Rule 403 balancing test. State v. Spears, 403 S.C. 247, 742, S.E.2d 878 (Ct. App. 2013) (quoting State v. Colf, 337 S.C. 622, 629, 525 S.E.2d 246, 249 (2000)) ("It is difficult, if not impossible, for an appellate court to balance the interests at stake when the record does not contain the specific facts and circumstances necessary to a decision."). Therefore, the Court of Appeals remanded the matter for the trial court to conduct a 403 hearing.

Analysis

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A prior bad act has the potential to cause unfair prejudice to the defendant and bias the jury. The danger is substantially enhanced when the prior bad act is strikingly similar to the one which the defendant is being tried. It is clear the evidence of the Walmart shooting is prejudicial to Defendant. However, the rule does not state that any testimony which brings a danger of prejudice should be excluded, the rule states that the danger of unfair prejudice must substantially outweigh the probative value for the evidence to be excluded.

Defendant was not convicted of the Walmart shooting. The only evidence presented to the jury about the Walmart shooting was from Hammonds, stating that Victim told her Defendant had shot him. The jurors were not shown the video of the Walmart shooting. The jury is able to judge the credibility of each witness, they are free to believe all, some, or none of the testimony of any witness presented. Defendant argues the State is making a propensity argument, suggesting the evidence is being used simply to show he shot him once so it must have been Defendant who shot him again. It is well-settled law that a propensity argument is inadmissible. However, in State v. Dennis the South Carolina Court of Appeals held, "One of the accepted bases for the admissibility of evidence of other crimes arises when such evidence furnishes part of the context of the crime or is necessary to a full presentation of the case, or is so intimately connected with the explanatory of the crime charge against the defendant and is so much a part of the setting of the case and its environment that its proof is appropriate in order to complete the story of the crime on trial by proving its immediate context, and where evidence is admissible to provide this full presentation of the offense, there is no reason to fragmentize the event under inquiry by suppressing parts of the res gestae." 402 S.C. 627, 742 S.E.2d 21 (S.C. Ct. App., 2013). The State's theory behind the murder was that the shooting was a gang related revenge-killing. Victim's murder was not a random act of gang violence, instead, the murder was a planned hit on Victim's life. The State did not use the evidence of the Walmart shooting to identify Defendant in the Myrtle Beach shooting. The State was not making the argument that the perpetrator was necessarily Defendant because he shot at Victim in a prior instance. The Walmart shooting was admitted because it was a part of a common scheme or plan to kill Victim, and it went to the motive and intent of Defendant.

Additionally, the danger of unfair prejudice is substantially decreased by other evidence presented at trial. There were multiple eye witnesses and testimony to identify defendant as the shooter in the Myrtle Beach shooting. Tim Smith, a cell mate of Defendant in jail, testified

Defendant admitted to killing Victim. Smith testified Defendant told him of the plan to kill Victim—Defendant was upset because Victim had killed his friend and that when he learned Victim was in Myrtle Beach for Bike week, Defendant and several friends loaded up to "take care of [Victim]." Smith testified, "[Defendant] said that, that they had got up with the guy and this fellow who used to be his partner named Bird said that he was supposed to take care of the guy and he couldn't do it. So he said he run back to the car and said he was parked at the K-Mart parking lot. Said he run back to his car and got his gun come back; and, you know, he said they was going down Ocean Boulevard and said that he was running through the crowd and passed his buddies and caught up with the guy that they had been arguing with, the guy that killed his friend; and he said he did what they called wetting him up, he said he wet him up and evidently, you know, he shot three other people at the time you know."

Co-defendant Jeffrey Bethea testified he was there the night of the shooting. He claimed he and Defendant "hyped" each other up to take out a member of the rival gang. After seeing Victim and speaking to Lemark Irons they decided to attack the East Side Bloods and kill Victim. Bethea testified, "I pulled out a knife. I was, I was looking for Lemark [Irons] and as we walked up, when we was coming up [Defendant] pulled out his gun." Bethea testified Defendant pulled out his small caliber pistol from his right side waistband, which is consistent with other testimony, and shot Victim.

Brittney Maynor, Victim's girlfriend, was at the Boulevard with Victim when he was murdered. She testified that a man dressed in a red shirt and a red hat shot her boyfriend. Bethea said Defendant was wearing a red shirt. Nathaniel Douglas testified Defendant was dressed in three shirts, with a red shirt worn on the outside and a black and red New York Yankees hat. There was over-whelming evidence presented at trial that Defendant was the shooter. The prejudicial effect of the Walmart shooting is thus diminished in light of this evidence. The danger of unfair prejudice and the undue tendency to suggest decision on an improper basis is nullified by the fact that the jury could have found Defendant guilty from the testimony of multiple witnesses stating either the Defendant was the shooter or Defendant admitted to the shooting, even without the introduction of the Walmart shooting.

At the hearing, Defendant brought up for the first time his objection under Rule 403 that the testimony, besides being unfairly prejudicial, was cumulative. Defendant admits there is

evidence against him, however, he argues that the introduction of the Walmart shooting is a needless presentation of cumulative evidence. But, in order to exclude the introduction of evidence because it is cumulative, the evidence must be needless. S.C. R. Evid. 403. Again, the testimony of the prior shooting goes to the theory that it was a gang-related revenge killing. It shows that there was an intent and plan to kill Victim. The prior shooting shows the full picture of the theory of the case. Although Defendant could have been convicted without the evidence, the rules of evidence do not prevent a party from presenting other pieces of evidence to bolster its case.

The Court finds the evidence of the Walmart shooting is overwhelmingly probative. It was a necessary part of the evidence to tell the whole story of the events that took place and led up to the killing of Victim. The probative value goes to the motive, intent, common scheme and plan, and the absence of a mistake or accident. The fact that this was a revenge-killing rather than a random act of gang violence is the difference between Murder and Voluntary Manslaughter. The evidence of the prior shooting reveals Defendant's intent was not to scare or inflict injury, but to kill Victim. Moreover, it clarifies that the Boulevard shooting was neither an accident nor mistake. The shooting was a deliberate, planned, and calculated murder of Victim.

I find and conclude the danger of unfair prejudice does not substantially outweigh the probative value of the evidence. Nor, in light of the evidence presented, is there the undue tendency to suggest a decision on an improper basis brought on by a propensity argument. For the foregoing reasons, the Court finds the evidence of the Walmart shooting to be highly probative and the danger of unfair prejudice to be minimal in light of the circumstances.

IT IS SO ORDERED!



The Honorable Larry B. Hyman

Presiding Judge
Fifteenth Judicial Circuit

February 9, 2017

Conway, South Carolina

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FILED

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal from Horry County

Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN SPEARS

APPELLANT

APPELLATE CASE NO 2017-000480

FINAL BRIEF OF APPELLANT

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ATTORNEY FOR APPELLANT

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STATEMENT OF ISSUE ON APPEAL

Whether the lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice?

STATEMENT OF THE CASE

Appellant was convicted of murder and three (3) counts of assault and battery with intent to kill after a jury trial held before the Honorable Larry B. Hyman, Jr., on May 10-13, 2010, in Horry County. A sentence of thirty (30) years was imposed for murder and twenty (20) year sentences were imposed on the remaining charges.

Appellant appealed his convictions and submitted a final brief on September 12, 2011. Respondent submitted its final brief also on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, respondent filed a petition for rehearing en banc. On May 2, 2013, appellant filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013. Appellant filed a petition for writ of certiorari on July 15, 2013. The State filed a petition for writ of certiorari on July 12, 2013. On August 1, 2013, appellant filed a return to the State's petition. On August 14, 2013, the State filed a return to appellant's petition. On September 11, 2014, the South Carolina Supreme Court issued an order denying the petitions of both parties.

The rehearing on remand for the Rule 403, SCRE balancing test was not heard until December 8, 2016. Barbara Pratt, Esq. again represented appellant and Thomas Terrell, Esq. represented the respondent.

On February 9, 2017, the Honorable Larry B. Hyman issued his amended order on remand for the Rule 403 hearing. He found that the probative value of the prior similar bad act was not substantially outweighed by the danger of unfair prejudice. He also found there was not

an undue tendency to suggest a decision on an improper basis brought on by the propensity argument.

This appeal follows.

ARGUMENT

The lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice.

The victim was shot and killed in Myrtle Beach while he was visiting there with some of the gang members he was with from Lumberton, North Carolina. Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a rival gang also from Lumberton and they, too, were visiting in Myrtle Beach. No one was really quite sure who did the shooting.¹ The police made a composite sketch of the suspected shooter that resembled Jeffrey Bethea. Nathan Douglas testified for the State and implicated Bethea. Bethea testified for the State in exchange for more lenient treatment and implicated appellant. Appellant's defense was the Bethea was the one (1) shooter.

Eight shell casings were recovered from the crime scene and three bullets were recovered from the victim's body. (R. 83, line 9 – R. 85, line 15). They were all identified as coming from a .25 caliber semi-automatic weapon. (R. 353, line 19 – R. 354, line 22). It was the own State's witness, Nathaniel Douglas, who said appellant had a titanium chrome handgun with a lot of black on it. It was a medium sized automatic handgun the size of a .380. He said everybody in the car with him that night had a handgun. (R. 224, line 10 – R. 225, line 22).

On cross-examination, Douglas said it was Bethea that had gotten into an argument with a rival gang member that day and appellant was calm. (R. 232, line 4 – R. 235, line 6). Douglas said he was 19 at the time, appellant was 20, and Bethea who was the leader was much older. (R. 236, line 17 – R. 237, line 1). When they got back home after the shooting, Bethea said he smoked sausage and nobody had to worry about it now. "Smoked sausage" meant the victim was

¹ Respondent admitted in his brief that the "State proceeded under the theory that either Appellant or Bethea shot victim... (R. 618)

stiff. Bethea was bragging. Nobody else was. (R. 253, line 1 – R. 254, line 13); Douglas also said Bethea told him he needed to tell the police that appellant did it but he wouldn't do it. (R. 254, line 24 – R. 255, line 11).

The assistant solicitor also had to try to make a point that appellant made rap lyrics about the incident to try to corroborate Bethea's version of the shooting blaming appellant. (R. 328, line 7 – R. 329, line 16). Nathaniel Douglas explained, however, that rap music is just a reflection of what is going on and is fiction. If it weren't all rappers would be in jail. (R. 256, line 18 – R. 257, line 4).

Jeffrey Bethea testified that he was charged with murder and three attempt to kill charges. He pled guilty to voluntary manslaughter in exchange for his promise to testify. (R. 359, lines 10-23). He said he turned himself in because he saw the composite drawing of himself in the newspaper. When he turned himself in, he was arrested. He pinned the murder on appellant in his interviews with the police. (R. 376, line 15 – R. 377, line 23). Earlier it was noted that the assistant attorney general said the State's theory of the case was that either Bethea or appellant shot the victim. One could also theorize that Bethea killed the victim, since his composite drawing became public, and he decided to pin the murder on appellant to get more favorable for himself. Appellant also was not known to use a .25 caliber handgun.

After the State rested its case, the defense called Alexis Brown to testify. The victim was the father of her young son. She was with the victim the night he was killed. (R. 449, line 10 – R. 450, line 12). She identified Jeffrey Bethea as the person who shot the victim from the composite drawing of him. (R. 453, line 6 – R. 454, line 10).

Deandre Bishop testified that he came into contact with Jeffrey Bethea while they were both at J. Reuben Long Detention Center. Bethea told him he did what he was charged with "but he wasn't going down by himself." (R. 462, line 21 – R. 464, line 22).

Appellant testified he did not shoot the people he was charged with shooting. (R. 472, lines 3-10). He talked about the altercation Bethea had with a rival gang member at the beach. (R. 480, lines 6-11). Appellant said he did not see the actual shooting. After it happened he went back to where they parked and they all went back to Lumberton. (R. 482, lines 5-24). At a cookout back in Lumberton, he overheard Bethea commenting on the victim as being "smoked sausage and we ain't got to worry about him no more..." (R. 483, lines 18-21). He explained that rap music does not always come from personal experience but from what people want to hear. (R. 494, lines 7-14). He said he brought a gun with him to the beach but left it in the car. (R. 495, lines 10-16). "It was a black, faded black 380 11 shot." (R. 510, lines 19-20).

THE ARGUMENT PRESENTED ON DIRECT APPEAL

The trial court erred in admitting evidence that appellant shot the victim about a month prior to the shooting death for which appellant was on trial because it was unfairly prejudicial under Rule 403, SCRE.

“Appellant, Jeffrey Bethea, and Nathaniel Douglas were in a gang from the southside of Lumberton, North Carolina. The victim was in a competing gang from the eastside of Lumberton. On May 27, 2077, the victim, his girlfriend, and several others decided to drive down to Myrtle Beach to see bike weekend. Appellant, Bethea and Douglas were also in Myrtle Beach that weekend. The victim was shot and killed that evening and three bystanders were hit by stray bullets. The State’s theory of the case was one of accomplice liability and that the shooting was done by appellant, Douglas and Bethea. The killing was thought to have been done in retaliation because the victim had killed a member in appellant’s gang. Nathaniel Douglas testified for the State and implicated Bethea. Bethea testified for State in exchange for more lenient treatment and implicated appellant. Appellant’s defense was that Bethea was the (1) shooter.

In an effort to prove that appellant was the shooter, the State wanted to put into evidence testimony from the victim’s sister that appellant shot the victim at a Walmart parking lot in Lumberton about a month prior to the shooting in Myrtle Beach.

At an in camera hearing, Danyell Hammonds, the victim’s sister, testified that the victim came home one night in April of 2006 with blood on his shirt and said that he got shot at Walmart by “Bos” who is appellant’s nickname. She also said her brother was in a rival gang and had gotten out of prison about a month prior to this shooting. He had been convicted of accessory

after the fact of murder. The victim in that case was in the gang appellant belonged to. (R. 145, line 6 – R. 148, line 17).

After much discussion, the trial court held that the victim's sister could testify to what her brother told her because it was an excited utterance under Rule 803(2), SCRE. (R. 187, line 11 – R. 188, line 14). Defense counsel had argued earlier that the evidence should not come in under Rule 403, SCRE because of unfair prejudice. (R. 190, lines 7-10; R. 167, line 20 – R. 168, line 1). Later, the trial court allowed the solicitor the opportunity to put on the record that she was also putting in this evidence as a prior bad act under Rule 404, SCRE. She said it went to motive, intent, common scheme of plan, continuous scheme of plan and identity. The trial judge found there was clear and convincing evidence of the prior bad act. (R. 190, line 18 – R. 191, line 14). The decision to admit this evidence was in error.

Rule 403, SCRE provides that “evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice...” “Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” State v. Alexander, 303 S.C. 377, 382, 401 S.E.2d 146 (1991). If we assume that the victim's sister is telling the truth about what her brother told her,² there is still the danger that the jury will conclude that, if appellant shot the victim once, he must also be the one who shot him a second time.

In State v. Gore, 283 S.C. 118, 322 S.E.2d 12 (1984) the Court wrote:

Under our system of justice, a conviction must be based upon evidence of the offense for which the accused is on trial rather than prior criminal or immoral acts. State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Furthermore, where bad acts did not result in a conviction, guilty plea, indictment, or arrest of the appellant, this Court has limited the State's use of evidence. State

² In “most cases, proof that the event occurred is furnished either by testimony other than the declarant, or by circumstantial evidence that something out of the ordinary occurred.” Weinstein's Federal Evidence §803. 04 [2][a] at p 803-20-21 (March, 1977 ed).

v. Smith, 279 S.C. 440, 308 S.E.2d 794 (1983). (Appellant's lover improperly related instance of the appellant's unconvicted sexual battery upon her in his trial for murder of another woman); State v. Rivers, 273 S.C. 75, 254 S.E.2d 299 (1979). (In trial for criminal sexual conduct with the prosecutrix, the court erred in receiving testimony from the appellant's wife regarding his prior unconvicted acts of sexual misconduct on her). State v. Conyers, 268 S.C. 276, 233 S.E.2d 95 (1977). (Allegations that the appellant poisoned her first husband were not admissible because the evidence was not clear and convincing); State v. Drew, 316 S.E.2d 367 (S.C. 1984).) Cross-examination and reply testimony regarding unconvicted act of burning a combine not proper in criminal conspiracy trial for burning a business.)

The Court went on to conclude that "when, as here, the previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced."

The trial court in this case failed to conduct a balancing test to determine whether the probative value of the prior bad act substantially outweighed its prejudicial effect. See, State v. Colf, 337 S.E. 2d 622, 525 S.E. 2d 246 (2000); Green v. State, 338 S.C. 428, 527 S.E.2d 98 (2000). At the end of the case the trial court remarked that, "I don't know the basis for the jury's finding of guilt, whether it be that the jury felt that you were the shooter or you were an accomplice." (R. 585, lines 10-12). Appellate Counsel would suggest that the basis was the unfair prejudice of the prior bad act."

THE COURT OF APPEALS OPINION ON DIRECT APPEAL

The Court of Appeals opinion is reported at 403 S.C. 247, 742 S.E. 2d 878 (2013). It should be noted the Court found that the trial court failed to conduct an on-the-record balancing test concerning the prior bad act testimony and that this failure was not harmless. (emphasis supplied). The Court of Appeals explained as follows:

We note the potential prejudice to Spears upon the introduction of this evidence. Spears was tried for shooting and killing Victim. The prior bad act testimony involved Spears shooting the Victim a month before the incident herein. Based upon these similarities, the jury could have determined Spears was guilty on an improper basis by relying on the Wal-mart testimony as propensity evidence. See *State v. Wiles*, 383 S.C. 151, 158, 679 S.E.2d 172, 176 (2009) (“Unfair prejudice means an undue tendency to suggest decision on an improper basis.”); *State v. Johnson*, 293 S.C. 321, 324, 360 S.E. 2d 317,319 (1987) (“[E]vidence of other crimes or prior bad acts is inadmissible to show criminal propensity.”); *State v. Gore*, 283 S.C. 118, 121, 322 S.E. 2d 12, 13 (1984) (stating when a “previous alleged bad act is strikingly similar to the one for which the appellant is being tried, the danger of prejudice is enhanced”); *State v. Taylor*, 399 S.C. 51, 61, 731 S.E.2d 596, 601 (Ct. App. 2011) (recognizing the prejudicial effect of admitting “evidence of other crimes, wrongs, or acts based upon the degree of similarity with the charged crime”). Moreover, based upon the record herein, we are unable to say that the admission of the prior bad act testimony was harmless error. See *Black*, 400 S.C. at 27, 732 S.E.2d at 890 (“In applying the harmless error rule, the court must be able to declare the error had little, if any, likelihood of having *259 changed the result of the trial and the court must be able to declare such belief beyond a reasonable doubt.”); *Scriven*, 339 S.C. at 344, 529 S.E.2d at 77 (“On the basis of this record, we are unable to say that the admission of these prior convictions was harmless error.”) Accordingly, we find it appropriate to remand for an on-the-rule record Rule 403 balancing test.

403 S.C. at 258-259, 742 S.E. 2d at 884.

PETITION FOR REHEARING

Appellant petitioned for rehearing and counsel wrote the following:

The solicitor in this case failed to specify why the Wal-Mart shooting was admissible under Rule 404(b). Instead, she merely made a rote recitation of all the exceptions to State v. Lyle, 125 S.C. 406, 118 S.E. 803 (1923). Counsel has found in the past when a solicitor can not specify the exception, the real motive is to prejudice the defendant with the prior bad act.

This Court found and concluded that it was “unable to say that the admission of the prior bad act at testimony was harmless error.” If the error was not harmless, remanding the case for a Rule 403, SCRE balancing test would lead only to prejudice and confusion, it is respectfully submitted.

Both appellant’s petition and respondent’s petitions were denied.

THE CURRENT APPEAL

In this current appeal it should be noted that in State v. Palmer and Gorman 413 S.C. 410, 776 S.E. 2d 558 (2015) that the case was also from Horry County and it was also before Judge Hyman. There, the assistant solicitor “admitted that they did not know who did this crime so they were prosecuting both parties!” (Brief of Appellant, p. 21). Directed verdicts were granted on all charges against Palmer by the South Carolina Supreme Court. In this current case, again in Horry County and again before Judge Hyman, the assistant attorney general noted in his Brief of Respondent that “The State proceeded under the theory that either Appellant or Bethea shot the victim...” (R. 618). Apparently, in Horry County, if the solicitors do not, or cannot figure out who is guilty, they will throw their suspects into a trial and let the jury guess at who is guilty.

