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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of General Sessions

Appellate Case No. 2024-000461

The Honorable Paul M. Burch, Circuit Court Judge

State of South Carolina.....Respondent,

v.

Michael Lamont WattsAppellant.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

The circuit court erred by denying Watts's motion for a new trial because the evidence produced at the hearing showed the State withheld material exculpatory and impeaching evidence from the defense which, had it been timely produced to counsel and used at trial, would have undermined Watts's conviction.

STATEMENT OF THE CASE

Michael Lamont Watts was indicted by the Chesterfield County Grand Jury during its May 2005 term for murder (2005-GS-13-0471), two counts of assault and battery with intent to kill (2005-GS-13-0473, -0474), possession of a firearm in a public building (2005-GS-13-0477), discharging a firearm into a building (2005-GS-13-0476), and escape (2005-GS-13-0477) and at the April 2006 term for possession of a weapon during the commission of a violent crime (2006-GS-13-0499). He was represented by James P. Rogers, who is now deceased.

At trial, two charges were dismissed by way of directed verdict (one count of ABWIK and possession of a firearm in a public building). He was found guilty of the remaining charges and the Honorable Paul M. Burch imposed a life sentence for murder, 20 years for ABWIK, 10 years for discharging a firearm into a building, and one year for escape. He also received a five-year sentence for possession of a weapon during the commission of violent crime.

Watts filed a timely notice of appeal and his appeal was dismissed by the South Carolina Court of Appeals. *State v. Watts*, Op. No. 2010-UP-019 (S.C. App. filed January 25, 2010).

Watts then timely filed an application for post-conviction relief on July 2, 2010. An evidentiary hearing was held on July 16, 2013 at the Darlington County courthouse. Watts was represented by Tara D. Shurling. On October 23, 2013, the Honorable R. Ferrell Cothran, Jr.

dismissed the application. After appeal, the South Carolina Supreme Court denied certiorari on February 19, 2015.

Undersigned counsel filed a motion for a new trial based on after-discovered evidence on June 3, 2022. A hearing was held before Judge Burch on April 26, 2023. Judge Burch denied the motion on March 11, 2024.

This appeal follows.

ARGUMENT

The circuit court erred by denying Watts’s motion for a new trial because the evidence produced at the hearing showed the State withheld material exculpatory and impeaching evidence from the defense which, had it been timely produced to counsel and used at trial, would have undermined Watts’s conviction.

Relevant Facts

From July 30 through August 1, 2007, Michael Lamont Watts was tried by a Chesterfield County, South Carolina jury in front of the Honorable Paul M. Burch. At the conclusion of the three-day trial, he was convicted of escape (05-GS-13-0477), discharging firearms into an occupied building (05-GS-13-0476), assault and battery with the intent to kill (“ABWIK”) of David Evans (05-GS-13-0473), murder of Clifton Funderburk, Jr. (05-GS-13-0471), and possession of a weapon during the commission of certain crimes (05-GS-13-0499).¹ Tr. 410-412. He was sentenced to life without parole for the murder conviction, with additional concurrent terms imposed as to the remaining charges. Tr. 416-417.

¹ Two other indictments for ABWIK (05-GS-13-0474) as to Jeffrey Crowder and firearms in a public building (05-GS-13-0475) were dismissed at the close of the prosecution’s case upon the defense’s motion for a directed verdict. Tr. 271, 274.

These indictments arose from a November 28, 2004 shooting at Matrix, a bar or club located in Pageland, South Carolina. Tr. 38. The shooting was precipitated by an altercation which arose in the club and, during the course of the dispute, Funderburk was fatally shot in the torso; Evans and Crowder also suffered nonfatal gunshot wounds. Tr. 37-38, 403.

The State contended the fatal and injurious shots were discharged from a firearm in Watts' control. Tr. 38. Conversely, Watts contended there were multiple shooters within the club, any of whom could have caused such harms. Tr. 41-43. The arguments of counsel, as well as the evidence introduced at trial, are summarized below.

At trial, the State was represented by Assistant Solicitors Franklin Joyner and Kevin Hales.² Tr. 1. As indicated above, their version of the case was that, in the midst of the argument that arose in the club, Watts exited the club, obtained a firearm from his vehicle, and then returned to the club and discharged the weapon, striking the three men, causing Funderburk's death and nonfatally shooting the other two. Tr. 38, 40, 375, 376-379.

The prosecution was adamant that Watts was the only shooter in the club. Tr. 367, 378. In support of its theory, the State argued that the lack of certain evidence amounted to its absolute non-existence, regardless of cause for its absence (*e.g.*, there were no photographs of bullet holes in the wall, meaning there could not have been bullet holes in the wall; people heard but did not see gunfire from a second source). Tr. 367-368, 378. Assistant Solicitor Joyner also argued that, because Watts was not, himself, shot, it necessarily could not have been "so dangerous for him that he had

² These are the same two prosecutors who were found to have committed prosecutorial misconduct by the South Carolina Supreme Court in another Chesterfield County case. *Fortune v. State*, 428 S.C. 545, 837 S.E.2d 37 (2019). Fortune's conviction was reversed by the Court based on this misconduct.

to shoot a gun,” and on that basis, claimed his lack of injury was necessarily directly correlated to the lack of presence of another shooter. Tr. 378.

It also focused heavily on Watts’ mindset at the times he discharged his weapon. Tr. 342-344, 375-377. Specifically, the State claimed Watts intended to kill Funderburk – and others – arguing the requisite mindset “clearly existed” based upon the fact that Watts: (1) went to the car and obtained the gun, (2) came back inside with the gun, (3) the gun was cocked, meaning it was “ready to shoot,” (3) he discharged the firearm, and (4) there was no “cause” or “reason” for doing so, based on what they described as Funderburk’s “100 percent innocen[ce]” and Evans not possessing a gun himself. Tr. 375-378.

Assistant Solicitor Joyner also claimed Watts’ admissions to bringing a cocked firearm into the club and discharging it alone amounted to an admission to guilt as to the charged counts of murder and ABWIK. Tr. 377.

The State further drew attention to the importance that the jury conduct a credibility assessment of the parties’ cases, with a focus on the points of “corroboration” and “expert testimony,” specifically pointing out the number of witnesses it presented. Tr. 39, 364-365, 368-370. It also advised the jury to use its “common sense” and think “logically,” while also telling them that it was not their place to “search for reasonable doubt,” but rather to “search for the truth,” which it claimed to be that Watts murdered Funderburk and intended to kill others. Tr. 375, 378-379.

In support of its version of events, the State first called several percipient witnesses to the shooting – David Evans (also one of the complainants) (Tr. 43-75), Latoya Miller³ (Tr. 77-91), Tyrone Miller (Tr. 91-100), Charles Miller (Tr. 101-114), Kevin Johnson (126-141), Dewayne Miller (141-153), Angelo Mason (153-164), Tameka Austin (Tr. 164-167), Michael Tresdale (Tr. 177-183), and Detective Larry Brown (Tr. 183-228). These witnesses presented varied versions of events, but each agreeing an altercation occurred, followed by a shooting.

One of these eyewitnesses, Tyrone Miller, had a federal plea agreement which provided for a reduction in sentence in exchange for assisting the prosecution, but he denied knowing anything about a reduction based on his testimony in state court and further denied testifying for that purpose. Tr. 230.

Austin and Tresdale were the only percipient witness with prior remote familiarity with Watts, and Dewayne testified to being incarcerated with him in the county jail – *i.e.*, while Watts was awaiting trial on the charges at issue – after the fact. Tr. 166, 127, 149-151, 179-180.

Testimony was also provided by Investigator Bennett, who took Watts' statement. Tr. 170-177; *see also* State's Exhibit 1. He found Watts to be “cooperative” and “forthright” with him. Tr. 175. Further, Detective Brown testified not only as an eyewitness, but also as the “main case investigator.” Tr. 217.