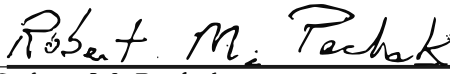
The trial court’s order on remand was a blend of “fake law” and “fake facts.” The Order stated that there was “over-whelming evidence presented at trial that Defendant was the shooter.” (R. 763). That is simply not true. The composite drawing was of Bethea. Appellant was not known to use a .25 caliber semi-automatic handgun. No witnesses identified appellant as the shooter. It was only Bethea himself who dragged appellant into this so Bethea could get his charges reduced.

Next, the trial court stated that “the evidence of the Walmart shooting is overwhelmingly probative.” (R. 764). Apparently the trial court finds “overwhelmingly probative” synonymous with prejudicial propensity evidence. It forgets the admonition in Gore that “when, as here, the previous alleged bad act is strikingly similar to the one for which appellant is being tried, the danger of prejudice is enhanced.” As the court in State v. Alexander said above: “Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis.” The

danger in this case was that the jury could well conclude that if appellant shot the victim once, he must also be the one who shot him a second time. That is not a fair trial.

CONCLUSION

Appellant should be given a new trial.


Robert M. Pachak
Appellate Defender

ATTORNEY FOR APPELLANT

This 21st day of March, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

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."

March 21, 2017

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SC Court of Appeals

ORIGINAL

STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Beaufort County
The Honorable Larry B. Hyman, Circuit Court Judge

THE STATE,

RESPONDENT,

v.

BRIAN SPEARS

APPELLANT.

Appellate Case No. 2017-000480

FINAL BRIEF OF RESPONDENT

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APPELLANT'S STATEMENT OF ISSUES ON APPEAL

- I. Whether the lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice?

RESPONDENT'S COUNTERSTATEMENT OF ISSUES ON APPEAL

- I. Did the trial court abuse its discretion in finding that the probative value of Ms. Hammond's testimony was not substantially outweighed by unfair prejudice to Appellant after conducting a Rule 403 balancing test for admission of prior bad acts?

STATEMENT OF THE CASE

Appellant Brian Spears was indicted on one count of Murder and three counts of Assault and Battery with Intent to Kill ("ABWIK). (Case No. 2007-GS-26-3387, #2007-GS-26-3388, #2007-GS-26-3389, #2007-GS-26-3390). On May 10, 2010, the Honorable Larry B. Hyman, Jr. presided over Appellant's jury trial. (R.p. 5). Appellant was represented by Barbara Pratt and the State was represented by Assistant Solicitors Donna Elder and Lawrence Filiberto. (R.p. 5). After a three day trial, Appellant was convicted on all four charges and sentenced to thirty (30) years imprisonment for murder, and twenty (20) years imprisonment for each ABWIK charge, to run concurrently. (R.pp. 579, 587).

Following his conviction, Appellant sought direct Appeal to the South Carolina Court of Appeals on the basis that the trial court erred in admitting evidence of prior bad acts of Appellant that were unfairly prejudicial. Both Appellant and Respondent submitted their respective Final Briefs on September 12, 2011. Oral argument was heard by the Court of Appeals on January 17, 2013. The Court of Appeals then issued its published Opinion in the matter on April 17, 2013. The Court of Appeals agreed that the trial court was in error and remanded the issue back to the trial court with instructions that a 403 balancing test be conducted on the record to determine whether unfair prejudice substantially outweighed the probative value of the evidence in question. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013).

Respondent filed a Petition for rehearing *en banc* on April 26, 2013. Appellant filed a petition for rehearing. Both parties' Petitions were denied on June 14, 2013. The State filed a Petition for Writ of Certiorari on July 12, 2013. On July 15, 2013, Appellant filed his own Petition for Writ of Certiorari. The Appellant's and the State's respective Returns to the Petitions were filed on August 1, 2013, and August 14, 2013. The South Carolina Supreme Court issued

an Order denying the Petitions of both parties on September 11, 2014.

As instructed, the rehearing on remand was heard on December 8, 2016, before the Honorable Judge Larry B. Hyman, Jr. Appellant was again represented by Barbara Pratt, however, Assistant Solicitor Thomas Terrell represented the Respondent at hearing. (R.p. 732). Following the arguments from both parties, Judge Hyman took the matter under advisement so that he could give further consideration to the matter. (R.p. 754). On February 9, 2017, Judge Hyman issued his Amended Order on Remand for Rule 403 Hearing (hereinafter “Amended Order”, finding the probative value of the admitted prior bad act was not substantially outweighed by unfair prejudice. (Amended Order, R.p. 764). Judge Hyman also held in his Order that in light of the evidence presented trial, there was no undue tendency to suggest a decision on an improper basis brought about by a propensity argument. (Amended Order, R.p. 764).

This appeal now follows.

STATEMENT OF FACTS

Testimony from initial trial

On May 26, 2007, Appellant, along with fellow gang members Nathaniel “June” Douglas, Ishmael “Ish” Douglas,¹ and Thomas “T.C.” Shaw (collectively Appellant’s group) left Lumberton, North Carolina and headed to Myrtle Beach over bike weekend.² (R.p. 217-18, 472-73). The three individuals were all part of a Lumberton gang known as 41-Curve. (R.pp. 196-97, 210, 211, 282-83, 287, 361, 490).

Once arriving on Ocean Boulevard, Appellant’s group was joined by fellow 41-Curve member, Jeffrey “Bird” Bethea. (R.pp. 211-12). Testimony from trial indicated that Appellant

¹ Ishmael “Ish” Douglas is also known as Wa-Gee. (R.p. 218).

² Appellant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (R.pp. 196-97, 210, 211, 282-83, 287, 361, 490).

was wearing a white t-shirt and a black t-shirt underneath a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey.³ (R.pp 210-11, 221). Bethea, who did not know Appellant's group was coming to Myrtle Beach, wore a black shirt with colorful combination locks on it, a black hat, and blue jean shorts. (R.pp. 217-18, 363, 219, 220). Testimony elicited at trial demonstrated that Defendant's red colored attire was important: Red was actually the color of the "East Side Bloods", a rival gang to 41-Curve. Testimony from witnesses familiar with gang activity informed the jury that gang members would often wear the color of a rival gang when they intended to "go do something". (R.pp. 201-02).

Shortly after Bethea's arrival, a member of Appellant's group stated they had observed Aaron Hammonds ("Victim") walking down Ocean Boulevard. (R.p. 478). Victim was a high-ranking member of Lumberton's East Side Bloods, and had served four years in prison for "Accessory after the fact" in the murder of 41-Curve member Eric Floyd, also known as "G-Black" and "Turk". (R.pp. 147-48, 195-97, 211-13). Testimony from Brittney Maynor, Victim's girlfriend, showed that Victim, Aaron Hammonds, fellow East Side Blood Lemark Irons, and other members of the East Side Bloods were walking together along Ocean Boulevard. (R.pp. 114-15, 118-19). Lemark Irons, left the group and approached Appellant's group to compliment them on their clothes and jewelry stating "we need to stop beefing and get money together." (R.pp. 117-18, 119-20, 193, 195, 195, 201-03, 223). Irons, whose right arm was in a

³ Danyell Hammonds, who was the victim, Aaron Hammonds' younger sister and lived with him, would later testify that her brother was a Blood and that Bloods wear red. (R.pp. 201-02). However, Danyell Hammonds further explained that when gang members would "go to do something" they would wear opposite colors. (R.pp. 201-02). Additionally, Appellant's former cellmate in the detention center, Timothy Smith, testified that Appellant told him he received a phone call that Aaron Hammonds was in Myrtle Beach for bike week prompting Appellant's and his friends to come to Myrtle Beach. (R.pp. 428-29).

sling, then attempted to shake Bethea's hand with his left hand, which Nathaniel Douglas would later explain, was considered a sign of disrespect. (R.p. 223). In response to Irons' gesture, Bethea slapped Irons' hand and began cursing at him. (R.pp. 223, 234). Irons then left the group, and crossed Ocean Boulevard, once again rejoining his group on the other side of the street. (R.pp. 223, 119-20).

Immediately after the initial altercation, Bethea, who was a high-ranking member of 41-Curve, became angry and began talking to Appellant who was a foot soldier in 41-Curve and did not get along with Victim. (R.pp. 212, 362, 224, 232, 369-371). Specifically, Appellant expressed to Bethea his belief that Irons and his group, which included Victim, were going to kill someone in Appellant's group, unless Appellant and Bethea killed someone from Irons and Victim's group first. (R.pp. 369-70). Following this conversation, a shooting occurred resulting in Victim's death. (R.pp. 125-133, 138-140). In addition, three bystanders were wounded. (R.p. 54, 78-79, 93, 111).

At the crime scene, authorities interviewed multiple witnesses and were able to produce a composite sketch matching Bethea's description. (R.p. 276-77). After interviewing Bethea, authorities also spoke with Appellant in Lumberton on June 4, 2007. (R.p. 277). In the June 4th interview, Appellant repeatedly denied being in Myrtle Beach on the date in question instead claiming he was in Lumberton all weekend. (R.pp. 280-81, 283). Additionally, Appellant informed authorities that he did not hang around Bethea. (R.p. 281). Following the first interview Appellant was charged with one count of Murder and three counts of ABWIK. (R.pp. 285-86).

After waiving extradition, Appellant was transported back to Myrtle Beach where he was interviewed a second time on June 7, 2007. (R.pp. 285-86). In his second statement, Appellant

admitted he was in Myrtle Beach on the date in question, but insisted that after the altercation between Bethea and Irons he walked away with Nathaniel Douglas and, when he heard gunshots, fled the scene. (R.pp. 289-90).

At trial, the State presented testimony that there were eight (8) shell casings recovered from the crime scene and three bullets recovered from Victim's body during the autopsy. (R.pp. 83-85, 95-96). SLED Agent Suzanne Cromer then testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (T.pp. 353-54).

The State also introduced eyewitness testimony from Brittney Maynor. Maynor testified that the shooter was a black male who was approximately five-foot-seven (5'7) and was wearing a red shirt, a red bandana over his face, and a red fitted hat with another red bandana on his wrist.⁴ (R.pp. 125-26, 131, 133). She further noted that the shooter crossed the road and was right in front of her when she saw him begin shooting. (R.pp. 116, 125, 128). Maynor then told the jury that she turned and began running when she heard "five or six" shots. (R.pp. 129, 132). Maynor described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (R.p. 133).

Additionally the State presented testimony from Appellant's co-defendants, Nathaniel Douglas and Jeffrey Bethea. (R.pp. 209-272, 359-421). Nathaniel Douglas testified that after Irons' initial dispute with Bethea he walked off while Appellant remained with the rest of the group. Continuing, Nathaniel Douglas informed that jury that approximately ten minutes after he left Appellant's group, he heard gunfire and saw Appellant and the other members of his group running up the street. (R.pp. 224, 226-27). Nathaniel Douglas also confirmed that Appellant had a medium black and titanium handgun in his waistband on the night in question,

⁴ A South Carolina Department of Corrections incarcerated inmate search lists Appellant's height at five-foot-nine (5'9).

which was around the size of a .380, while also noting that Bethea did not appear to be carrying a gun. (R.pp. 224-26). Meanwhile, Bethea confirmed that Nathaniel Douglas left the group and explained that he and Appellant subsequently approached Irons' and Victim's group and attacked them. (R.p. 371). Specifically, Bethea told the jury that Appellant pulled out a small caliber handgun from his waistband and began shooting. (R.pp. 372-73).

To corroborate Bethea's version of the shooting, the State also introduced rap lyrics written by Appellant which indicated Appellant had killed Victim to avenge Eric Floyd's death. (R.pp. 215-17, 328-29, 337). There was also testimony from Appellant's former cellmate Timothy Smith, who shared a cell with Appellant while he was awaiting trial. (R.pp. 421-444). Smith told the jury that Appellant informed him he had pushed through the crowd and shot Victim because he believed Bethea would not do it. (R.pp. 428-29). Smith further added that Appellant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him. (R.pp. 428-29). Smith also learned through his conversations with Appellant, that Appellant had been told that Victim would be in Myrtle Beach, and that Appellant and his group drove to go take care of him. (R.pp. 427-28).

Following the close of the State's case, the defense presented testimony from eyewitness Alexis Brown who was part of Irons' and Victim's group on the night of the shooting. (R.p. 450). Brown testified that the composite generated by authorities was Bethea, but confirmed that the shooter was wearing a red bandana over his face and pulled a gun from his waistband. (R.pp. 453-54, 456-57).

Finally, Appellant testified in his own defense. (R.pp. 471-521). Specifically, Appellant explained he had walked off following the dispute between Irons and Bethea, heard gunshots and ran back to the K-Mart parking lot to meet with the rest of his group. (R.pp. 481-82). He added

that he did not shoot anyone. (R.p. 472). On cross-examination, Appellant admitted he brought a gun to Myrtle Beach, but left it in the car. (R.p. 495). Appellant also admitted he owned a .380, but gave it away. (R.p. 510).

PRESENTATION OF ISSUE AT TRIAL AND AT REMAND HEARING

The issue before the court after remand involves the admission of prior bad acts evidence against Appellant without the trial court first performing a 403 balancing test to determine whether unfair prejudice substantially outweighs the probative value of the evidence in question. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013). The prior bad act comes from the testimony of Victim's sister, Danyell Hammonds (hereinafter "Ms. Hammonds"). Prior to her testimony before the jury, the trial court proffered her testimony in order to address concerns of hearsay and evidence of prior bad acts. (R.pp. 145-160).

During the proffered testimony, Ms. Hammonds recalled that about one month after Victim was released from prison for accessory after the fact in the murder of Eric Floyd, he came running into their home around midnight. (R.pp. 145-48, 151). She testified that Victim exclaimed that he had been shot, that she saw that the wound on his shoulder was still bleeding, and that he still had fresh blood on his hands. She asked who had shot him and recalled that Victim's response was "come on, man, you know who did it. . . Bos, man, Bos." (R.p. 153). Ms. Hammonds knew that "Bos" was Appellant's nickname. (R.p. 147).

The trial court heard this testimony and initially expressed concern that, while it was certainly relevant testimony, that it was hearsay and doubted that it would fall under the exception of "excited utterance". (R.p. 161). However, to corroborate the testimony of Ms. Hammonds, the State proffered the Walmart security video that showed the shooting take place. (R.pp. 169-70). The video showed that the shooting had taken place at 12:10am, which

corresponded closely the timeframe in which Ms. Hammonds claimed the Victim's statement occurred. (R.pp. 150, 170, 178). The video did not identify Appellant and the Solicitor acknowledged that they would not attempt to introduce the video, but only utilized it to corroborate the testimony of Ms. Hammonds as hearsay, admissible under excited utterance exception, and to show that the evidence was clear and convincing to purposes of admitting a prior bad act of Appellant. (R.pp. 170-71, 190-91)

The court heard initial arguments from both parties about the admissibility of Ms. Hammonds' testimony, and then gave the parties the opportunity to research the matter and present additional arguments and case law in support of their positions the following morning. (R.pp. 165-173).

Arguments continued the following morning, wherein the State put forth case law demonstrating that an excited utterance statement does not require the statement to be made contemporaneous with stressful event. (R.pp. 176-180). All that is required is that declarant still be under the influence of the stress from the event without opportunity to have calmed down. (R.pp. 176-180). The Court ultimately ruled that Ms. Hammonds' testimony demonstrating Appellant to have shot the Victim on a prior occasion was admissible under the excited utterance exception. (R.pp. 187-88). The court cited that Ms. Hammonds' testified it was approximately midnight when Victim informed her that "Bos" had shot him, which was corroborated by the time records of the Walmart video. (R.pp. 187-88). Also, the Court acknowledge that the description of how he entered the home, and the fact that he was still treating a bleeding wound would indicate that Victim was still under the stress of the shooting. (R.pp. 187-88). Furthermore, the trial court found that evidence of Appellant's prior bad act was clear and convincing when the testimony of Ms. Hammonds and the video were considered together. (R.

pp. 187-191). The Court found that the evidence met the *Lyle* exceptions and went to show motive, intent, lack of mistake or accident, and common plan or scheme. (R.pp. 168-69, 191). However, the trial court did not conduct an on the record 403 balancing test to determine whether the unfair prejudice of Ms. Hammonds' testimony outweighed its probative value. Ms. Hammonds testimony before the jury was substantially similar to her proffered testimony, and the evidence was admitted over the preserved objections of Appellant. (R.pp. 190-208).

The Court of Appeals remanded the matter back to the trial court so that a 403 balancing test could be performed on the record. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013). A hearing on December 8, 2016 was held before Judge Hyman in order to perform the 403 balancing test. (R.pp. 732-756). The Court heard the arguments of counsel during the hearing and took the matter under advisement. (R.pp. 754). The Court then issued an extensive Amended Order, finding that the probative value of Ms. Hammonds' testimony was not substantially outweighed by unfair prejudice, along with detailed analysis and reasoning for the decision. (Amended Order, R.pp. 757-764).

Appellant now seeks to appeal the ruling of the trial court as set forth by the Amended Order.

STANDARD OF REVIEW

A trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991); *State v. Jeffcoat* 354, 279 S.C. 167, 303 S.E.2d 855 (1983). A trial court's rulings pursuant to 403 balancing test are subject to an abuse of discretion standard and great deference is given to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). An abuse of discretion "means nothing more or less than that the ruling of the trial court was without reasonable factual support, resulted

in prejudice to the rights of appellant, and therefore, in the circumstances, amounted to error of law.” *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961). “A trial judge’s balancing decision under Rule 403 should not be reversed simply because an appellate court believes it would have decided the matter otherwise because of a differing view of the highly subjective factors of the probative value or the prejudice presented by the evidence.” *State v. Hamilton*, 344 S.C. 344, 358, 543 S.E.2d 586, 594 (Ct. App. 2001), overruled on other grounds by *State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005) (citing *United States v. Long*, 574 F.2d 761 (3d Cir.1978)). A trial judge’s decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in “exceptional circumstances.” *Hamilton*, at 593 (citing *United States v. Green*, 887 F.2d 25, 27 (1st Cir.1989)).

SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in finding that the probative value of Ms. Hammond’s testimony was not substantially outweighed by unfair prejudice to Appellant. The Amended Order demonstrates that the trial court’s recitation of the facts was supported by the record, and that the trial court conducted a thorough 403 balancing test of Ms. Hammonds’ testimony. The court’s reasoning that the evidence provided the full picture of the State’s gang retaliation theory in a way that other evidence could not, and that the evidence of the prior shooting by Appellant was overwhelmingly probative to show numerous *Lyle* exceptions to bad act evidence. The Court also articulated that concern over propensity arguments is considerably reduced given that there was substantial evidence presented at trial to prove identity of Defendant as the shooter. As such, the trial court did not abuse its discretion in admitting the evidence at trial and the conviction should be affirmed.

ARGUMENT

The sole issue on appeal of this matter is whether the trial court abused its discretion in finding that the probative value of Ms. Hammonds' testimony was not substantially outweighed by the unfair prejudice of the prior bad act of Appellant. Based upon the hearing transcript, and the extensive factual findings and reasoning of the Amended Order from the trial court, no abuse of discretion exists and the conviction should be affirmed.

A trial court's rulings pursuant to 403 balancing test are subject to an abuse of discretion standard and great deference is given to the trial court's decision. *State v. Myers*, 359 S.C. 40, 48, 596 S.E.2d 488, 492 (2004). Thus, in order for the trial court's 403 balancing test to be reversed on appeal, there must be a lack of reasonable factual support or errors of law in the trial court's analysis. *Bridges v. Wyandotte Worsted Co.*, 239 S.C. 37, 40, 121 S.E.2d 300, 302 (1961).

The trial court, per the Court of Appeals' instructions on remand, conducted a thorough hearing on the record with counsel for the State and Appellant. (R.pp. 732-755). At hearing, Appellant argued that the remand of the trial court should include a full rehearing of the admissibility of Ms. Hammonds' testimony, which would include argument regarding excited utterance, and whether the evidence was clear and convincing, so as to render the prior bad act admissible. (R.p. 739). The Court concludes, that while there were "three tiers" of analysis, the remand was strictly to conduct the third tier of analysis, the 403 balancing test. (R.pp. 738-746). As the instructions of the remand were specifically and solely for the conducting of a 403 balancing test, the trial court was correct to focus the hearing on the probative and prejudicial aspects of the witness testimony. *State v. Spears*, 403 S.C. 247, 259, 742 S.E.2d 878, 884 (Ct. App. 2013).

The Court then moves on to specifically address the probative value and the unfair prejudice that may exist. Counsel for the State argued that it is probative in numerous ways; chiefly, he argued that this testimony demonstrated Appellant's motive, intent, absence of mistake, and common plan or scheme. (R.pp. 746-47). As it applies to the State's case in chief, counsel argued that the evidence fits into the broader picture that Victim's death was a specific gang retaliation. As such, the testimony fit numerous factors for which prior bad acts may be admitted. (R.p. 747). The Court acknowledged these arguments and also added that, as this was a charge for murder of Victim, it would need to be shown that this wasn't just a random shooting, and that the Appellant went to Myrtle Beach with the purpose of shooting the victim. (R.pp. 747-48).

Appellant in response argued this evidence was unnecessary to show a theory of vendetta, and it was made known through other testimony that the gang had a vendetta against Victim for his role in killing Eric Floyd. (R.p. 748). However, the trial court felt that Ms. Hammonds' testimony adds even more to the theory, by showing intent for Appellant killing Victim specifically. (R.p. 48, line 24 through p. 749, line 7). Appellant acknowledges that argument, but suggests that it is cumulative and would be akin to a "propensity" argument, wherein the unfair prejudice should keep it out. (R.p. 749). Appellant then argue the unfair prejudice arises because the jury may find guilt on an improper basis of propensity. (R.pp. 751-52).

The matter was taken under advisement for further consideration, and the trial court issued an Amended Order that thoroughly addressed all aspects of the Rule 403 dispute argued before it. (Amended Order, R.pp. 757-764).

In an effort to thoroughly address the concerns expressed in the Remand Opinion, Judge Hyman first provided a review of the facts of the case, how the arguments were presented at the

trial, and the initial rulings that were made. Therein, the trial court reviewed his decisions regarding hearsay and excited utterance which formed the context of the task at hand. He noted that under the circumstances of this case the Victim's statements to Ms. Hammonds were admissible. (Amended Order, R.p. 759). The Court cites the video time stamp as corroboration of Ms. Hammonds' testimony that the Victim's statement came at near midnight. (Amended Order, R.p. 759). The trial court confirms his initial ruling by noting that excited utterance does not need to be made immediately after the stressing event, if the circumstances show that the stress was still affecting the declarant and there had not been time to calm down. (Amended Order, R.p. 759)(citing *State v. Burroughs*, 328 S.C. 489, 492 S.E.2d 408, (SC App. 1997)). The Court also cites the fresh blood and circumstances of Victim's entry into the house as his basis for confirming the applicability of excited utterance. (Amended Order, R.p. 759).

Next the Court addresses its prior ruling under 404(b), finding that the evidence of a prior bad act was clear and convincing, and therefore admissible under the *Lyle* exceptions. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). The trial court acknowledged that the Appellant could not be identified in the security video, but based its finding of clear and convincing evidence of Appellant's involvement in the Walmart shooting on the fact that Victim *specifically* named Appellant as his shooter (Amended Order, R.p. 760). The trial court acknowledged that the two different shootings were related, in that they demonstrated a common plan or scheme of Defendant. (Amended Order, R.p. 760). It likewise showed the intent to kill the Victim specifically, and Appellant's motive for revenge. (Amended Order, R.p. 760). The trial court agreed that that Ms. Hammonds' testimony corroborated all three theories in which the State was arguing at trial, and that the 41-Curve gang desired to kill Victim. (Amended Order, R.p. 760).

With the initial rulings examined, the trial court then addressed his failure to provide a 403 balancing test to determine whether unfair prejudice substantially outweighed the probative value, and identified the 403 analysis as the sole issue for consideration. (Amended Order, R.p. 760-61).

The Amended Order court correctly recited Rule 403 and that probative value must be substantially outweighed by danger of unfair prejudice. The trial court then correctly defined “unfair prejudice” to be “an undue tendency to suggest a decision on an improper basis.” (Amended Order, R.p. 761 (citing *State v. Stokes*, 381 S.C. 390, 673 S.E.2d 434 (2009))).

The trial court found that the evidence of the Walmart shooting was overwhelmingly probative, as it demonstrates motive, intent, common scheme and plan, and the absence of a mistake or accident. All five are recognized Lyle exceptions. *State v. Lyle*, 125 S.C. 406, 118 S.E. 803, 807 (1923). Judge Hyman explained that the evidence showed the whole picture of the State’s theory that this was a gang retaliation, specifically against this Victim, and not a random shooting. (Amended Order, R.p. 762-64)(citing *State v. Dennis*, 402 S.C. 627, 742 S.E.2d 21 (S.C. Ct. App., 2013). Ms. Hammonds’ testimony shows that the intent of Appellant to actually kill the Victim, as opposed to injuring or scaring him, and showed that it was not an accident or mistake that this particular individual was targeted and killed. (Amended Order, R.p. 764).

The trial court also addresses the potential of unfair prejudice in admitting this testimony, acknowledging the risk for the jury to use it as evidence of propensity. (Amended Order, R.p. 762). However, the Amended Order goes on to demonstrate that the danger of unfair prejudice in this case is decreased substantially by the other evidence tending to show the identity of Appellant as the shooter in Victim’s death. The trial court references the testimony of Appellant’s cell mate, Tim Smith, wherein Defendant told him of the specific plan and intent to

kill Victim, how Appellant did not think that Bethea would carry through with doing it himself, and admitted to killing Victim. (Amended Order, R.p. 762-63). Co-defendant Jeffrey Bethea identified Appellant as the shooter and corroborated the testimony of others who saw a small caliber pistol in Appellant's waste band that he used to murder the Victim. (Amended Order, R.p. 763). Brittney Maynor identified the shooter as wearing red shirt, red hat, and a red bandana, which was corroborated by both Nathaniel Douglas and Jeffrey Bethea. (Amended Order, R.p. 763). All of which the trial court accurately recounted and correctly attributes to "identity" evidence that would prevent the jury from convicting Appellant on the basis of propensity.

The trial court's 403 balancing test can only be overruled in the face of an abuse of discretion. Herein, Judge Hyman has provided an extensive legal reasoning for why Ms. Hammonds' testimony is admissible, and why it is "overwhelmingly" probative, along with accurate citations to proper authorities for his ruling. Additionally, numerous facts are discussed which show precisely how the evidence goes to show motive, intent, common plan, and absence of mistake under *Lyles*. Lastly, the court provided numerous facts proving Appellant's identity alleviate concern for unfair prejudice under improper propensity arguments. Consequently, there is no abuse of discretion in the trial court's ruling, and the admission of Ms. Hammonds' testimony under the court's 403 balancing test was proper.

While absent from the initial trial record, the trial court's Amended Order provides a level of analysis and factual findings that well exceed the common 403 balancing tests performed contemporaneous with the admission of the evidence. As such, the ruling of the trial court and the conviction of Appellant should be affirmed.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the judgments, convictions, and sentences of the trial court should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

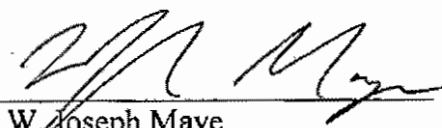
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ATTORNEYS FOR RESPONDENT

March 9, 2018

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Beaufort County

Larry B. Hyman, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BRIAN KENDRICK SPEARS,

APPELLANT,

Appellate Case No. 2017-000480

CERTIFICATE OF COMPLIANCE

RECEIVED
MAR 09 2018
SC Court of Appeals

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the April 15, 2014 Order of the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."


W. JOSEPH MAYE
Assistant Attorney General

March 9, 2018

CERTIFICATE OF SERVICE

I, **W. Joseph Maye**, hereby certify that I have served the Final Brief of Respondent in the foregoing by depositing copies in the InterAgency mail addressed to:

Robert M. Pachak
Appellate Defender
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, SC 29201

This 9th day of March, 2018.



W. JOSEPH MAYE
Assistant Attorney General

RECEIVED
MAR 09 2018
SC Court of Appeals

**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.

Brian K. Spears, Appellant.

Appellate Case No. 2017-000480

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2019-UP-230
Submitted June 3, 2019 – Filed June 26, 2019

AFFIRMED

Appellate Defender Robert M. Pachak and Appellate
Defender Taylor Davis Gilliam, both of Columbia, for
Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General W. Jeffrey Young, Deputy Attorney
General Donald J. Zelenka, Senior Assistant Deputy
Attorney General Melody Jane Brown, and Assistant
Attorney General William Joseph Maye, all of Columbia,
for Respondent.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities: *State v. Wallace*, 384 S.C. 428, 435, 683 S.E.2d 275, 278 (2009) ("Once bad act evidence is found admissible under Rule 404(b), the trial court *must* then conduct the prejudice analysis required by Rule 403, SCRE." (emphasis added)), *overruled on other grounds by State v. King*, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018); Rule 403, SCRE ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *State v. King*, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct. App. 2002) (stating when an on-the-record Rule 403 analysis is required, the appellate court "will not reverse the conviction if the trial [court's] comments concerning the matter indicate [it] was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts"); *State v. Hamilton*, 344 S.C. 344, 357, 543 S.E.2d 586, 593 (Ct. App. 2001) ("A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence should be reversed only in 'exceptional circumstances.'" (quoting *United States v. Green*, 887 F.2d 25, 27 (1st Cir. 1989))), *overruled on other grounds by State v. Gentry*, 363 S.C. 93, 610 S.E.2d 494 (2005).

AFFIRMED.¹

LOCKEMY, C.J., and SHORT and MCDONALD, JJ., concur.

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



The South Carolina Court of Appeals

JENNY ABBOTT KITCHINGS
CLERK

V. CLAIRE ALLEN
DEPUTY CLERK

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July 12, 2019

The Honorable Renee Elvis
PO Box 677
Conway SC 29528-0677

REMITTITUR

Re: The State v. Brian Spears
Lower Court Case No. 2007GS2603387, 2007GS2603388,
2007GS2603389, 2007GS2603390
Appellate Case No. 2017-000480

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,

A handwritten signature in cursive script, appearing to read "Jenny Abbott Kitchings".

CLERK

Enclosure

cc: Alan McCrory Wilson, Esquire
Robert M. Pachak, Esquire
Donald J. Zelenka, Esquire
William Joseph Maye, Esquire
W. Jeffrey Young, Esquire
Melody Jane Brown, Esquire
Taylor Davis Gilliam, Esquire

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

County of Horry)Brian K. Spears #340805)

Full name and prison number (if any) of Applicant)

20 11 CP26 1119)

v.)

APPLICATION FOR)

State of South Carolina)

POST-CONVICTION RELIEF)

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 Lee County Correctional
2. Name and location of Court which imposed sentence Horry County
General Sessions
3. Name(s) of co-defendant(s) (if any) Jeffrey Bethea ; Nathaniel
Douglas
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2007-GS-26-3387 (ABWIK)
 - (b) 2007-GS-26-3389 (ABWIK)

2019 SEP 26 PM 1:23
CLERK OF COURT
HORRY COUNTY

- (c) 2007-GS-26-3390 (ABWIK), 2007-GS-26-3388 (Murder)
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) 5-13-2010 (20 years ABWIK), 5-13-2010 (20 years ABWIK)
- (b) 5-13-2010 (20 years ABWIK), 5-13-2010 (30 years Murder)
- (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. State of South Carolina in the Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Remand to lower courts for ~~the record~~ failure
- ii. to conduct balancing test, instructions for trial judge to
- iii. conduct balance test which is subject to appeal, conviction affirmed
- (c) the date of each such result:
- i. SC court of appeals remanded on April 17 2013, on Feb. 9 2017
- ii. trial judge Larry B Hyman issued amended order on remand finding
- iii. probative value outweighing prejudice, Oct 13 2017 appealed trial judge
- (d) on the record balancing test, June 3 2019 SC court of appeals affirmed
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) _____
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) There is 5 issues which I raised which are
- (b) attached following this page. A, B, C, D, E
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) The facts which support my grounds are also
- (b) attached following this page
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. _____
- ii. _____
- iii. _____
- iv. _____

1. (Questions 10 & 11 of PCR application)

Grounds which I base my allegations I'm being held unlawfully and facts which support each of the grounds

A) Trial Counsel was ineffective for failing to call officer Mark Jackson who did an "Investigative Report" on 5-27-07 in which he interviewed Danielle Hammond (sister of murder victim Aaron Hammond) who told officer Mark Jackson that a friend of her brother (Lemark Irons) told her that Brian Spears (aka BOS) was the person who shot Aaron at Walmart in a prior bad act incident. The solicitor disclosed this "Investigative Report" in applicant's "Motion of Discovery"; Consequently, at trial the solicitor knowingly introduced false testimony by Danielle Hammonds that "her brother aaron told her that Spears (aka BOS) shot him at Walmart in Lumberton, N.C.; In Giglio v. United States, 92 S.Ct. 763 (1976) the court held that the deliberate deception of court and jury by the presentation of known false evidence is reversible error. See also State v. Jones, 541 S.E. 2d 813. This deliberate introduction of false propensity evidence used during trial and in the prosecutions closing arguments could very well be the basis of the jury's guilty verdict.

B) Trial Counsel was ineffective for failing to call a material witness, Shakeral Gordon (that was at murder scene) who did not pick Brian Spears (aka BOS) out of a photo line-up as the shooter, but did pick Jeffrey Bethea (aka Bird) out of photo line-up as the one who shot the victim (Aaron Hammond). Trial Counsel was provided an "Investigative Report" in Discovery with this information, it was essential to a proper defense. See, e.g. Thomas v. State, 117 S.E. 2d 531 (S.C. 1992) Not only was this witness essential for defense but it shed light on Jeffrey Bethea the only witness to claim he saw Brian Spears (aka BOS) commit the murder of Aaron Hammonds, there was no physical evidence connecting Spears to the shooting.

C) Trial Counsel was ineffective for failing to object to state's violation of applicant's right to confrontation by adverse witness when evidence was produced by state that ABWIK victims were shot by applicant when ABWIK victims were not present at trial for cross-examination by applicant. See State v. Graham, 444 S.E. 2d 525 (S.C. 1994); Inhke v. State, 402 S.E. 2d 777 (S.C. 1991)

(Questions 10 & 11 on PCR application)

Continuation of grounds and facts

D) Trial Counsel was ineffective for failing to move for verdict in arrest of judgment on grounds that the court lacked jurisdiction to try applicant's ABWIK offenses after amending the indictments during the charge to the jury. Applicant's ABWIK indictments charged that applicant committed the offenses "with Malice". The judge charged the jury on "ABWIK with Malice aforethought". As the "aforethought" element was not presented to grand jury, see State v. Brown, 23 S.E. 2d 381 (1942); State v. Taylor, 558 S.E. 2d 917 (S.C. App. 2001); State v. Simmons, 303 S.E. 2d 857 (1985); see also ABWIK statute § 16-3-20 (ABWIK is an unlawful act of violent nature to the person of another with "Malice aforethought", either expressed or implied); see also S.C. Code 17-19-100

(Amendment of indictments)

E) Ineffective assistance of appellant counsel failure to raise on appeal applicant's ground that trial court lacked subject-matter jurisdiction to convict him of Murder and ABWIK offenses. The applicant was provided a general sessions court calendar by the S.C. Court - Administration which showed there was no court term of general sessions for return of his indictments by a grand jury to confer subject-matter jurisdiction upon trial court to convict him. The applicant provided copy of calendar to appellate counsel to raise and argue this issue but counsel ignored request. Matters of subject matter jurisdiction may be raised at any time, Weinhaber v. State, 513 S.E. 2d 840 (S.C. 1999). To prove ineffective assistance of counsel, defendant must show that his attorney's performance was deficient, Shirley v. State, 411 S.E. 2d 215 (S.C. 1991).

(c) the disposition thereof:

- i. _____
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

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

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

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

- i. _____
- ii. _____
- iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) _____
- (b) _____
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- (a) your arraignment and plea? _____
- (b) your trial, if any? Yes
- (c) your sentencing? Yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? Yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? Yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. Barbara Wilson Pratt, Attorney at Law
408 Elm Street Conway, S.C. 29526
- ii. Appellate Defender Robert M. Pachak (retired)
P.O. Box 11589 Columbia, S.C. 29211
- iii. Appellate Defender Taylor D. Gilliam (assumed duty after
former Appellate Defender Retired) P.O. Box 11589 Columbia, S.C. 29211
- (b) the proceedings at which each such attorney represented you:
- i. Barbara W. Pratt represented me at trial, sentencing, and
notice for direct appeal, also at remand on the record balance test
- ii. Robert M. Pachak represented me on direct appeal
- iii. Taylor D. Gilliam represented me after Robert M. Pachak
retired he delivered news my conviction was affirmed
and closed my case with his office

19. State clearly the relief you seek in filing this application:

I seek to have my conviction reversed and be
granted a new trial

20. Are you now under sentence from any other court that you have not challenged?

No

2019 CP26 0129

STATE OF SOUTH CAROLINA)

County of Horry)

VERIFICATION

I, Brian K. Spears, 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.

Brian Spears

SWORN to and subscribed before me this 19
 day of Sept, 2019.

John Eastman (L.S.)
 Notary Public

My Commission Expires: 3/3/2026

HORRY COUNTY
 2019 SEP 26 PM 1:23
 CLERK OF COURT
 HORRY COUNTY, SC

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

20 19 CP26 6129

I, Brian K. Spears, 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.

Brian Spears
Applicant

SWORN or affirmed to and subscribed before me this

19 day of Sept, 2019.

Debra Cantelero
Notary Public

My Commission Expires: 3/3/2024

HORRY COUNTY
2019 SEP 26 PM 1:23
NEW JERSEY
CLERK OF COURT
HORRY COUNTY, SC

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Brian K. Spears, #340805,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No. 2019-CP-26-6129

**RETURN AND MOTION FOR A
MORE DEFINITE STATEMENT**

NOW COMES Respondent, making its return to the post-conviction relief (hereafter “PCR”) application filed on September 26, 2019 by Brian K. Spears (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 Horry County Clerk of Court. During its August 2007 term, the Horry County Grand Jury indicted Applicant for three counts of Assault and Battery with Intent to Kill (hereafter “ABWIK”) (2007-GS-26-3387, -3389, and -3390), and Murder (2007-GS-26-3388). Applicant was represented by Barbara W. Pratt, Esquire. Assistant Solicitors Donna E. Elder, Esquire, and Lawrence R. Filiberto, Esquire of the Fifteenth Circuit Solicitor’s Office prosecuted the case. On May 10-13, 2010, Applicant proceeded to a jury trial where he was ultimately convicted as indicted. The Honorable Larry B. Hyman, circuit court judge, presided over the trial. Judge Hyman sentenced Applicant to thirty years’ imprisonment.

Applicant’s First Direct Appeal: (2010-162287)

Applicant appealed his convictions and submitted a final brief on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the

court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, Respondent filed a petition for rehearing *en banc*. On May 2, 2013, Applicant filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013.

Respondent filed a petition for writ of certiorari on July 12, 2013. Applicant filed a petition for writ of certiorari on July 15, 2013. On September 11, 2014, the South Carolina Supreme Court issued an order denying the petitions of both parties.

The rehearing on remand for the Rule 403, SCRE balancing test was not heard until December 8, 2016. On February 9, 2017, the Honorable Larry B. Hyman issued his amended order on remand for the Rule 403 hearing, finding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, nor that there was an undue tendency to suggest a decision on an improper basis brought on by a propensity argument.

Applicant filed his notice of appeal on February 23, 2017. Through Counsel Robert Pachak, Applicant raised the following issue:

Whether the lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice.

Briefing concluded on or around March 21, 2018. An opinion affirming the conviction was issued pursuant to Rule 220(b), SCACR. *State v. Spears*, Op No. 2019-UP-230 (filed June 26, 2019). The remittitur was issued on July 12, 2019.

II. Statement of Facts

On May 26, 2007, Applicant, along with Nathaniel “June” Douglas, Ishmael “Ish”

Douglas,¹ and Thomas “T.C.” Shaw (collectively Applicant’s group), all of whom were affiliated with the gang 41-Curve, left Lumberton, North Carolina and went to Myrtle Beach over the weekend.² (Tr. 274-75, 288-289, 295-96, 360-61, 365, 439, 566-67, 584).

When they arrived, the group was joined by fellow 41-Curve member, Jeffrey “Bird” Bethea. (Tr. 289-90). Applicant was wearing a white t-shirt and a black t-shirt underneath a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas, was wearing a red O.J. Simpson jersey. (Tr. 288-89, 299). Trial testimony showed that red was the color of the “East Side Bloods”, a rival gang and that gang members often wear the color of a rival gang when intending to “go do something”. (Tr. 279-280).