Moreover, expert testimony was elicited from Agent Jennifer Stoner from the Trace Evidence Division of the South Carolina Law Enforcement Division testified to the gunshot residue

³ Multiple witnesses for the State have the same surname, *i.e.*, Miller. Tr. 77-91 (Testimony of Latoya Miller), 91-100 and 229-231 (Testimony of Tyrone Miller), 101-116 (Testimony of Charles Miller), and 141-153 (Testimony of Dewayne Miller). For the sake of clarity, they are referred to by their first names. No disrespect is intended.

(GSR) testing she did – and did not – perform. Tr. 233-242. Similarly, Agent Frank Dan Defreese testified as a firearms identification expert. Tr. 242-253. Finally, Dr. Janice Ross testified to completing the autopsy on Funderburk and detailed her findings for the jury. Tr. 259-268.

The Initial Altercation

Latoya, Tyrone, Johnson, and Austin testified that they witnessed a fight in the club on the night in question. Tr. 78, 89, 93, 126-127, 131-132, 133-135, 137-138 165-166. Tyrone testified that his cousins, Charles and Johnson, were involved. Tr. 93-94. Austin reported seeing Dwayne and Watts involved, as well. Tr. 165-166.

Charles confirmed his involvement and admitted to believing he hit Watts, though he believed Watts hit him first. Tr. 103-105, 111-112. Johnson, however, testified to Watts being not an intervenor, but rather the initial instigator of the fight, however he stated it was instead Dewayne that first hit Watts. Tr. 135-137. He also testified to seeing Watts swing, though his initial statement did not include such an allegation. Tr. 136. Dewayne denied this was an accurate portrayal of events, stating himself and “some little black guy” he did not know were the initial parties involved in the disagreement, and Watts attempted to intervene; he did, however, claim Watts swung on him and Charles first. Tr. 141-144, 152. Dewayne admitted to reciprocating, and then fighting with Watts, though he never reported fight to the investigating officer. Tr. 144, 146-149.

Evans denied witnessing the altercation, but reported witnessing its aftermath, which included Watts being at the bar with two females, appearing “intoxicated.” Tr. 44-46, 55. Mason, who was working security at the front door of the Matrix that night, also did not witness the fight but did intervene after the fact, breaking it up. Tr. 154-155, 157-158. Likewise, Tresdale, the co-owner of the Matrix, also did not see the fight but was aware it occurred. Tr. 178-180. Critically to

this motion for a new trial, Detective Larry Brown was also moonlighting as a security guard at the Matrix on the night of the shooting and saw the end of the fight only, as it was being broken up. Tr. 184-187, 189.

Mason, Treesdale and Detective Brown each identified one of the men involved as Watts. Tr. 155, 179, 186-187, 189. Detective Brown also identified “Shawn Demorris” and/or “Rashad” and/or Simpson being involved. Tr. 186-187, 189.

The Events Leading Up to the Shooting

Tresdale and Detective Brown each reported seeing Watts obtain a gun from a vehicle and “cock” it, and then reentering the club. Tr. 180, 189-190, 199-200, 209. Johnson also testified he witnessed Watts pull the gun out of the car, but he went back and forth regarding whether he saw him reenter the club, first, saying Watts “shot the door and came in shooting,” then he said he “didn’t see him physically come through the door.” Tr. 128-130, 133-134, 140.

Evans and Latoya each offered testimony to seeing Watts in possession of a firearm and he described it and identified the State’s Exhibit 3 as “similar” to the one he saw in Watts’ possession. Tr. 46-47, 60-63, 78-80, 83, 89-90. Evans recalled it being unconcealed and pointed “down.” Tr. 63-64. Tyrone, Charles, Johnson, Dewayne, and Mason similarly described the firearm and the fact of it being in Watts’ possession. Tr. 95, 105-106, 112-114, 127, 129, 131-134, 141, 145, 153. 156. However, Charles was unsure if Exhibit 3 was the same firearm he had seen (Tr. 114) and Austin never saw Watts with a gun (Tr. 168).

When interviewed by Investigator Bennett, Watts admitted to retrieving a firearm and bringing it back into the club “to get [his] buddies out of the club.” Tr. 175. Watts similarly told

Detective Brown, “I remember getting the gun, going in to get my boys, but I don’t remember shooting anybody. I thought I was shooting in the air.’” Tr. 195.