Shortly after Bethea’s arrival, a member of Applicant’s group stated they observed Aaron Hammonds (hereafter “Victim”) walking down Ocean Boulevard. (Tr. 572). Victim was a high-ranking member of the East Side Bloods, and served four years in prison for “accessory after the fact” in the murder of 41-Curve member Eric Floyd. (Tr. 225-26, 273-75, 289-291).

Victim, Lemark Irons, and other members of the East Side Bloods were walking together along Ocean Boulevard. (Tr. 192-193, 196-197). Irons left the group and approached Applicant’s group to compliment them on their clothes and jewelry stating “we need to stop beefing and get money together.” (Tr. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, attempted to shake Bethea’s hand with his left hand, which was considered disrespectful. (Tr. 301). In response, Bethea slapped Irons’ hand and began cursing at him. (Tr. 301, 312). Irons left the group, crossed the road, and rejoined his group. (Tr. 301, 197-98).

Immediately thereafter, Bethea, a high-ranking member of 41-Curve, became angry and

¹ Ishmael “Ish” Douglas is also known as Wa-Gee. (Tr. 296).

² Applicant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (Tr. 274-75, 288, 289, 360-61, 365, 439, 584).

began talking to Applicant, a foot soldier in the gang who did not get along with Victim. (Tr. 290, 440, 302, 310, 447-49). Applicant said to Bethea that he thought Irons and his group, including Victim, would kill someone in their group, unless they killed someone from the other group first. (Tr. 447-48). Thus, a shooting occurred resulting in Victim's death and three bystanders getting wounded. (Tr. 132, 156-57, 171, 189, 203-11, 216-18).

Eyewitness Brittney Maynor testified at trial that the shooter was a black male, about five-foot-seven, and was wearing a red shirt, a red bandana over his face, a red fitted hat, and another red bandana on his wrist. (Tr. 203-04, 209, 211). She noted that the shooter crossed the road and was right in front of her when he began shooting. (Tr. 194, 203, 206). Maynor told the jury that she turned and ran when she heard "five or six" shots. (Tr. 207, 210). She described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (Tr. 211).

At the crime scene, authorities interviewed multiple witnesses and produced a composite sketch matching Bethea's description. (Tr. 354-55). Eight shell casings were recovered from the crime scene and three bullets recovered from Victim's body during the autopsy. (Tr. 161-63, 173-74). SLED Agent Suzanne Cromer then testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (Tr. 431-32).

After interviewing Bethea, authorities spoke with Applicant in Lumberton on June 4, 2007, where Applicant repeatedly denied being in Myrtle Beach on the date in question, instead claiming he was in Lumberton all weekend and told authorities that he did not hang around Bethea. (Tr. 355, 358-59, 361). Following the first interview, Applicant was charged with one count of Murder and three counts of ABWIK. (Tr. 363-64).

On June 7, 2007, Applicant was interviewed again. (Tr. 363-64). After waiving extradition, Applicant admitted to law enforcement that he was in Myrtle Beach on the date in

question, but insisted that after the altercation between Bethea and Irons he walked away and, when he heard gunshots, fled the scene. (Tr. 363-64, 367-68).

Applicant's co-defendants, Nathaniel Douglas and Jeffrey Bethea, also testified at trial. (Tr. 287-350, 437-99). Nathaniel Douglas said that after Irons' initial dispute with Bethea he walked off while Applicant remained with the rest of the group and approximately ten minutes after he left the group, he heard gunfire and saw Applicant and the other members of his group running up the street. (Tr. 302, 304-05). Douglas also confirmed that Applicant had a handgun in his waistband that night and that Bethea did not appear to be carrying a gun. (Tr. 302-04). Meanwhile, Bethea confirmed that Douglas left the group and explained that he and Applicant approached Irons' and Victim's group and attacked them. (Tr. 449). Bethea told the jury that Applicant pulled out a handgun and began shooting. (Tr. 450-51).

To corroborate Bethea's version of the shooting, the State also introduced rap lyrics written by Applicant which indicated he killed Victim to avenge Eric Floyd's death. (Tr. 293-95, 406-07, 415). There was also testimony from Applicant's former cellmate Timothy Smith, who told the jury that Applicant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him and he had pushed through the crowd and shot Victim because he believed Bethea would not. (Tr. 499-522). Smith, testified that Applicant told him he received a phone call that Victim was in Myrtle Beach for bike week prompting Applicant's and his friends to come to Myrtle Beach to "go take care of him". (Tr. 505-07).

Alexis Brown, a member of Irons' and Victim's group that night, testified that the composite generated by authorities was Bethea, but confirmed that the shooter was wearing a red bandana over his face and pulled a gun from his waistband. (Tr. 544, 547-48, 550-51).

Finally, Applicant testified in his own defense. (Tr. 565-611). Specifically, Applicant

explained he had walked off following the dispute between Irons and Bethea, heard gunshots and ran back to the K-Mart parking lot to meet with the rest of his group. (Tr. 575-76). He said he did not shoot anyone. (Tr. 566). On cross-examination, Applicant said he brought a gun to Myrtle Beach, but left it in the car and that he owned a .380, but gave it away. (Tr. 589, 600).

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. Defense counsel was ineffective because:
 - a. “Trial counsel was ineffective for failing to call Officer Mark Jackson from his ‘Investigative Report’.”
 - b. “Trial counsel was ineffective for failing to call a material witness . . . who did not pick Applicant out of a photo line-up.”
 - c. “Trial Counsel was ineffective for failing to object State’s violation of Applicant’s right to confrontation by adverse witness when evidence was produced by state that ABWIK victims were shot by an Applicant when ABWIK victims were not present at trial for cross-examination by Applicant.”
 - d. “Trial counsel was ineffective for failing to move for verdict in arrest of judgement on grounds that the court lacked jurisdiction to try Applicant’s ABWIK offenses after amending the indictments during the charge to the jury.”
 - e. “Ineffective assistance of appellant counsel failure to raise on appeal applicant’s ground that trial court lacked subject matter jurisdiction to convict him of murder and ABWIK offenses.”

Attached to and incorporated herein are Applicant’s Horry County Clerk of Court Records, Applicant’s South Carolina Department of Corrections Records, the trial transcript, the PCR application, and the direct appeal records. Respondent reserves the right to amend this return upon receipt of additional relevant information.

IV. Argument

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 that “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, which the Supreme Court expanded upon through developing the two-pronged test outlined 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 the preponderance of the evidence³ that counsel’s actions fell outside of the zone of “reasonableness under prevailing professional norms.” *Strickland*, 466 U.S. at 688. 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 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

³ As per Rule 71.1(e) SCRC

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).

Failure to Call Witnesses

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*, 315S.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).

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'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).

Applicant claims Counsel was ineffective for failure to call Officer Mark Jackson and "a material witness" but does not state why Counsel was ineffective for calling them, what testimony they would have offered, or how the results of the proceeding may have been different, but for the alleged deficiency. Thus, a more definite statement is needed for Respondent to ascertain whether or not the allegation has merit.

Failure to Object

Applicant claims Counsel was ineffective for failing to object to the State's evidence at trial. 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”).

Applicant claims Counsel was ineffective for failing to object at trial to evidence produced by the State. However, he fails to state on what basis, why the objection likely would have been sustained, how it would have affected the results at trial, or why Counsel was deficient for failing to object. A more definite statement is needed.

Failure to Move for Directed Verdict

Applicant claims Counsel was ineffective for failing to move for a directed verdict for lack of jurisdiction. Applicants are not entitled to directed verdicts as a matter of law, and counsel will not be found ineffective for failure to move for a directed verdict if the motion would have been denied when viewed in the light most favorable to the State. *See Teamer v. State*, 416 S.C. 171, 181, 786 S.E.2d 109, 114 (2016) (finding counsel was not ineffective for failing to request a directed verdict when, viewed in the light most favorable to the State, ample evidence of the defendant’s guilt was clear). Further, “[c]ircuit courts obviously have subject-matter jurisdiction to try criminal matters.” *State v. Gentry*, 363 S.C. 93, 101, 610 S.E.2d 494, 499 (2005). Thus, Respondent contends this allegation is likely without merit. However, a more definite statement is still needed to ascertain whether or not the allegation has merit, given the fact that Applicant has failed to state exactly why he is entitled to a directed verdict, why Counsel was deficient for not requesting a directed verdict, or how he was prejudiced by this alleged deficiency. Thereafter, Respondent respectfully requests an evidentiary hearing because the allegation presumably raises questions of fact the record does not conclusively refute.

Ineffective Assistance of Appellate Counsel

A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). “Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Applicant must show appellate counsel’s performance was deficient, and he was prejudiced by the deficiency. *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Thrift v. State*, 302 S.C. 535, 537, 397 S.E.2d 523, 525 (1990).

Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . .”)).

When a claim of ineffective assistance of counsel is based upon neglecting to file a merits-based brief, Applicant must show that appellate counsel unreasonably failed to discover non-frivolous issues and file a merits brief raising them, and a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he or she would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Applicant must show that a reasonably competent attorney would have found one non-frivolous issue warranting a merits brief, and that

the issue identified would have won on appeal. *Id.* at 288.

Applicant claims Appellate Counsel was ineffective for failing to raise the issue of lack of subject matter jurisdiction on appeal. However, he does not state why Counsel unreasonably by failing to raise this issue or why he would have prevailed on appeal. Thus, a more definite statement is needed.

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 plea counsel was constitutionally ineffective because of failure to move for a direct verdict, failure to call witnesses, failure to object to the State’s evidence, and failure on the part of Appellate Counsel to raise a specific issue on appeal. 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 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 an application for post-conviction relief, 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 explain in this return is hereby denied by 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 respectfully requests that the Court hold an evidentiary hearing regarding Applicant's allegations.

Respectfully submitted,

ALAN WILSON
Attorney General

W. JEFFREY YOUNG
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March 3, 2021

1 State of South Carolina) **TRANSCRIPT OF RECORD**
2 COUNTY OF HORRY) CASE NO. : 2019-CP-26-06129

3 -----

4 September 6, 2022

5 **BEFORE:** The Honorable Kristi F. Curtis

6 -----

7

8 Brian K. Spears,)

9 Applicant,)

10 vs.)

11 State of South Carolina,)

12 -----

13 **APPEARANCES:**

14 Chelsey F. Marto, Esquire
15 Attorney for the State of South Carolina

16 Steven W. Fowler, Esquire
17 Attorney for the Defendant.

18 **Witnesses**

19 Barbara Pratt, Esquire

20 Robert M. Pachak, Esquire (virtual)

21 Taylor G. Gilliam, Esquire (virtual)

22

23 Julie A. Kevish
24 Official Court Reporter

25

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September 6, 2022

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P-R-O-C-E-E-D-I-N-G-S

5

MS. MARTO: Good afternoon, Your Honor.

6

THE COURT: Good afternoon.

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MS. MARTO: We are here today in the case of Mr.

8

Brian Spears versus the State of South Carolina, docket number

9

2019-CP-26-6129. In August, 2007 he was indicted for three

10

counts of assault and battery with intent to kill and murder.

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He was represented by Ms. Barbara Pratt. On May 10th through

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the 13th, 2010 he proceeded to a jury trial where he was found

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guilty as indicted. He was sentenced to 30 years imprisonment.

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He appealed his convictions and submitted a final brief

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September 12, 2011, oral argument in the Court of Appeals was

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held January 17, 2013. April 17, 2013 the Court issued an

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Opinion remanding the case to a Trial Court for it to conduct

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an on the record balancing test under Rule 403. On April 26,

19

2013 he filed a petition for a -- or Respondent filed Petition

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for rehearing en banc. On May 2, 2013 he filed a Petition for

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rehearing, and both were denied. Respondent filed a Petition

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for writ of cert July 12, 2013 and filed a petition for writ

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of -- Applicant filed one on July 15, 2013. September 11, 2014

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South Carolina Supreme Court issued an order denying the

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petitions. The rehearing on remand was heard December 8, 2016.

1 February 9, 2017 Judge Hyman issued an amended order on remand
2 for the 403 hearing finding that the danger of unfair prejudice
3 did not substantially outweigh the probative value nor that
4 there was an undue tendency to suggest decision on the improper
5 basis brought on by a propensity argument. Applicant filed his
6 notice of appeal February 23, 2017 and raised the issue whether
7 the lower court in its order on remand was incorrect in ruling
8 that the probative value of prior similar bad acts was not
9 outweighed by the danger of unfair prejudice. Brief then
10 concluded March 21, 2018, an Opinion affirming the conviction
11 pursuant to Rule 220 was issued and the remittitur issued
12 July 12, 2019. Application was filed September 26, 2019 and
13 the State's return made March 3, 2021. With that I'll turn it
14 over to Mr. Fowler.

15 THE COURT: Mr. Fowler?

16 MR. FOWLER: Your Honor, I'd like to call Mr. Spears
17 to the witness stand, please.

18 BRIAN K. SPEARS WAS DULY SWORN AT THIS TIME AND
19 TESTIFIED AS FOLLOWS:

20 THE CLERK: Please have a seat, sir, and state your
21 name for the Court and spell your last name, please.

22 THE APPLICANT: My name is Brian K. Spears,
23 S-p-e-a-r-s.

24 MR. FOWLER: May I begin, Your Honor?

25 THE COURT: Yes.

1 MR. FOWLER: Mr. Spears, I notice you're wearing a
2 mask. Do you wish to take that off, is it acceptable for him
3 to take the mask off, Your Honor?

4 THE COURT: Yes, that's fine with me.

5 MR. FOWLER: Okay. Secondly, Your Honor, I'll
6 probably be approaching the witness quite a bit, if that's
7 acceptable?

8 THE COURT: Sure.

9 **DIRECT EXAMINATION**

10 BY MR. FOWLER:

11 Q. Mr. Spears, do you recognize this document?

12 A. Yes, sir.

13 Q. What is that?

14 A. That's my PCR application.

15 Q. And this is your verification signature at the back; is
16 that correct?

17 A. Yes, sir.

18 Q. And you and I have spoken about this a couple times at
19 least, correct?

20 A. Yes, sir.

21 Q. And then we spoke this morning, right?

22 A. Yes, sir.

23 Q. Are you familiar with your application?

24 A. Yes, sir.

25 Q. In question number ten of the application it states, let

1 me get to it: State concisely the grounds on which you base
2 your allegation that you are being held in custody unlawfully.
3 And you state: There is five issues which I raised which are
4 attached to following page A, B, C, D and E; is that correct?

5 A. Yes, sir.

6 Q. Fantastic. My understanding is that question ten(a) you
7 state that trial counsel was ineffective, and this is the trial
8 counsel, not the appellate counsel, you state that trial
9 counsel was ineffective for failing to call Officer Mark
10 Jackson who did an investigative report. Now, who is Officer
11 Mark Jackson?

12 A. He was one of the lead investigators on the case.

13 Q. And what about this investigative report, what is that?

14 A. The investigative report was disclosed in discovery and
15 it was basically just all of the witnesses and the evidence
16 that they had gathered.

17 Q. And you state here on May 27, 2007 in which he
18 interviewed Danielle Hammond, sister of the murder victim,
19 Andrew Hammond. Okay? So what was the significance of Mark
20 Jackson with your trial?

21 A. Well, Mark Jackson, he could have impeached the
22 testimony for the simple fact that in the investigative report
23 that was given to me by my attorney it clearly stated in there
24 that the Mark Irons, the victim's friend told her about the
25 prior bad act, but come time for trial all of the sudden it's

1 transformed into the victim has directly -- the deceased victim
2 has directly told his sister about the prior bad act now.

3 Q. So you're saying that there was some discrepancy between
4 the investigative report and what was heard at trial?

5 A. Yeah, a big discrepancy.

6 Q. And once again, if you could explain that discrepancy
7 one more time?

8 A. The discrepancy would be, from the beginning of the
9 investigative report you could clearly see that it's basically
10 hearsay because if Mark Irons is the one who is telling her
11 that a prior bad act occurred where there was a lead shootout
12 between me and the deceased victim, but now when it comes time
13 for trial she's directly saying that her brother told her this
14 out of his mouth, that's not what she told Mark Jackson.

15 Q. Do you feel like that was prejudicial to you at the
16 trial?

17 A. Yeah, it was extremely prejudicial because I was in
18 there using it as propensity evidence because they're going to
19 try to say it was a common scheme going on like it was a back
20 and forth, but clearly that's not what was going on because I
21 was never charged with this crime or anything or questioned or
22 anything of that matter and it only came up in this situation
23 right here and there was no real realm on the situation so for
24 it just come up and to be used in closing arguments, like, you
25 know what I'm saying, that the jury could have easily come to

1 the conclusion that if he shot him this time then he had to be
2 the guy who shot him this time.

3 Q. Did you discuss that with your attorney?

4 A. Yes, sir.

5 Q. And she's in the courtroom here today, correct?

6 A. Yes, sir.

7 Q. What was your conversation with you and her about this
8 wanting Mark Jackson?

9 A. Well, we looked at the paperwork and she clearly seen
10 what I was saying about Mark telling the -- and she was telling
11 me, she was, like, well -- that's when she let me know that,
12 well, that's not what she's saying now and we're about to hold
13 an in camera to where she's gonna say that her brother directly
14 told, you know what I'm saying, her that the prior bad act had
15 happened. And I was, like, well, that's not what it's saying
16 in the investigative report, and she was, like, I understand
17 that and we're going to have to work on that and that's why
18 we're gonna have the in camera first before they even put her
19 on the stand during the trial with the jury present.

20 Q. Now, basically you're saying that now -- what's the
21 relationship between Mark Jackson and Danielle Hammond that you
22 quote in 10(a)?

23 A. Well, the connection is he was the one who interviewed
24 her and I felt like he had the capabilities, you know, to
25 impeach her testimony, or even if she would have produced the

1 handwritten, you know what I'm saying, order, what you call it,
2 a transcript of the recording of the initial statement, she
3 would have been able to impeach that in Hammond's there on the
4 stand because she asked Daniel Hammonds, do you recall telling
5 Mark Jackson this, and she simply just said "no," and then she
6 moved on when she should have had the statement to refresh her
7 memory and make her say on the record that she did tell Mark
8 Jackson that Mark Irons told her that.

9 Q. Did you discuss that with your attorney?

10 A. Yes, sir.

11 Q. What did she say?

12 A. Well, she said that she was gonna -- she worked -- she
13 tried to, you know what I'm saying, keep it out of the
14 argument, but she didn't call Mark Jackson and she didn't have
15 the statement. She never presented me with Danielle -- no,
16 actually, I never got any verbal statement from Danielle
17 Hammonds, period.

18 Q. Do you feel like that was prejudicial to you?

19 A. Yeah, it didn't give me a proper chance to defend
20 against her testimony or even impeach her.

21 Q. It says here: Consequently at trial the Solicitor
22 knowingly introduced false testimony by Danielle Hammonds that
23 her brother Aaron told her that Spears shot at him at the
24 Wal-Mart in Lumberton in North Carolina. You know, that's a
25 fairly strong statement in my opinion. Tell me a little bit

1 about that in terms of what you feel like the solicitor maybe
2 knowingly introduced false testimony?

3 A. Well, the investigative report came from a disclosure on
4 the discovery, you know what I'm saying, a motion of discovery,
5 so obviously the solicitor had the information first, you know,
6 the detective is basically working on their side. They're
7 interviewing the witnesses off of the strength of the State, so
8 what that means is once she has it she already knew, and then
9 come time for trial it's like they had the perfect explanation
10 for excited utterance. All of the sudden it transformed from
11 blatant hearsay from the Mark Irons to, now he's coming in and
12 he's bleeding so it's an excited utterance exception to allow
13 this in.

14 Q. And then your question number 10, you quote:
15 G-I-G-L-I-O versus United States and State versus Jones; is
16 that correct?

17 A. Yes, sir.

18 Q. And you feel like those cases are relevant in this
19 matter?

20 A. Yes, sir.

21 Q. Why do you feel that?

22 A. I mean, it's been a while since I looked over, it's been
23 a while since I looked over the case law.

24 Q. Just in general.

25 A. In general, I mean, I just feel like if somebody is

1 introducing false propensity evidence, which is basically
2 perjury testimony, you know, it's extremely prejudicial, you
3 know, it should have been dealt with on the scene, I felt like,
4 because if we had the statement or we could have impeached
5 her or Mark Jackson could have possibly spoke up and said what
6 actually happened then it would have been revealed and I feel
7 like we could have nipped it in the bud. The jury wouldn't
8 have had to hear it in closing arguments either.

9 Q. Gotcha. You state in conclusion of section 10(a) that:
10 This deliberate introduction of false propensity evidence used
11 during trial and in the prosecutor's closing arguments could
12 very well be the basis of the jury's guilty verdict. Why did
13 you say that?

14 A. Well, like I said, they're gonna try to link it in as a
15 common scheme of plans and they're gonna say that -- you know,
16 it's reasonable for a jury to conclude if he shot him then,
17 then he on probably finished him out, you know, so it's easy
18 for them to conclude that from just getting that piece of
19 information like that, which I feel like kind of overshadowed
20 what was actually going on in the case of the -- for each
21 circumstantial case they did have.

22 Q. Anything else on question 10(a) that you feel like might
23 be relevant to this action?

24 A. No, sir.

25 Q. You state in ten(b) that trial counsel was ineffective.

1 Well, let me ask you one other question. In this 10(a) you
2 talked about Lemar Irons, or Lemark Irons, how do can you
3 pronounce his name?

4 A. Lemark Irons.

5 Q. Tell me a little about, since you mention it here in the
6 application, tell me a little bit about Lemark Irons?

7 A. Well, Lemark Irons was a witness -- he was a friend of
8 the victim of the deceased and he was -- he was never called,
9 but he's the guy in the investigative report that Mark Jackson
10 says that Danielle Hammonds told her that Lemark told her about
11 the prior bad act, you know, but never called, he was never
12 called as a witness.

13 Q. Did you discuss with your attorney him being called as a
14 witness?

15 A. Yes. I discussed Lemark being called as a witness.

16 Q. What did your attorney say to you about that?

17 A. I don't recall. I don't think she had any plans on
18 using Lemark.

19 Q. Well, did you mention that you wanted Lemark Irons as a
20 witness at the trial?

21 A. No, I didn't mention that I wanted Lemark Irons as a
22 witness. I didn't think he was necessary. I thought Mark
23 Jackson and the statement itself was enough.

24 Q. So your contention is Mark Jackson should have been
25 called, correct?

1 A. Yeah, that's my contention. Lemark never gave a
2 statement on the prior bad act to the police, period.

3 Q. Okay. If nothing else on 10(a), in 10(b) you talk
4 about: Trial counsel was ineffective for failing to call a
5 material witness, Shakera Gordon, who you say was at the murder
6 scene. Tell me a little about Shakera Gordon and what her
7 relevance is to today's action regarding your attorney's
8 performance?

9 A. Okay. Shakera Gordon was the friend of one of the ABWIK
10 victims.

11 Q. And when you say, "ABWIK," what do you mean by that?

12 A. Assault and battery with intent to kill. She was, you
13 know, one of the other bystanders who was hit by a stray
14 bullet, I'm presuming, and she was the friend of one of them,
15 but she is the only witness who positively picked somebody out
16 of a photo lineup. There was a lineup conducted of me and
17 several other people who were down here at the beach that were
18 a part of my group and Jeff Bethea is the only one who was
19 positively picked out of a photo lineup and Shakera Gordon was
20 the person to do so for it.

21 Q. So in summery, you're saying that Shakera Gordon picked
22 out a Jeffrey Bethea in a lineup and not you; is that correct?

23 A. Yes, sir.

24 Q. Did you have any kind of conversations with your
25 attorney about that?

1 A. Yes, sir.

2 Q. What was the basis of the conversation?

3 A. The conversation was this right here is the key
4 component. She seen everything and she has no dog in the
5 fight. She doesn't know me, she doesn't know the victim.
6 She's not from where I'm from. She has no reason to lie. You
7 know, I don't see why she wouldn't be called as a material
8 witness when she's the only reliable witness that we have
9 that's identifying anybody as the killer.

10 Q. So what relationship, or how did your attorney inquire
11 anything about Shakera Gordon. Did she just look at the
12 investigative report, did she interview Shakera Gordon, what
13 happened there, to the best of your knowledge?

14 A. I was going to say, no she didn't interview him, but I
15 don't know that for a fact, but one thing I do know is she told
16 me that she wasn't going to call her because she was calling
17 the other witnesses that she felt would be copulative, you know
18 what I'm saying, evidence that she felt like was going to be
19 piled on, other people were gonna be saying the same things,
20 but nobody else that was a witness picked anybody out of a
21 photo lineup, and you know, she's the only witness that
22 positively picked the shooter out.

23 Q. So you're saying that your counsel did not call Shakera
24 Gordon who picked somebody other than you out of a lineup; is
25 that correct?

1 A. Yes, sir.

2 Q. Do you feel like that was prejudicial to you?

3 A. Yes, sir.

4 Q. Do you feel like that was a deficiency in the
5 performance of your attorney?

6 A. Yes, sir, because our main defense is that Jeffrey
7 Bethea is the sole shooter and he's the only person who was
8 connecting me to this crime. He was the person who positively
9 identified me, so if this is the person that the State's
10 relying on then I feel like it should be known that it's a
11 witness that's picking him out of the lineup that I never was
12 picked out of.

13 Q. You said you felt it was cumulative --

14 A. That's the word, sir.

15 Q. -- but it wasn't cumulative as to others picking someone
16 out of the lineup; is that correct?

17 A. Yeah. No one else testified to what she could have
18 testified to. Nobody else could pick anybody out and
19 positively identify what the shooter looked like. Shakera
20 Gordon was the only person that could pick somebody out of a
21 photo lineup.

22 Q. Anything else about Shakera Gordon that you feel is
23 relevant?

24 A. Like I said, Shakera Gordon was down there with one of
25 the ABWIK victims, you know, she was a close friend to her, and

1 who knows what other information that she possibly could have
2 had if I would have had a chance to, you know, cross-examine
3 her because the only person who got to speak to her was,
4 obviously, the detectives.

5 Q. And this was something that was known, correct?

6 A. Yes, sir. It was in the investigative report and it was
7 supplied to me and my attorney.

8 Q. That's what I was going to get to. You say here: Trial
9 counsel was provided an investigative report in discovery of
10 this information and it was an essential to the proper defense.
11 So there wasn't any secret that Shakera Gordon and her lineup,
12 what she did with the line up?

13 A. No, it was no secret, sir.

14 Q. Okay. Fantastic. You mentioned some case law here, but
15 you state here: Not only was this witness essential for
16 defense, but it shed light on Jeffrey Bethea, the only witness
17 to claim he saw a Brian Spears commit the murder, there was no
18 physical evidence. Okay. So with the physical evidence part,
19 how does that tie into Shakera Gordon and your response here?

20 A. Well, the entire case, sir, is a circumstantial case.
21 There is no fingerprints on any shell casings or there was no
22 firearm retrieved. There's no other witnesses to the homicide
23 except for Shakera Gordon and Jeffrey Bethea who is pointing
24 the finger at me, but you have Shakera Gordon pointing the
25 finger at him. She's the one who basically jump started the

1 investigation.

2 Q. Anything else on 10(b) that you wish to bring to the
3 Court's attention?

4 A. No, sir.

5 Q. You mention in 10(c): Trial counsel was ineffective for
6 failing to object to State's violation of Applicant's right to
7 confrontation by -- okay. Let me start this over again: Trial
8 counsel was ineffective for failing to object to the State's
9 violation of Applicant's right to confrontation by adverse
10 witness when evidence was produced that the State victims were
11 shot by Applicant by when victims were not present. So tell me
12 a little about 10(c) here in terms of confrontation of adverse
13 witness, as I understand it?

14 A. It's the same scenerio. The only person who got to
15 speak to these gunshot victims were the detectives. I'm not
16 sure -- I don't think my lawyer had a private investigator
17 reach out to these people and speak to these people, but if I'm
18 being put on trial and convicted for shooting these said people
19 then I should have the right to confront them and question them
20 and ask them questions relating to the incident, because who
21 knows what could have came out during trial.

22 Q. Any particular persons come to mind on of this adverse
23 witness, again? You said by confrontation by adverse witness,
24 and who specifically was the adverse witness, do you have a
25 particular name in mind?

1 A. I don't -- I don't remember all of the gunshot -- I know
2 there was three of them, but I would have liked to have
3 cross-examined them, especially the one that was down there
4 with Shakera Gordon.

5 Q. So you're saying that there were other victims?

6 A. Yes, there was three other victims.

7 Q. Okay. And how did your trial counsel approach them, or
8 did she?

9 A. She didn't.

10 Q. Do you feel like that was prejudicial to you?

11 A. Yes, sir.

12 Q. Anything else on 10(c)?

13 A. No, sir.

14 Q. You mentioned in 10(d) that trial counsel was
15 ineffective for failing to move for a verdict in arrest of
16 judgment on grounds that the court like jurisdiction to try
17 Applicant's offenses after amending the indictments during the
18 charge to the jury. Tell me a little bit about that.

19 A. Okay. So when it comes to -- I mean, some people in
20 here should know, but when it comes to indictment or charges,
21 its certain elements that must be made and brought forth in
22 order for the charges to even be, you know, placed on me, so
23 with that, a malice aforethought, when the trial judge
24 instructed the jury, you know, for them to go on to
25 deliberations he amended the indictment by adding the

1 "aforethought," I believe that's what he left out, the
2 "aforethought" part that wasn't presented to the grand jury, so
3 this wasn't presented to the grand jury. The indictment wasn't
4 even done right in the first place because it's supposed to
5 have "aforethought," malice aforethought" in there, but with
6 the "aforethought" part being left out and him noticing that
7 and then trying to change it in the middle of the trial and
8 amend it when he sent it to the jury, I felt like that was an
9 error right there.

10 Q. So you state here: Applicant's indictments charge that
11 the Applicant committed the offenses with malice and the judge
12 charged the jury on assault and battery with intent to
13 kill with malice aforethought, as the aforethought element was
14 not presented to the grand jury. Tell me about that. You
15 touched on it earlier, but tell me about the "aforethought"
16 action. Are you saying that they left out an element of the
17 charge?

18 A. Yeah. In the indictment they left out the
19 "aforethought," and the judge, I guess he picked up on it and
20 wanted to amend it himself when he was sending it to the jury
21 for deliberations.

22 Q. Tell me about, what did your attorney say or do in
23 regards to this?

24 A. She didn't have anything to say about that.

25 Q. Did you talk to her about it?

1 A. I didn't even -- at that time I didn't even catch it. I
2 didn't catch it until I got my trial transcript and started
3 reading through it, and then that's when I picked up on it.

4 Q. But in retrospect, you feel like that was an error she
5 made; is that correct?

6 A. Yeah, that was an error.

7 Q. Do you feel like that was prejudicial to you?

8 A. Yes, sir.

9 Q. Anything else on 10(d) that you wish to bring to the
10 Court's attention?

11 A. No, sir.

12 Q. Then in 10(f) -- no, excuse me, 10(e) it states:
13 Ineffective assistance of appellate counsel, and this is where
14 we get to the appellate counsel, correct?

15 A. Yes, sir.

16 Q. Failure to raise on appeal Applicant's ground that the
17 trial Court lacked subject matter jurisdiction to convict him
18 on murder and assault and battery with intent to kill offenses.
19 Tell me a little bit about that.

20 A. Well, basically, what's going on with that is, during
21 the trial my lawyer tried to have two of the indictments --
22 well, I think she tried to have all of the indictments quashed
23 because she found out that two of the indictments didn't even
24 have the Solicitor's signature on it. She said -- her exact
25 worries were, is missing the rubber stamp, I think that's what

1 she said, her exact words, missing the rubber stamp. So that
2 peaked my interest. Even though the judge, he didn't take
3 into, you know what I'm saying, I don't think he took into
4 account what she was saying about the indictments. He started
5 going into gentry and all that, so we moved from that and when
6 I get my trial transcript and I start to pay attention to it I
7 said, let me write the Clerk of Court for South Carolina, I
8 think it was the Chief Justice Office and the secretary sent me
9 a court calendar for terms of General Sessions for an August of
10 2007 term and I look at the terms and I started doing research
11 on indictments and I realize, you know, a grand jury has to be
12 convened during the term of General Sessions Court, and that
13 court calendar that was provided to me and notarized, I didn't
14 see any terms for General Sessions court, so I don't see how I
15 can be indicted or that these indictments even be valid.

16 Q. Do you recognize this document?

17 A. Yes, sir.

18 Q. What is that?

19 A. This is the letter that I typed up to my appellate
20 defense and I advised them, I state the case law, I spoke to
21 them about the grand jury, the grand jury can't be convened in
22 the term of Common Pleas, it has to be during a General
23 Sessions Court. I drew up all the codes for him, and I sent it
24 to him and I said let the record state and reflect that I want
25 you to raise this to matter for me, and what he did was he just

1 put a note of my indictments into the brief. He didn't even
2 raise the argument.

3 Q. And this is a two-page letter, correct?

4 A. Yes, sir.

5 Q. And you typed this to yourself, correct?

6 A. Yes, sir.

7 Q. And that's your signature at the bottom, correct?

8 A. Yes, sir.

9 Q. Okay. And you state that the second page is an

10 attachment of the calendar with terms of Circuit and Family
11 Court, correct?

12 A. Yes, sir.

13 Q. And how is that relevant to your page, that the term of
14 court was not in session?

15 A. Yes, sir. Yeah, once I found out that two of the
16 indictments wasn't signed, that peaked my interest, like I
17 said, and I got this calendar right here and I started going
18 through it and tried to read it as best I could and looking for
19 the Common Pleas and the General Sessions, and I'm looking for
20 the date. I see my indictments and I see where they claim that
21 they true billed me, and I looked and I said there was no term
22 of General Sessions going on so how could the grand jury be
23 convened?

24 MR. FOWLER: Your Honor, I'd like to enter this into
25 evidence at this time.

1 THE COURT: Okay.

2 MS. MARTO: No objection.

3 MR. FOWLER: As Number 1 or A. May I approach, Your
4 Honor.

5 (Applicant's Exhibit No. 1 was marked for
6 identification and admitted into evidence.)

7 Q. So how does this relate to the subject matter
8 jurisdiction argument, this letter?

9 A. Like I was speaking earlier, when the judge tried to go
10 into gentry, they say indictment is a noticing document, you
11 know, that puts you on notice of what you could be tried for in
12 the court, but it also puts the Court on notice and gives them
13 the power to try me, so if a grand jury hasn't been convened
14 they thereby lack, you know, the jurisdiction and the power to
15 even take me to trial on these charges because it hasn't been
16 presented to a grand jury and there could be no trial of this
17 degree without a presentment of a true billed indictment to a
18 grand jury that's been convened in a term of General Sessions,
19 so that's basically the gist of it.

20 Q. In your PCR application it says: The Applicant provided
21 copy of the calendar to appellate counsel to raise and argue
22 this issue, but counsel ignored request. Did you have any
23 conversations with your appellant counsel about this?

24 A. No, sir.

25 Q. Okay. But you state that you sent a letter to them.

1 A. Yes, sir.

2 Q. Which should suffice; is that correct?

3 A. Yes, sir.

4 Q. And you're stating that matters of subject jurisdiction
5 can be raised at any time; is that correct?

6 A. That's correct.

7 Q. Did you have a lot of conversations with your appellate
8 counsel?

9 A. No, sir.

10 Q. How often did you speak to them?

11 A. I think I might have spoke to -- I think I had like
12 three of them. I think I spoke to one of them one time.

13 Q. Right. You mentioned the appellate defender, and I
14 don't know if I can pronounce the name, Robert M. Pachak; is
15 that correct?

16 A. Pachak.

17 Q. Pachak, something like that? I don't know, I'm
18 unfamiliar with the name, and then appellate defender, Taylor
19 Gilliam. Did you speak to any one of those? Who did you speak
20 to, I guess, Gilliam or Pachak?

21 A. I want to say I spoke with Pachak. I don't think I
22 spoke to Savitz.

23 Q. Now, who is Savitz?

24 A. He was the one that I think initially was on my case. I
25 told you I went through three of them, I think one of them

1 retired in the middle of the case.

2 Q. Right. Anything else about question, well, 10(e) as in
3 "every," that you'd like to bring to the Court's attention?

4 A. No, sir.

5 Q. My understanding is that completes your application. Do
6 you feel based on your testimony today that your trial counsel
7 was deficient in her performance of you?

8 A. No, sir.

9 Q. Let me rephrase that. Do you feel like your trial
10 counsel was lacking in performance? Was she deficient in if
11 her performance representing you?

12 A. No, sir.

13 Q. Okay. Maybe I'm misphrasing it. Your attorney, your
14 trial counsel did not do a good job, did she?

15 A. No, sir.

16 Q. So you're saying that she did not do a good job, right?

17 A. Yes, sir.

18 Q. And you feel like that was prejudicial to you, correct?

19 A. Yes, sir.

20 Q. Anything else you'd like to bring to the Court's
21 attention?

22 A. No, sir.

23 Q. That's it, Your Honor.

24 MS. MARTO: Good afternoon, sir.

25

CROSS-EXAMINATION

1

2 BY MS. MARTO:

3 Q. Now, you talked about this investigation report with Ms.
4 Pratt, correct?

5 A. Yes, ma'am.

6 Q. And now, did you want her to use that investigation form
7 to cross-examine Danielle, or did you want her to call the
8 officer to testify, or both?

9 A. I wanted her to call the officer and I wanted her to
10 have the printed out transcript word for word what Danielle
11 Hammond said, that's what I wanted her to impeach it with.

12 Q. So you wanted the officer to come and state what
13 Danielle said?

14 A. Yes, ma'am.

15 Q. Now, you stated that at trial the only person that
16 placed you at the scene and said you were guilty was Mr.
17 Bethea, right?

18 A. Yes, ma'am.

19 Q. And that was made clear at the hearing, correct, or
20 trial?

21 A. Yes, ma'am.

22 Q. So is it fair to say that Shakera's statement basically
23 would have said the same thing?

24 A. No, ma'am. She was saying the total opposite of what
25 Jeffrey Bethea was saying.

1 Q. Right, but he was, again, the only person that put you
2 on the scene, right?

3 A. He was the person who said I killed the guy.

4 Q. And there was a composite drawn in this case, correct?

5 A. Yes, ma'am.

6 Q. And that was a Mr. Bethea, right?

7 A. I mean, I think it looked like him, but you know.

8 Q. Okay. And he said that you two were in this together,
9 right?

10 A. Jeffrey Bethea had about three to four different
11 statements. One statement, he completely denied having
12 anything to do with it. The second statement he went to saying
13 that, I believe he said he told me and Nataniel Douglas to do
14 it, we conspired to do it and I did it, and then the third, it
15 just changed to, now he told me personally to do it and he was
16 with me and he seen me do it.

17 Q. Now, the indictment sheet said you were charged with
18 murder and ABWIK, right?

19 A. Yes, ma'am.

20 Q. Did you know you were proceeding forward on all those
21 charges at trial?

22 A. Could you repeat that?

23 Q. Did you know you were proceeding forward on those
24 charges at trial?

25 A. Did I know I was proceeding forward?

1 Q. Yes, sir.

2 A. Like, did I know that --

3 Q. Did you know you were going to trial for murder?

4 A. Yes, ma'am.

5 Q. Okay.

6 MS. MARTO: One moment, Your Honor. No further
7 questions.

8 THE COURT: Mr. Fowler?

9 REDIRECT EXAMINATION

10 BY MR. FOWLER:

11 Q. So basically, as we mentioned on direct but reiterated
12 it here on cross, that you wanted Officer Mark Jackson there to
13 clarify what his investigative reported said, correct?

14 A. Yes, sir.

15 Q. And that would have helped clarify that you were not the
16 perpetrator; is that correct?

17 A. Yes, sir.

18 Q. And also, in terms of Jeffrey Bethea, you're saying that
19 he had several conflicting statements; is that correct?

20 A. Yes, sir.

21 Q. Now, were those statements official type things or like
22 in an investigative report, or were they what you just heard
23 hearsay?

24 A. Oh, no, they had all Jeffrey Bethea's statements typed
25 out, they had them in recording, video.

1 Q. And you're saying that Shakera Gordon could have helped
2 point the finger at Jeffrey Bethea, correct?

3 A. Yeah, she pointed the finger at Jeffrey Bethea.

4 Q. And away from you, correct?

5 A. She didn't pick me out of a photo lineup, sir.

6 Q. Okay.

7 MR. FOWLER: No further questions, Your Honor.

8 MS. MARTO: No further questions, Your Honor.

9 THE COURT: You can step down, sir. Any other
10 witnesses?

11 MR. FOWLER: If I may have a moment to speak with my
12 client? Your Honor, after consulting with my client, no
13 further questions.

14 THE COURT: And no further witnesses?

15 MR. FOWLER: I apologize, Your Honor, no further
16 witnesses.

17 MS. MARTO: Your Honor, the State would call Mr.
18 Taylor Gilliam.

19 THE COURT: I'm going to unmute myself for a minute
20 so I can swear him in. Okay, Mr. Gilliam, can you hear me
21 okay? I just had to turn my volume down so we wouldn't have
22 multiple microphones open in the courtroom. Sir, if I can get
23 you to raise your right hand?

24 **TAYLOR G. GILLIAM WAS DULY SWORN AT THIS TIME AND**
25 **TESTIFIED AS FOLLOWS: (via video)**

1 THE COURT: Now, the issue is Mr. Spears, is he going
2 to be able to hear, are you all going to be able to hear Mr.
3 Gilliam's testimony?

4 MS. MARTO: Can you all hear?

5 MR. FOWLER: We can hear him so far.

6 THE COURT: I think you're going to need to, at the
7 very least, move that microphone around to your --

8 MS. MARTO: Move this one?

9 THE COURT: Is that a microphone? Okay. Maybe get
10 him to say his name and let's see.

11 MS. MARTO: Taylor, can you put your name on the
12 record, please. Mr. Gilliam, can you put your name on the
13 record, please.

14 THE WITNESS: Taylor Gilliam, last name
15 G-i-l-l-i-a-m.

16 MS. MARTO: Can you all hear that?

17 MR. FOWLER: I could hear him earlier, but now that
18 you put the microphone there will it be louder?

19 MS. MARTO: Can you try it again?

20 MR. GILLIAM: Sure. My name is Taylor Gilliam. I'm
21 an appellate defender in South Carolina Commission on Indigent
22 Defense.

23 MS. MARTO: Thank you, sir.

24 THE COURT: Let's make sure, are you getting him
25 okay?

1 THE COURT REPORTER: Yes, I can hear him.

2 THE COURT: If at some point you can't hear just let
3 me know and we'll do it over.

4 THE COURT REPORTER: Okay.

5 **DIRECT EXAMINATION**

6 BY MS. MARTO:

7 Q. So you were the appellate defender in this case,
8 correct?

9 A. That's partially correct. I assumed representation
10 after Rob Pachak left our office.

11 Q. And did you do an independent review of the case by
12 chance?

13 A. I've reviewed the case based on the allegations that
14 were listed in the PCR application. It may be helpful if I
15 could give you brief procedural history of the appeal?

16 Q. Yes, sir.

17 A. So the notice of appeal was filed in February of 2017.
18 Rob Pachak, my predecessor who no longer works at this agency,
19 filed his initial brief in October of 2017. He cited
20 approximately three cases in the brief and the substantive
21 portion. The State's brief was filed in February of 2018 by
22 Assistant Attorney General Joe May. No reply brief was filed
23 by Mr. Pachak. Final briefs were submitted to the South
24 Carolina Court of Appeals in March of 2018, and then in October
25 of 2018 when Rob Pachak left this agency Mr. Spears' case was

1 reassigned to me.

2 Q. Now, in your professional judgment did you think that
3 the issues raised were the ones most likely to succeed on
4 appeal?

5 A. I did not conduct a review of the entire record. I was
6 not in a position where I could move to withdraw, in my
7 opinion, the initial briefs and final briefs before the Court
8 of Appeals, meaning, in my opinion Mr. Spears was stuck with
9 the issue or issues that Mr. Pachak had raised.

10 Q. You heard Mr. Spears' testimony concerning subject
11 matter jurisdiction of the indictments and whether that should
12 have been raised on appeal?

13 A. I did hear his testimony as well as review that portion
14 of his PCR application. I would not have raised that as an
15 issue in a brief before the South Carolina Court of Appeals or
16 South Carolina Supreme Court.

17 Q. Do you think that it would be in any way winnable on
18 appeal?

19 A. No.

20 MS. MARTO: No further questions.

21 THE COURT: And if I could get you to approach the
22 laptop to ask him questions on cross?

23 MR. FOWLER: If I may have just a moment?

24 THE COURT: I know you can't hear me, Mr. Gilliam.
25 I'm unmuting my microphone to tell you what we're doing. I've

1 just asked Mr. Fowler to approach the laptop to ask you
2 questions on cross. He just needed a moment to confer with his
3 client.

4 MR. GILLIAM: Thank you, Judge. I appreciate you
5 accommodating me testifying virtually, it means a lot.

6 MR. FOWLER: Mr. Gilliam?

7 MR. GILLIAM: Yes.

8 MR. FOWLER: Hi, I'm Attorney Steve Fowler. Can you
9 see me?

10 MR. GILLIAM: I can see you and hear you.

11 MR. FOWLER: Great. Fantastic.

12 **CROSS-EXAMINATION**

13 BY MR. FOWLER:

14 Q. You heard the testimony earlier of my client; is that
15 correct?

16 A. That's correct.

17 Q. And you saw that we introduced into evidence a letter
18 that he wrote regarding subject matter jurisdiction; is that
19 correct?

20 A. That's correct.

21 Q. Did you ever have a conversation with him about that
22 topic?

23 A. We did not. If I would have had a conversation with Mr.
24 Spears about that I would have created a telephone log and
25 saved it in the file. This file does not have a telephone log

1 created by me indicating that Mr. Spears and I ever had any
2 conversation about that issue or any other.

3 Q. So did you speak with him at all about his issues?

4 A. I did not at the time. When I was appointed to
5 represent him after Mr. Pachak left, a reassignment letter was
6 sent, especially Mr. Spears was aware of my involvement, but as
7 the briefs had already been filed, we never had a conversation.

8 Q. So you were representing him in appellate court; is that
9 correct?

10 A. Yes, that's correct.

11 Q. And you never had a conversation with him; is that
12 correct?

13 A. Yes, and if I had to elaborate, that's not out of the
14 ordinary.

15 Q. But he did provide a letter to your office inquiring
16 about, or stating that subject matter jurisdiction was an issue
17 that he wanted to be raised; is that correct?

18 A. That's what's been represented today.

19 Q. Did you ever address that specific issue with him, if
20 not in person by any kind of letter or written communication?

21 A. I did not. That letter was not addressed to me, and
22 again, at the time that I assumed representation the final
23 brief and initial briefs by both parties had already been filed
24 and submitted to the South Carolina Court of Appeals.

25 Q. Is it possible to amend the brief?

1 A. It would require leave of court, and I'm not actually
2 sure at the time to final brief is filed if the Court would
3 allow that.

4 Q. Did you try?

5 A. I did not.

6 Q. So we have a situation here, from my understanding is
7 that Mr. Spears sent you a -- sent your office a letter stating
8 that he wanted to contest subject matter jurisdiction, correct?

9 A. Yes.

10 Q. And you made no effort to reach out to him to explain
11 that that is not a winnable argument, as you put it earlier; is
12 that correct?

13 A. That is correct, but for the third time, at the time of
14 which I assumed representation the briefs had been filed.

15 Q. I'm a little bit confused on this. How many attorneys
16 represented him on this? I've got the name of, I think Mr.
17 pronounced it "Pachak," and then yourself, and then maybe
18 somebody else, how many attorneys represented him in this
19 matter?

20 A. Based upon the South Carolina Appellate Court records,
21 which are available on what we call C-Track, a South Carolina
22 Appellate Case Management System, there have been two attorneys
23 listed as representing Mr. Spears, myself and Robert Pachak.

24 Q. So how long did you represent him time wise?

25 A. I represented him from October 2, 2018 at the time the

1 reassignment letter was sent to July 12, 2019 at the time the
2 Remittitur was sent to the lower court.

3 Q. Okay. And nowhere in that time did you reach out to
4 him; is that correct?

5 A. That is correct, and again, not out of the ordinary.

6 MR. FOWLER: If I may have a moment, please?

7 MR. GILLIAM: Mr. Fowler, may I revise that?

8 MR. FOWLER: Excuse me?

9 MR. GILLIAM: I apologize, I'd like to revise that
10 last answer.

11 MR. FOWLER: Please do.

12 A. Our office sent a reassignment letter, the one I
13 mentioned in October, so as to your answer to that, I did not
14 contact him, I did sent him a letter so he knew I was
15 representing him and from that moment until I ceased
16 representation and his video ended, I did not hear from him
17 whether a call or written communication.

18 Q. But the letter, the reassignment letter had nothing
19 substitutive, it was just a notice; is that correct?

20 A. That's correct.

21 MR. FOWLER: If I might have just a moment, please?

22 Q. Mr. Gilliam, just to be clear, subject matter
23 jurisdiction is a legal argument that could be raised at any
24 times; is that correct?

25 A. Yes.

1 Q. And you've used that in other briefs; is that correct,
2 for other clients?

3 A. I'm not sure.

4 Q. Let me clarify my question. The topic, as my
5 understanding in the letter that there was an issue in my
6 client's mind about subject matter jurisdiction. You've used
7 that legal terminology before, that legal argument before in
8 other briefs; is that correct?

9 A. I'm not sure offhand. If you have one of my briefs or
10 sur-petitions I'd be glad to review it, but I don't know
11 offhand the case where I would have raised that.

12 Q. But it is a legal argument that can be raised before
13 Court; is that correct?

14 A. Yes, sir.

15 MR. FOWLER: No further questions.

16 MS. MARTO: Just briefly, Your Honor.

17 **REDIRECT EXAMINATION**

18 BY MS. MARTO:

19 Q. Sir, is deciding what issues to raise on appeal
20 typically a matter of preference of the defendant or something
21 you exercise in your professional judgment?

22 A. There's no type of way about it. The appellate attorney
23 is the one with the sole responsibility and decision-making
24 capacity of choosing the issues that go in the briefs.

25 Q. And even though you didn't select the issues in this

1 case you felt that the issue Mr. Spears raised today is
2 unwinnable, correct?

3 A. That's right, yes.

4 MS. MARTO: No further questions.

5 THE COURT: Anything further?

6 **RECROSS-EXAMINATION**

7 BY MR. FOWLER:

8 Q. Well, when you say it's unwinnable, as you just did, you
9 haven't done a lot of investigation into this topic; is that
10 correct?

11 A. This is an issue that is raised with some frequency by
12 individuals who are incarcerated, and it is not known to be a
13 winning issue. Just because I haven't raised it in a brief
14 doesn't mean I'm not slightly familiar with it to know that it
15 is, I don't want to say frivolous, but it's not a winning
16 issue.

17 MR. FOWLER: No further questions.

18 MS. MARTO: No questions. We would request
19 permission to excuse this witness, Your Honor.

20 THE COURT: Thank you, Mr. Gilliam, you are excused.
21 We appreciate you.

22 MR. GILLIAM: Thank you, Your Honor. I appreciate
23 you accommodating me.

24 MS. MARTO: Your Honor, the State would call Ms.
25 Barbara Pratt.

1 BARBARA PRATT WAS DULY SWORN AT THIS TIME AND
2 TESTIFIED AS FOLLOWS:

3 THE CLERK: Please have a seat and state your name
4 for the Court and spell your last name, please.

5 THE WITNESS: My name is Barbara Wilson Pratt,
6 P-r-a-t-t.

7 DIRECT EXAMINATION

8 BY MS. MARTO:

9 Q. Good afternoon, ma'am.

10 A. Good afternoon.

11 Q. So you represented Mr. Spears at the trial, correct?

12 A. I did.

13 Q. When did you become involved in this case?

14 A. My file was a 2010 file so I was involved with it
15 shortly after he was actually arrested and incarcerated, and I
16 met with him at J. Reuben Long on several occasions.

17 Q. Were you retained in this case?

18 A. No, I was appointed.

19 Q. By 608 contract?

20 A. Yes.

21 Q. Roughly how many times did you meet with Mr. Spears, do
22 you recall?

23 A. Oh, gosh, I didn't count them. I would say, easily,
24 between ten and 20 times. We certainly prepared for trial.

25 Q. Was this case always going to trial?

1 A. Yes.

2 Q. And what did you all review prior to trial?

3 A. We looked at all of the discovery together and I know we
4 talked about the potential witnesses. We looked at the
5 interview that the police had done of him. We looked at the
6 composite drawing of Jeffrey Bethea known as "Bird," which was
7 the actual drawing of the person they identified as being the
8 shooter, and he was arrested and then of course he pointed the
9 finger at Brian.

10 Q. Was Mr. Bethea's testimony the only evidence implicating
11 Mr. Spears?

12 A. I would say so. Mr. Spears had given a statement. I
13 mean, we knew he was present, but whether or not he was
14 actually involved or not, you know, and the State tried to put
15 in some rap lyrics that he had written and the evidence of a
16 tattoo that was on his neck, which was visible to the jury, and
17 some other things like that, but the most, the biggest evidence
18 against Brian was the testimony of Jeffrey Bethea.

19 Q. Now, did you discuss the statement taken by Mark Jackson
20 with Mr. Spears?

21 A. We looked at it in discovery, and I've been trying to
22 remember just what our discussions were about it, whether or
23 not I felt it was useful or not to call him. You know, Mr.
24 Jackson actually testified in the Jackson V. Denno hearing, and
25 I was a little rough on him, basically calling him a liar in

1 the Jackson V Denno because he had used a lot of misstatements
2 or exaggerations when he was trying to coerce Brian into giving
3 a confession, and it usually doesn't bode well to call police
4 officers when you're the defendant, because when you do and you
5 ask them specific things, like whether it had been Lemark Irons
6 that Danielle had said -- had told them about the Wal-Mart
7 video, or whether it was Aaron himself that had told Danielle
8 about the Wal-Mart video, first of all, he probably would not
9 have been particularly helpful to us. He might have said he
10 didn't remember, he might have said, I guess if that's what my
11 report said, but then it opens it up for the State to
12 cross-examine, and they can have a field day, and that's why I
13 usually, as a matter of strategy, don't call police.

14 Q. Police officers are generally more State-friendly, in
15 your opinion?

16 A. Oh, yeah, definitely. They have a tendency to remember
17 things when the State asks them and not remember things when we
18 do.

19 Q. So they would have been a hostile witness?

20 A. Absolutely.

21 Q. Do you recall any discussions about Shakera potentially
22 identifying or not identifying Mr. Spears?

23 A. I was looking in my notes for that, and I really don't
24 have any notes about calling her as a witness, but I guess it
25 would be kind of like putting up a negative, you know, just

1 because she identified "Bird" wouldn't mean she would not
2 subsequently say, well, I did see "Boss" walking around, or saw
3 Brian walking around, so I think I felt like minimal amount was
4 best, that she had identified "Bird," no question, and we had a
5 composite, and we knew that he was the one that everybody had
6 thought had done it until he changed and pointed the finger at
7 Brian.

8 Q. So were you afraid of potentially calling the witness it
9 would open the door to her implicating him?

10 A. It was a potential and I didn't know how much help it
11 really would be because it was her testimony about "Bird" would
12 have been cumulative to the composite and all of the police
13 officers identifying him from that.

14 Q. Was that pretty much settled at trial that Mr. Bethea
15 was involved in the murder?

16 A. Oh, yeah, and he was testifying, I mean, he was trying
17 to save himself, and I really don't know what the jury thought
18 at the end. It was something I wondered about, whether they
19 thought that Brian was guilty because it was the hand of one is
20 the hand of all or whether it was a situation where he was
21 actually the shooter, because we really didn't know who the
22 shooter was.

23 Q. Now, concerning these indictments, did you see anything
24 facially improper about them upon review?

25 A. The indictments I have in my trial file, actually, are

1 true billed August 23rd of two thousand -- is it seven --
2 whatever year that was, because I was looking at that, so I did
3 not see anything improper about them.

4 Q. And from your conversations with Mr. Spears, he was
5 aware of what he was going to trial on, right, what charges?

6 A. Yes.

7 Q. Do you think that any challenge to the indictments would
8 have been successful?

9 MR. FOWLER: Objection, Your Honor. Speculation.

10 THE COURT: I'll allow the question.

11 THE WITNESS: And it would be beyond my knowledge
12 too. I really don't do any appeal work.

13 Q. Was it an issue at trial you considered raising?

14 A. No.

15 Q. Do you recall discussions about potentially calling the
16 ABWIK victims to testify?

17 A. I don't know if we actually talked about that or not,
18 but I would not, again, have been one who would have called
19 them because that opens the State up to being allowed to
20 cross-examine them, you know? So I was looking in my notes to
21 see if I had anything about it. The trial was 12 years ago so
22 I don't really remember much about that part of it.

23 Q. Do you think the victims would have been useful to the
24 defense in this case?

25 A. I think that if they had identified Jeffrey Bethea as

1 the shooter it would have been in their statements so calling
2 them would not have been helpful.

3 MS. MARTO: One moment, Your Honor. No further
4 questions.

5 MR. FOWLER: May I have a moment, Your Honor?

6 THE COURT: Sure.

7 CROSS-EXAMINATION

8 BY MR. FOWLER:

9 Q. Good afternoon.

10 A. Good afternoon.

11 Q. You've been in the courtroom during Mr. Spears'
12 testimony; is that correct?

13 A. Yes.

14 Q. And you heard that he stated that Officer Mark Jackson
15 had an investigative report; is that correct?

16 A. Yes.

17 Q. And how was this to investigative report used by you in
18 the trial?

19 A. Well, we used it for preparation, you know, and we used
20 it in cross-examination during the Jackson v. Denno, although I
21 didn't have to refer to it directly, but there were a lot of
22 things that they said in the Jackson v. Denno hearing about
23 several witnesses that identified, and et cetera, that we knew
24 were not true from the investigative report and from the other
25 evidence, so I used it then.

1 Q. And you said you had some hesitancy about Officer Mark
2 Jackson being called as one of your witnesses; is that correct?

3 A. Yes.

4 Q. But what about Danielle Hammonds? Danielle Hammonds was
5 somebody who could have pointed the finger at someone else; is
6 that correct?

7 A. Well, she wasn't there.

8 Q. But saying that Mark Jackson had told a friend of her
9 brother that Brian Spears was the person who shot at Aaron, so
10 how was Danielle Hammond used in your case preparation, or was
11 she?

12 A. Danielle Hammond was the victim's sister, and first of
13 all, I think the whole issue of the introduction of that
14 Wal-Mart video was wrong, and I think the Court of Appeals got
15 it wrong. I think everybody got it wrong because I do believe
16 that it was certainly more prejudicial than probative. I don't
17 know that it would matter who told Danielle, although, I
18 understand Brian's concern about the fact that if -- that when
19 the Court talked about it being an excited utterance it was
20 whether or not the victim Aaron Hammond had said it to Danielle
21 or not. But, you know, under Rule 613, when you're trying to
22 put in extrinsic evidence to impeach somebody, and they say,
23 no, they don't recall, then I think there's some difficulty in
24 putting up another witness to say, this is who you actually
25 said, and then as I say, you've opened the door for that

1 person, that police officer to, you know, go to town with
2 questions from the Solicitor.

3 Q. But he did do an investigative report and there was some
4 positives there that Mr. Spears was not named as the shooter;
5 is that correct? There were some positive aspects to that
6 investigative report for Mr. Spears, correct?

7 A. I'd have to look at it, I don't think so.

8 Q. Okay. In Mr. Spears' application he said: At trial the
9 Solicitor knowingly introduced false testimony by Danielle
10 Hammonds that her brother, Aaron, told her that Spears shot him
11 at Wal-Mart. Were you familiar with that at trial?

12 A. I knew it was different from what she had said before.
13 Witnesses often say things a little bit differently at trial
14 than they may have said in statements, but that doesn't
15 necessarily mean that the State is intentionally putting up
16 false information, but it certainly means that someone is
17 changing their story and could be giving false information or
18 perjuring themselves.

19 Q. And that was used in the closing argument, as well; is
20 that correct?

21 A. What was used in the closing argument?

22 Q. The false propensity evidence that Mr. Spears indicated
23 was there; is that correct? There were some false statements
24 by the prosecution; is that correct?

25 A. I don't really understand your question. I know in

1 closing the propensity argument that the State was making had
2 to do with the Wal-Mart video, is that what you're talking
3 about?

4 Q. Yes.

5 A. Okay. And whether or not Lamark told Danielle or Aaron
6 told Danielle, the Wal-Mart video was a problem, and I don't
7 know that it would be significant as to which person told
8 Danielle, I don't think that the video should have come in.
9 That was my opinion at the time and still is today.

10 Q. It says here that the trial counsel was ineffective for
11 failing to call material witness, Shakera Gordon, who did not
12 pick Brian Spears out of a photo lineup but did pick Jeffrey
13 Bethea. Were you involved with that photo lineup that he was
14 referring to there?

15 A. I'm sure we reviewed it and knew what was going on with
16 it. I don't know if we discussed putting up Ms. Graham but --

17 Q. Shakera Gordon.

18 A. Gordon, I'm sorry, Gordon. But again, just because she
19 picked out Jeffrey doesn't necessarily mean she wouldn't have
20 seen Brian at some point. I don't know if she was shown a six
21 pack with him in it.

22 Q. But there's a difference between the shooter, the actual
23 shooter and somebody who was just there at the scene, correct?
24 And from my understanding is that Jeffrey Bethea was picked out
25 from her as the shooter and not just some random person there

1 at the scene?

2 A. I'd have to look at the actual statement that she made.
3 I don't remember if she just picked him out as the shooter or
4 not, but they certainly picked out -- we had a composite of
5 Bethea that looked just like him.

6 Q. So how was that used at trial?

7 A. I waived it around a lot, I mean, certainly in my
8 closing, it was -- you know, there was no question that he was
9 the one that had been identified and the only way he could get
10 himself out of trouble was to point at Brian.

11 Q. It states here the trial counsel was ineffective for
12 failing to object to State's violation of Applicant's right to
13 confrontation of reverse witnesses. There were other people
14 there that were shot; is that correct?

15 A. Yes. There were three victims for the assault and
16 battery with intent to kill indictments.

17 Q. Did you call any of those at trial?

18 A. No, I did not.

19 Q. Did you interview them?

20 A. No, I did not.

21 Q. Why not? I mean, couldn't they have been helpful to Mr.
22 Spears?

23 A. I guess in hindsight they might have been, but I don't
24 know that they would have been. They certainly didn't give a
25 statement to the police that said that Brian was not there.

1 Q. It states in Mr. Spears' application that there was some
2 issues with the -- at the jury charge portion of the trial, as
3 to aforethought element was not presented to the grand jury,
4 and that there was also some malice -- that malice aforethought
5 was not properly presented. Are you familiar with either one
6 of those statements, those accusations of him, Mr. Spears, in
7 this case?

8 A. I did not object to that. I don't know that I thought
9 it would be much of a difference between the words "malice" and
10 the words "malice aforethought," but I certainly did not object
11 to it, and that would've up to appellate counsel, I would
12 imagine, to deal with the indictments.

13 MR. FOWLER: May I have just a moment, Your Honor?

14 Q. Did you ever show Spears the Wal-Mart video to prepare a
15 defense?

16 A. No, I don't think I did. I don't think I had a copy of
17 it. I don't remember that.

18 Q. Did you ask for a copy through discovery or anything
19 like that?

20 A. Well, and that was one of the things that happened on
21 appeal was that the video actually disappeared, so it was not
22 available on the appeal and they asked me to go through my file
23 to try to find a copy, and I did not have a copy of it.

24 Q. You heard about Lemark Irons; is that correct --

25 A. Yes.

1 Q. -- in today's testimony? Why didn't you call Lemark
2 Irons to testify?

3 A. He testified for the State, did he not?

4 Q. I don't know.

5 A. Okay. Well, I could look at the list.

6 Q. Well, just generally.

7 A. I don't know why we didn't do that.

8 Q. Did the prosecution call Lemark Irons?

9 A. I'd have to look at the transcript to see if there
10 was -- give me a moment. No, the State did not call him and
11 neither did I.

12 Q. In your opinion, why did the State not call Lemark
13 Irons?

14 A. I have no idea.

15 Q. Do you remember what the substance of Lamark Iron's
16 testimony might have been?

17 A. I don't.

18 Q. Did you ever interview Lemark Irons?

19 A. No, I was -- I don't have an investigator so I do the
20 work myself and I look for the witnesses that I believe I would
21 probably call. He was a friend of the victim, so I'm not sure
22 that he would have been helpful to us.

23 Q. Going back to Danielle Hammonds, was there ever a
24 statement provided by Danielle -- did you ever get the
25 prosecution to release a statement of Danielle Hammonds to you

1 or Mr. Spears, any kind of statement by Danielle Hammonds?

2 A. I honestly don't remember if we had a statement from her
3 because the Wal-Mart video came up kind of late in the game
4 that they wanted to introduce it. I know there was the
5 reference to her in the investigative report, but I don't know
6 if they gave me an actual written statement by her.

7 MR. FOWLER: If I could have just a moment, Your
8 Honor.

9 Q. So just to be clear, this Wal-Mart video, you said it
10 came up late in the game but then it disappeared, what was the
11 actual final status of the Wal-Mart video?

12 A. It was played for the jury. I remember it being played
13 on a large screen, and then when Rob Pachak contacted me about
14 the appeal he said it wasn't in the record, and I did not have
15 a copy of that video in my file or anywhere, so it was a
16 surveillance video and I don't -- technology back in 2010 was a
17 little different than it is now as far as getting copies of
18 videos, and so forth, from different people, but I did not have
19 it in my file.

20 Q. So you're saying that after it was played in court that
21 the Wal-Mart video was lost?

22 A. I got e-mails from Rob that asked me if I had the video
23 because it wasn't put into evidence, and of course it wouldn't
24 be up to me to have put it into evidence, it would have been up
25 to the State to have marked it and put it in, but he asked me

1 if I had a copy and I did not. I'm trying to think. I have
2 some notes, some emails there from him.

3 MR. FOWLER: Just a moment, please.

4 Q. So just a final question. You say you remember it being
5 played at trial; is that correct?

6 A. Uh-huh.

7 Q. In general, what were the contents of it? Was there a
8 fight between the deceased and somebody else? What's your
9 recollection of it?

10 A. There was a shooting at the victim, Aaron Hammond, that
11 was in the Wal-Mart parking lot, and it's the Wal-Mart up in
12 North Carolina, I think maybe Lumberton, I can't remember
13 exactly, but I remember you could see the vehicle. I remember
14 you could, you know, you could tell that there was shooting,
15 but I don't think that they saw Mr. Spears' face or would have
16 been able to identify him on that video and so that had to do
17 with the testimony of Ms. Hammond, and you know, the fact that
18 somebody had told her whether it was Lemark or whether it was
19 Aaron, that Brian was the one.

20 Q. Do you recall if the deceased got in a fight on that
21 video at some point?

22 A. I mean, my memory may be wrong, it's a long time ago and
23 I'm 67 years old now, but I believe that it was like a drive-by
24 situation, a shooting like that in the parking lot, but I
25 really couldn't tell you.

1 MR. FOWLER: No further questions, Your Honor.

2 THE COURT: Just one moment. Go ahead.

3 MS. MARTO: Thank you.

4 **REDIRECT EXAMINATION**

5 BY MS. MARTO:

6 Q. So do you recall seeing any evidence in the case that
7 looked like it was fabricated by the State in any way?

8 A. No, I don't think they fabricated anything.

9 Q. Do you recall any Brady or Giglio violations?

10 A. No.

11 Q. Were you provided with any evidence such as statements
12 by the ABWIK victims?

13 A. I would have to look in my discovery, but I believe
14 there were statements that were taken.

15 Q. And based upon your review of those you did not think
16 further investigation into those witnesses would have been
17 helpful?

18 A. No.

19 Q. Was Mr. Irons a State-friendly witness in your opinion?

20 A. I don't think he would have been. He was a buddy of the
21 victim.

22 Q. Did you see the Wal-Mart video before it was entered at
23 trial?

24 A. I don't remember seeing it before then, and I'm not sure
25 exactly when they brought it up. It was raised during, I've

1 got an order on remand here. It was raised in pretrial
2 motions, certainly, about that Wal-Mart shooting, but I don't
3 remember us seeing it ahead of time.

4 Q. And again, that featured the victim in this case being
5 the perpetrator of the shooting in that instant, correct?

6 A. Yes. Well, he was a victim of the shooting there as
7 part of both, and according to what I've got in front of me
8 here on the order on remand it says that the video was not
9 published to the jury. It was just discussed, the incident was
10 discussed by Danielle, but we looked at it in camera.

11 Q. So it was marked but never entered, correct? Is that
12 your recollection?

13 A. I guess that could have happened, yeah, because it would
14 have been for an in camera hearing but not played to the jury.

15 MS. MARTO: No further questions.

16 THE COURT: Anything further?

17 **FURTHER CROSS-EXAMINATION**

18 BY MR. FOWLER:

19 Q. Just to be clear, you said earlier that you remember the
20 Wal-Mart video was played for the jury, correct?

21 A. I remember it was played because I remember seeing it.
22 I'm just looking, when I opened this up I found the order on
23 remand from the 403 hearing, and it states that it was not
24 played -- it was not published to the jury, but it says it was
25 shown to the Court.

1 Q. So was it played -- it was played before the Court but
2 not the jury?

3 A. That's what this says. I honestly don't -- I couldn't
4 tell you if the jury was in the room or not, I wish I could.

5 Q. Do you remember who -- you said -- okay, and just to be
6 clear about the video, I know you were getting into issues
7 here, but was there an interaction there, or are you saying
8 that your recollection was that it was a drive-by? Was there
9 interaction between two persons, like in a fistfight or a
10 shooting, or was it a drive-by with just cars, do you recall?

11 A. My memory is not perfect on that, I think there were
12 cars, but I may be wrong.

13 MR. FOWLER: No further questions, Your Honor.

14 MS. MARTO: Nothing further, Your Honor.

15 THE COURT: You can step down. Thank you.

16 THE WITNESS: Thank you, Your Honor.

17 MS. MARTO: No further witnesses, Your Honor.

18 THE COURT: Anything further from anybody?

19 MS. MARTO: No, Your Honor.

20 THE COURT: Okay. I'm going to look over the
21 transcript carefully and take the matter under advisement.
22 Thank you.

23 MS. MARTO: Thank you, Your Honor.

24

25

1 CERTIFICATE

2 STATE OF SOUTH CAROLINA

3 COUNTY OF HORRY

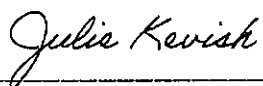
4 I, Julie A. Kevish, Official Court Reporter for the
5 State of South Carolina, do hereby certify that the foregoing
6 is a true, accurate and complete Transcript of Record of the
7 proceedings had and evidence introduced in the Court of Common
8 Pleas for Horry County, South Carolina, on the 6th of
9 September, 2022.

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

12 September 6, 2022

13

14



15

JULIE A. KEVISH
OFFICIAL COURT REPORTER

16

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25

January 26, 2011

Mr. Joseph L. Savitz, III, Senior Appellate Defender
Division of Appellate Defense
1330 Lady Street, Suite 401
Columbia, South Carolina 29201-3332

Re: My case

Dear Mr. Savitz:

Please be advised that prior to my trial my counsel moved to quash two of my indictments because they were unsigned by the solicitor to establish presentment to the grand jury for trial.

Following my trial, I requested, and was provided, a general sessions calendar by the S.C. Court of Administration which shows there was no term of general sessions court on the date indicated on my indictments. As you well know, there can be no presentment of indictments by a grand jury outside a term of general sessions court. See, S.C. Code §§14-9-170, 14-9-210, S.C. Const., Art. V, §22.

Since the record shows there was no legally convened grand jury during a term of general sessions in my case presentment for my indictments the trial court lacked subject matter jurisdiction to try and convict me. So as issues of subject matter jurisdiction can be raised at any time, I am, by this letter requesting that you raise and argue my subject matter jurisdiction issue to entitle me to relief.

Thank you for your assistance in this matter.

sincerely yours,

Brian K. Spears
Brian K. Spears
Perry Correctional Institution
430 Oaklawn RD. Q3B/210
Pelzer, S.C. 29669

cc: file

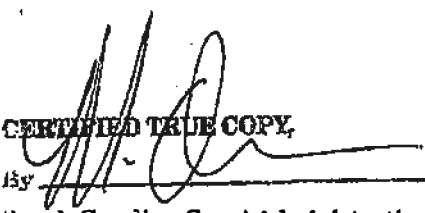
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Terms of Circuit and Family Court August 2007

Circuit Number	8/6/2007	8/13/2007	8/20/2007	8/27/2007
15	Common Pleas Georgetown Macaulay, Alexander EUBANK General Sessions Horry Milling, John BABB	General Sessions Horry Burch, Paul BUCKNER 13, 14, 15, 16 NO CR NEEDED 17 General Sessions Horry Goodstein, Diane HURLEY Common Pleas Horry Lockemy, James EUBANK	Common Pleas Non- Jury 20 Baxley, J. BUCKNER 20 Common Pleas Non- Jury 21 Cottingham, Edward MCCALL 21	Common Pleas Horry Hill, D. THUEME 27, 28, 29 NO CR NEEDED 30, 31 General Sessions Georgetown John, Steven HURLEY Common Pleas Horry Baxley, J. EUBANK

CERTIFIED TRUE COPY,

By 
South Carolina Court Administrator

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Brian K. Spears, #340805,)
Applicant,)

v.)

State of South Carolina,)
Respondent.)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTEENTH JUDICIAL CIRCUIT

Case No.: 2019-CP-26-6129

ORDER OF DISMISSAL

FILED
HORRY COUNTY
2023 JUN 20 P 3:53
RENEE H. ELYS
CLERK OF COURT
HORRY COUNTY, SC

This matter comes before this Court by way of Applicant's post-conviction relief application filed September 26, 2019. Respondent made its return on March 3, 2021, requesting an evidentiary hearing. An evidentiary hearing was held on September 6, 2022, at the Horry County Courthouse. Steven W. Fowler, Esquire, represented Applicant. Assistant Attorney General Chelsey F. Marto, Esquire, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Trial Counsel Barbara Pratt and Appellate Counsel Taylor Gillam also testified. After reviewing all records and evidence before this Court, this Court finds Applicant cannot meet his requisite burden of establishing he is entitled to post-conviction relief and denies and dismisses this application with prejudice.

Procedural History

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Horry County Clerk of Court. During its August 2007 term, the Horry County Grand Jury indicted Applicant for three counts of Assault and Battery with Intent to Kill (hereafter "ABWIK") (2007-GS-26-3387, -3389, and -3390), and Murder (2007-GS-26-3388). Applicant was represented by Barbara W. Pratt. Assistant Solicitors Donna E. Elder and Lawrence R. Filiberto of the Fifteenth Circuit Solicitor's Office prosecuted the case.

On May 10-13, 2010, Applicant proceeded to a jury trial where he was ultimately convicted as indicted. The Honorable Larry B. Hyman, circuit court judge, presided over the trial. Judge Hyman sentenced Applicant to thirty years' imprisonment.

Applicant appealed his convictions and submitted a final brief on September 12, 2011. Oral argument was heard in the Court of Appeals on January 17, 2013. On April 17, 2013, the court issued an opinion remanding the case to the trial court for it to conduct an on-the-record balancing test under Rule 403, SCRE to determine whether the probative value of the prior bad act of a shooting was substantially outweighed by the danger of unfair prejudice.

On April 26, 2013, Respondent filed a petition for rehearing *en banc*. On May 2, 2013, Applicant filed a petition for rehearing. Both petitions for rehearing were denied on June 14, 2013.

Respondent filed a petition for writ of certiorari on July 12, 2013. Applicant filed a petition for writ of certiorari on July 15, 2013. On September 11, 2014, the South Carolina Supreme Court issued an order denying the petitions of both parties.

The rehearing on remand for the Rule 403, SCRE balancing test was not heard until December 8, 2016. On February 9, 2017, the Honorable Larry B. Hyman issued his amended order on remand for the Rule 403 hearing, finding that the danger of unfair prejudice did not substantially outweigh the probative value of the evidence, nor was there any undue tendency to suggest a decision on an improper basis brought on by a propensity argument.

Applicant filed his notice of appeal on February 23, 2017. Through Counsel Robert Pachak, Applicant raised the following issue:

Whether the lower court in its order on remand was incorrect in ruling that the probative value of the prior similar bad act was not outweighed by the danger of unfair prejudice.

An opinion affirming the conviction was issued pursuant to Rule 220(b), SCACR. *State v. Spears*, Op No. 2019-UP-230 (filed June 26, 2019). The remittitur was issued on July 12, 2019.

Summary of Relevant Facts

On May 26, 2007, Applicant, along with Nathaniel "June" Douglas, Ishmael "Ish" Douglas,¹ and Thomas "T.C." Shaw (collectively Applicant's group), all of whom were affiliated with the gang 41-Curve, left Lumberton, North Carolina and went to Myrtle Beach over the weekend.² (Tr. 274-75, 288-289, 295-96, 360-61, 365, 439, 566-67, 584).

When they arrived, the group was joined by fellow 41-Curve member, Jeffrey "Bird" Bethea. (Tr. 289-90). Applicant was wearing a white t-shirt and a black t-shirt underneath a red t-shirt along with a black and red New York Yankees hat, while fellow gang member Nathaniel Douglas was wearing a red O.J. Simpson jersey. (Tr. 288-89, 299). Trial testimony showed that red was the color of the "East Side Bloods," a rival gang and that gang members often wear the color of a rival gang when intending to "go do something." (Tr. 279-280).

Shortly after Bethea's arrival, a member of Applicant's group stated they observed Aaron Hammonds (hereafter "Victim") walking down Ocean Boulevard. (Tr. 572). Victim was a high-ranking member of the East Side Bloods and served four years in prison for "accessory after the fact" in the murder of 41-Curve member Eric Floyd. (Tr. 225-26, 273-75, 289-291).

Victim, Lemark Irons, and other members of the East Side Bloods were walking together along Ocean Boulevard. (Tr. 192-193, 196-197). Irons left the group and approached Applicant's group to compliment them on their clothes and jewelry stating, "we need to stop beefing and get

¹ Ishmael "Ish" Douglas is also known as Wa-Gee. (Tr. 296).

² Applicant, along with June, was a member of 41-Curve, a Lumberton gang affiliated with Gangster Disciples and Folk Nation. (Tr. 274-75, 288, 289, 360-61, 365, 439, 584).

money together.” (Tr. 195-96, 197-98, 271, 273, 277, 279-81, 301). Irons, whose right arm was in a sling, attempted to shake Bethea’s hand with his left hand, which was considered disrespectful. (Tr. 301). In response, Bethea slapped Irons’ hand and began cursing at him. (Tr. 301, 312). Irons left the group, crossed the road, and rejoined his group. (Tr. 301, 197-98).

Immediately thereafter, Bethea, a high-ranking member of 41-Curve, became angry and began talking to Applicant, a foot soldier in the gang who did not get along with Victim. (Tr. 290, 440, 302, 310, 447-49). Applicant told Bethea that he thought Irons and his group, including Victim, would kill someone in their group, unless they killed someone from the other group first. (Tr. 447-48). Thus, a shooting occurred resulting in Victim’s death and three bystanders getting wounded. (Tr. 132, 156-57, 171, 189, 203-11, 216-18).

Eyewitness Brittney Maynor testified at trial that the shooter was a black male, about five-foot-seven, and was wearing a red shirt, a red bandana over his face, a red fitted hat, and another red bandana on his wrist. (Tr. 203-04, 209, 211). She noted that the shooter crossed the road and was right in front of her when he began shooting. (Tr. 194, 203, 206). Maynor told the jury that she turned and ran when she heard “five or six” shots. (Tr. 207, 210). She described the gun as a silver and black .380 that was small enough to fit in the palm of her hand. (Tr. 211).

At the crime scene, authorities interviewed multiple witnesses and produced a composite sketch matching Bethea’s description. (Tr. 354-55). Eight shell casings were recovered from the crime scene and three bullets were recovered from Victim’s body during the autopsy. (Tr. 161-63, 173-74). SLED Agent Suzanne Cromer testified that both the shell casings and bullets came from a .25 caliber automatic weapon. (Tr. 431-32).

After interviewing Bethea, authorities spoke with Applicant in Lumberton on June 4, 2007, where Applicant repeatedly denied being in Myrtle Beach on the date in question, instead

claiming he was in Lumberton all weekend and that he did not hang around Bethea. (Tr. 355, 358-59, 361). Following the first interview, Applicant was charged with one count of murder and three counts of ABWIK. (Tr. 363-64).

On June 7, 2007, Applicant was interviewed again. (Tr. 363-64). After waiving extradition, Applicant admitted to law enforcement that he was in Myrtle Beach on the date in question. Applicant insisted told law enforcement that he walked away after the altercation between Bethea and Irons, and then fled the scene when he heard gunshots. (Tr. 363-64, 367-68).

Applicant's co-defendants, Nathaniel Douglas and Jeffrey Bethea, also testified at trial. (Tr. 287-350, 437-99). Nathaniel Douglas said that after Irons' initial dispute with Bethea he walked off while Applicant remained with the rest of the group. Approximately ten minutes after he left the group, he heard gunfire and saw Applicant and the other members of his group running up the street. (Tr. 302, 304-05). Douglas also confirmed that Applicant had a handgun in his waistband that night and that Bethea did not appear to be carrying a gun. (Tr. 302-04). Bethea confirmed that Douglas left the group and explained that he and Applicant approached Irons' and Victim's group and attacked them. (Tr. 449). Bethea told the jury that Applicant pulled out a handgun and began shooting. (Tr. 450-51).

To corroborate Bethea's version of the shooting, the State also introduced rap lyrics written by Applicant which indicated he killed Victim to avenge Eric Floyd's death. (Tr. 293-95, 406-07, 415). There was also testimony from Applicant's former cellmate, Timothy Smith. Smith testified that Applicant said he would kill Bethea, his brother, his children and his whole family because he "snitched" on him, and he had pushed through the crowd and shot Victim because he believed Bethea would not. (Tr. 499-522). Smith testified that Applicant told him he received a phone call that Victim was in Myrtle Beach for bike week, prompting Applicant and

his friends to come to Myrtle Beach to "take care of him." (Tr. 505-07).

Alexis Brown, a member of Irons' and Victim's group that night, testified that the composite generated by authorities was Bethea, but confirmed that the shooter was wearing a red bandana over his face and pulled a gun from his waistband. (Tr. 544, 547-48, 550-51).

Finally, Applicant testified in his own defense. (Tr. 565-611). Specifically, Applicant explained he walked off following the dispute between Irons and Bethea, heard gunshots, and ran back to the K-Mart parking lot to meet with the rest of his group. (Tr. 575-76). He said he did not shoot anyone. (Tr. 566). On cross-examination, Applicant said he brought a gun to Myrtle Beach but left it in the car. He admitted he had previously owned a .380, but testified he had given it away. (Tr. 589, 600).

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. Defense counsel was ineffective because:
 - a. "Trial counsel was ineffective for failing to call Officer Mark Jackson from his 'Investigative Report'."
 - b. "Trial counsel was ineffective for failing to call a material witness . . . who did not pick Applicant out of a photo line-up."
 - c. "Trial Counsel was ineffective for failing to object State's violation of Applicant's right to confrontation by adverse witness when evidence was produced by state that ABWIK victims were shot by an Applicant when ABWIK victims were not present at trial for cross-examination by Applicant."
 - d. "Trial counsel was ineffective for failing to move for verdict in arrest of judgement on grounds that the court lacked jurisdiction to try Applicant's ABWIK offenses after amending the indictments during the charge to the jury."
 - e. "Ineffective assistance of appellant counsel failure to raise on appeal applicant's ground that trial court lacked subject matter jurisdiction to convict him of murder and ABWIK offenses."

At the PCR hearing, Applicant proceeded forward on the allegations listed in the initial application. All other allegations raised in his initial application and amendments are deemed

waived and abandoned and, accordingly, will not be addressed in this order.

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 Applicant's Horry County Clerk of Court Records, Applicant's South Carolina Department of Corrections Records, the trial transcript, the PCR action records, and the direct appeal 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. See 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.

Officer Jackson

Applicant claims that Counsel was ineffective for failure to call Officer Jackson to testify and for failure to enter his investigative report through him. Applicant argues that the victim's sister was interviewed by Officer Jackson and her credibility could have been impeached through Officer Jackson's testimony. He further testified that there was a discrepancy between the statement she made to Investigator Jackson and her testimony at trial. In her prior statement to law enforcement, she said that her friend told her about what happened. At trial, however, she testified that the decedent told her. Applicant testified that trial counsel's failure to call Officer Jackson to testify regarding the discrepancy was prejudicial to him and constituted ineffective assistance of counsel.

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).

This Court finds that the officer’s investigative report was likely not admissible, as any statements the witness she made to the officer would have been hearsay. Additionally, Counsel

credibly testified that she did not think that this witness would be helpful. Instead, she testified that calling him would open the door to entry of further incriminatory evidence. This is a reasonable strategic reason for not calling him to testify. Additionally, Applicant has failed to meet his burden of proof in establishing prejudice. *See Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993) (Mere speculation regarding the witness's testimony is insufficient to establish prejudice).

Failure to Call Person that did not Identify Applicant from Lineup

Applicant claims Counsel was ineffective for failure to call Shakira Gordon as a witness. Applicant alleges Gordon was the only person who identified someone out of a photo lined, and she picked Bethea out of the lineup rather than him. Trial Counsel credibly testified that while this witness identified Bethea alone, that did not mean they would not identify Applicant as being involved in the shooting if called at trial. Trial Counsel testified her testimony could have been damaging to defendant's case. This Court agrees. Further, Applicant has failed to meet his burden of producing the witness before the PCR court to demonstrate what the witness would have testified to at trial and how that testimony would have changed the results of the proceedings. Accordingly, relief on this ground is denied.

Failure to Call Victims

Applicant claims Counsel was ineffective for failure to object to the State's failure to call the other three shooting victims to testify. Whether failure to object constitutes deficient performance generally hinges on whether 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”).

This Court declines to find that the victims’ absence violated the Confrontation Clause. *See Crawford v. Washington*, 541 U.S. 36, 54 (2004) (finding that a Confrontation Clause violation occurs if there is admission of testimonial hearsay statements admitted, the declarant is unable to testify, and there was no prior opportunity for cross-examination). The victims existence and absence from the trial does not, by itself, constitute a Confrontation Clause violation.

Counsel’s decision to not call or request these witnesses’ presence is reasonable because they could have hurt the defense’s case. Additionally, Applicant has failed to show anything beneficial they could have offered that would have impacted the trial results. Accordingly, relief on this ground is denied.

Failure to Move for Directed Verdict – Indictments

Applicant claims Counsel was ineffective for failing to move for a directed verdict. Applicant testified at the PCR hearing that he believed the indictments in the case were faulty because they were not signed by the Solicitor and because the Grand Jury had not been convened during the General Sessions term of court. Applicants are not entitled to directed verdicts as a matter of law, and counsel will not be found ineffective for failure to move for a directed verdict if the motion would have been denied when viewed in the light most favorable to the State. Here, any attempts on Counsel’s part to move for a directed verdict based upon the insufficiency of the indictments would have failed. This allegation is without merit and this Court denies relief accordingly.

Appellate Counsel – Indictments

Applicant claims Appellate Counsel was ineffective for failure to challenge the indictments. A defendant is constitutionally entitled to effective assistance of appellate counsel. *Evitts v. Lucey*, 469 U.S. 387 (1985). “Generally, in analyzing a claim of ineffective assistance of appellate counsel, this Court applies the *Strickland* test just as it would when analyzing a claim of ineffective assistance of trial counsel. *Bennett v. State*, 383 S.C. 303, 309, 680 S.E.2d 273, 276 (2009). Applicant must show appellate counsel’s performance was deficient, and he was prejudiced by the deficiency. *Gilchrist v. State*, 364 S.C. 173, 612 S.E.2d 702 (2005); *Anderson v. State*, 354 S.C. 431, 581 S.E.2d 834 (2003); *Thrift v. State*, 302 S.C. 535, 537, 397 S.E.2d 523, 525 (1990).

Appellate counsel has a professional duty to choose among potential issues according to their merit. *Jones v. Barnes*, 463 U.S. 745 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. *Tisdale v. State*, 357 S.C. 474, 476, 594 S.E.2d 166, 167 (2004) (quoting *Jones v. Barnes*, 463 U.S. 745, 754 (1983) (“For judges to second-guess reasonable professional judgments and impose on . . . counsel a duty to raise every ‘colorable’ claim suggested by a client would disserve the very goal of vigorous and effective advocacy. . . .”)).

When a claim of ineffective assistance of counsel is based upon neglecting to file a merits-based brief, Applicant must show that appellate counsel unreasonably failed to discover non-frivolous issues and file a merits brief raising them, and a reasonable probability that, but for his counsel’s unreasonable failure to file a merits brief, he or she would have prevailed on his appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000). Applicant must show that a reasonably

competent attorney would have found one non-frivolous issue warranting a merits brief, and that the issue identified would have won on appeal. *Id.* at 288.

Appellate Counsel credibly testified that Applicant would not have succeeded on appeal by challenging the indictments. This Court agrees. Challenging the indictments is a frivolous issue and the allegation of failure to raise this issue does not constitute deficiency or prejudice. Accordingly, relief is denied.

Conclusion

Based on all the foregoing, this Court finds and concludes that Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court notifies Applicant that he must file and serve a notice of appeal within thirty days of receipt by counsel of the judgment entry's written notice to secure appropriate appellate review. *See* Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453, 409 S.E.2d 395 (1991), an Applicant has the right to appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP provides that if the Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate appellate procedures.

IT IS THEREFORE ORDERED:

1. The PCR application be denied and dismissed with prejudice; and
2. Applicant be remanded to the custody of Respondent.

AND IT IS SO ORDERED this 6th day of June, 2023.

Kristi F. Curtis

KRISTI F. CURTIS
Presiding Judge
Fifteenth Judicial Circuit

Spartanburg, South Carolina.

HULL/MBPD

CERTIFIED COPY
WITNESSES

2010 MAY 20 AM 9:04

*Melanie Hargrave-Walker*CLERK OF COURT
HORRY COUNTY

ARREST WARRANT NO. _____

J-735111

CDR: 0014 16-03-0620

CDR:

DOA: 07/08/2007

ACTION OF GRAND JURY

THIS BILL

AUG 23 2007

Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date:

DOCKET NO. 2007-GS-26- 3387

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY

85959-3

DEE

COURT OF GENERAL SESSIONS

AUGUST

TERM 2007

THE STATE

vs.

BRIAN FREDERICK SPEARS B/M

DOB

SSN:

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

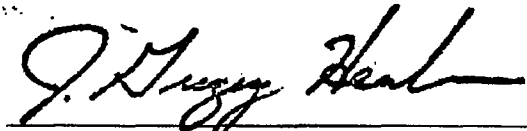
INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Krystal Fowler, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

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


SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie [unclear]
CLERK OF COURT
HORRY COUNTY

HULL/MBPD
WITNESSES

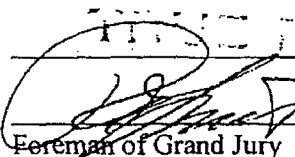
ARREST WARRANT NO. _____

J-735112
CDR: 0116 16-03-0010,0020

CDR: _____

DOA: 07/08/2007

ACTION OF GRAND JURY

 AUG 23 2007
Foreman of Grand Jury

VERDICT

Foreman of Petit Jury Date: _____

DOCKET NO. 2007-GS-26- 3388

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

BRIAN KENDRICK SPEARS B/M

DOB: _____
SSN: _____

ATTORNEY: BARBARA WILSON PRATT

INDICTMENT FOR:
MURDER

ORIGINAL

J. GREGORY HEMBREE, SOLICITOR

CLERK OF COURT
HORRY COUNTY

2010 MAY 20 AM 9:04

CERTIFIED COPY

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

**INDICTMENT FOR:
MURDER**

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

MURDER
CDR: 0116 16-03-0010,0020

That BRIAN KENDRICK SPEARS along with codefendants did in Horry County, on or about May 27, 2007, willfully, feloniously, and intentionally kill the victim, Aaron Hammonds, with malice aforethought, either express or implied, by means of shooting the victim, and the victim did die as a proximate result thereof on or about May 27, 2007 in Horry County, in violation of Section 16-3-10, 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.

J. Duggan Hunt

SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie ^{JD} ~~magnum~~ ~~Ward~~
CLERK OF COURT
Horry County

HULL/MBPD
WITNESSES

DOCKET NO. 2007-GS-26- 3389

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

ARREST WARRANT NO. _____

J-735113
CDR: 0014 16-03-0620

CDR: _____

DOA: 07/08/2007

BRIAN FREDERICK SPEARS B/M

DOB: _____
SSN: _____

ACTION OF GRAND JURY

TRUE BILL
AUG 23 2007
Foreman of Grand Jury

ATTORNEY: BARBARA WILSON PRATT

VERDICT

Foreman of Petit Jury Date: _____

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

J. GREGORY HEMBREE, SOLICITOR

2010 MAY 20 AM 9:04
CERTIFIED COPY
Horry County
Clerk of Court

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, DiJaun Quintell Monroe, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

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

SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie Ferguson
CLERK OF COURT
Horry County

HULL/MBPD
WITNESSES

DOCKET NO. 2007-GS-26- 3390

THE STATE OF SOUTH CAROLINA

COUNTY OF HORRY
85959-3 DEE

COURT OF GENERAL SESSIONS

AUGUST TERM 2007

THE STATE

vs.

ARREST WARRANT NO. _____

J-735114
CDR: 0014 16-03-0620

CDR: _____

DOA: 07/08/2007

BRIAN FREDERICK SPEARS B/M

DOB: _____
SSN: _____

ACTION OF GRAND JURY

TRUE BILL

AUG 23 2007
Foreman of Grand Jury

ATTORNEY: BARBARA WILSON PRATT

VERDICT

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

Foreman of Petit Jury Date: _____

J. GREGORY HEMBREE, SOLICITOR

CERTIFIED COPY
2008 MAY 20 AM 9:04
CLERK OF COURT
HORRY COUNTY

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)

INDICTMENT FOR:
ASSAULT AND BATTERY WITH INTENT TO KILL

At a Court of General Sessions, convened on August 23, 2007, the Grand Jurors of Horry County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL
(CDR: 0014 16-03-0620)

That BRIAN FREDERICK SPEARS along with codefendants did in Horry County on or about May 27, 2007, commit an unlawful act of violent injury to the victim, Lasheika Felton, with malice, by shooting said victim, thus committing the crime of Assault and Battery with Intent to Kill, in violation of Section 16-3-620, Code of Laws of South Carolina, 1976, as amended.

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

SOLICITOR

CERTIFIED COPY

2010 MAY 20 AM 9:04

Melanie Mayfield-Wood
 CLERK OF COURT
 HORRY COUNTY

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.Brian Spears

AKA:

Race: B Sex: M Age: 23DOB: [REDACTED] SS#: [REDACTED]

Address:

City, State, Zip: LUMBERTON, SC 28358DL#: [REDACTED] SID#: [REDACTED]*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Murder / Murder

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007GS2603388A/W#: J735112Date of Offense: 5/27/2007S.C. Code § : 16-03-0010, 0020CDR Code #: 0116

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADSin violation of § 16-03-0010, 0020 of the S.C. Code of Laws, bearing CDR Code # 0116☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)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:

Elder, Donna E.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 30 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☒ CONCURRENT or ☐ CONSECUTIVE to sentence on: 5/13/10☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-1-340 to be calculated and applied
by the State Department of Corrections.☐ 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 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

§ 47.12 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

§ 90.7 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (11/2009)

PTUP

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 25.00 beginning 06/13/2010

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 fee paid to Clerk
during probation.

Presiding Judge

Judge Code: 2152Sentence Date: 5/13/10

STATE OF SOUTH CAROLINA

COUNTY OF Horry
STATE VS.Brian Spears

AKA: _____

Race: B Sex: M Age: 23DOB: [REDACTED] SS#: [REDACTED]

Address: _____

City, State, Zip: LUMBERTON, SC 28358

DL#: _____ SID#: _____

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Assault / Assault and battery with Intent to Kill (ABWIK)

in violation of § 16-03-0620 of the S.C. Code of Laws, bearing CDR Code # 0014

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)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:

Elder, Donna E.

SC Bar# _____

Defendant

Attorney for Defendant

SC Bar# _____

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 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:☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on 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 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ Set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge).

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

§ 47.12 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

§ 90.7 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

\$100 \$100.00

\$100 \$

\$12 \$

\$25 \$

\$500 \$

\$25 \$

\$100 \$25.00

\$50 \$

\$40/ea \$

\$5 \$5.00

\$ \$3.90

\$133.90

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007GS2603387A/W#: J735111Date of Offense: 5/27/2007S.C. Code § : 16-03-0620CDR Code #: 0014

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 15.00 beginning 06/13/2008

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.Presiding Judge Car BUJudge Code: 2152Sentence Date: 5/13/10Clerk of Court/ Deputy Clerk Melanie Huggins-WardCourt Reporter: Brenda Babb

SCCA/217 (11/2009)

STATE OF SOUTH CAROLINA

COUNTY OF
STATEHorry
VS.

Brian Spears

AKA:

Race: B Sex: M Age: 23

DOB: [REDACTED]

SS#: [REDACTED]

Address:

City, State, Zip: LUMBERTON, SC 28358

DL#:

SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Assault / Assault and battery with Intent to Kill (ABWIK)

in violation of § 16-03-0620

of the S.C. Code of Laws, bearing CDR Code # 0014

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)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:

Elder, Donna E.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 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:☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on 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 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

§ 47.12 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114 (BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

§ 90.7 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

	\$
	\$
\$100	\$ 100.00
\$100	\$
\$12	\$
\$25	\$
\$500	\$
\$25	\$ 25.00
\$100	\$
\$50	\$
\$40/ea	\$
\$5	\$ 5.00
\$	\$ 3.90
\$	\$ 133.90

Clerk of Court/ Clerk

Court Reporter:

SCCA217 (11/2009)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007GS2603389

A/W#: J735113

Date of Offense: 5/27/2007

S.C. Code § : 16-03-0620

CDR Code #: 0014

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

_____ days/hours Public Service Employment

Obtain GED ☐

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly payments of \$ 25.00 beginning 06/13/2007

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2 152

Sentence Date: 5/13/10

STATE OF SOUTH CAROLINA

COUNTY OF
STATE

Horry

VS.

Brian Spears

AKA:

Race: B Sex: M Age: 23

DOB: [REDACTED] SS# [REDACTED]

Address:

City, State, Zip: LUMBERTON, SC 28358

DL#: SID#:

*CDL Yes ☐ No ☐ CMV Yes ☐ No ☐ Hazmat Yes ☐ No ☐In disposition of the said indictment comes now the Defendant who was
TO: Assault / Assault and battery with Intent to Kill (ABWIK)

IN THE COURT OF GENERAL SESSIONS

INDICTMENT/CASE#: 2007GS2603390

A/W#: J735114

Date of Offense: 5/27/2007

S.C. Code § : 16-03-0620

CDR Code #: 0014

SENTENCE SHEET

☒ CONVICTED OF or ☐ PLEADS

in violation of § 16-03-0620 of the S.C. Code of Laws, bearing CDR Code # 0014

☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☐ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)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:

Elder, Donna E.

SC Bar#

Defendant

Attorney for Defendant

SC Bar#

WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 20 ~~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: 5/13/10☐ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on 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 (Criminal
Domestic Violence) to ship, transport, possess, or receive a firearm or ammunition.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ OrderedTotal: \$ plus 20% fee: \$

Payment Terms:

☐ Set by SCDPPPS

Recipient:

*Fine:

§ 14-1-206 (Assessments 107.5 %)

§ 14-1-211(A)(1) (Conv. Surcharge)

§ 14-1-211(A)(2) (DUI Surcharge)

§ 56-5-2995 (DUI Assessment)

§ 56-1-286 (DUI Breath Test)

§ 47.12 (Public Def/Prob)

§ 14-1-212 (Law Enforce. Funding)

§ 14-1-213 (Drug Court Surcharge)

§ 50-21-114(BUI Breath Test Fee)

§ 56-5-2942(J) (Vehicle Assessment)

§ 90.7 (SCCA Surcharge)

3% to County (if paid in installments)

TOTAL

\$	
\$	
\$100	\$ 1002.00
\$100	\$
\$12	\$
\$25	\$
\$500	\$
\$25	\$ 25.00
\$100	\$
\$50	\$
\$40/ea	\$
\$5	\$ 5.00
\$	\$ 3.90
\$	\$ 133.90

Clerk of Court/ Deputy Clerk

Court Reporter:

SCCA/217 (11/2009)

PTUP

 days/hours Public Service EmploymentObtain GED ☐Attend Voc. Rehab. or Job Corp. May serve W/E beginning Substance Abuse Counseling ☐Random Drug/Alcohol testing ☐Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ 25.00 beginning 06/13/2010\$ paid to Public Defender FundOther: ☐ Appointed PD or appointed other counsel,
§ 47.12 requires \$500 be paid to Clerk
during probation.

Presiding Judge

Judge Code: 2152Sentence Date: 5/13/10