Prior to the shooting, Tyrone and Dewayne testified to Watts pointing the firearm in Tyrone’s face and asking, “who hit him.” Tr. 94-95, 145. Johnson also initially told Agent Anderson that he witnessed this occur, but on cross-examination he said he never witnessed it and had just repeated what Tyrone told him occurred. Tr. 129, 133-135.

Evans, Latoya, Johnson, and Tresdale, each testified they did not see anyone else with a gun that night. Tr. 72-73, 80, 82, 90, 133, 139, 141, 183. Mason also testified he did not see another person in possession of a firearm, but also admitted he did not look for another one or see anyone else doing so. Tr. 157, 164. Conversely, Charles reported seeing a big, dark-skinned guy that was kind of heavy set” in possession of a “shotgun” at the club. Tr. 107-108, 113. This allegation was not investigated by officers. Tr. 219.

The Shooting in the Club

Evans testified to witnessing Watts discharge the firearm inside the club, saying he did so after looking around and mumbling something to himself, and raising the gun up sideways. Tr. 47-49, 63-67, 72. Evans reported that Watts, “fired one shot” which struck Funderburk, who he hit the wall, slid down and onto the floor, moved for several moments and then stopped. Tr. 47-49, 63-67, 72. Evans identified State’s Exhibit 2 as being a photograph of the decedent. Tr. 53-55.

Latoya wavered back and forth between testifying to seeing the gun being discharged between one and three times, and only hearing it being discharged. Tr. 78-80, 83-84, 89-90. In her initial statement to police, she also reported hearing a “clicking” noise, which she initially omitted

from her testimony, but affirmed as accurate when her memory was refreshed by counsel. Tr. 84-86, 90. She admitted to not seeing who fired the shots at issue. Tr. 91.

Charles was similarly inconsistent, saying he saw Watts shoot and “fire come out of the barrel,” but then saying he only heard the three shots. Tr. 105-106, 111-113, 120. Johnson also first said he did not see the shooting occur and assumed it to be Watts because he did not see anyone else with a firearm that night (Tr. 133, 139, 140-141), however he later said he saw Watts “kind of turn” before he “shot off some more rounds” (Tr. 130); he did not see Funderburk get shot and was adamant that he heard “more than two” shots. Tr. 132-133, 138-140.

Tyrone did not see Watts discharge the firearm; he was in the bathroom. Tr. 94-95, 99. He did, however, hear a firearm discharge between three and five times. Tr. 94-95, 99. Dewayne was behind the bar and then in the kitchen of the club when he reported also hearing – but not seeing – a single gunshot, a pause, and then two more gunshots, for a total of “three shots.” Tr. 145-146, 151-152. Mason also reported not seeing, but hearing, a single initial gunshot, which he did not recognize to be as much until a patron told him someone had a gun. Tr. 156, 158-160. Similarly, Austin heard a “series of shots,” estimated to be between two and seven, but did not see the source of the gunfire. Tr. 166-168. Tresdale also did not see anyone discharge a weapon, but heard “three, four or five” gunshots from his position of cover in the store across the street. Tr. 180-183.

Latoya first told investigators that she was initially unaware that Funderburk had been shot, and only found out when she returned to the club. Tr. 90. However, at trial, she reported that she knew right away that he had been shot, because she “turned around and he fell on the floor,” but she was pushed out the door and had to come back in to find him. Tr. 80-81, 86-87, 90.

The Shooting Outside of the Club

After this shooting in the club, Evans reported he ran into Watts outside, who accused him of swinging on him, before Watts “raised his weapon and fired four or five times,” striking the ground, and then shooting the glass out of the door, which thereafter struck Evans in his right leg; he showed the jury his injured leg. Tr. 47-49, 63-70, 72. He described being at the “threshold” of the building when shot – both inside and outside – though this contradicted his medical records, which stated he was shot inside of the club, a statement Evans did not recollect making. Tr. 70-71, 73-74. Evans injuries were treated the same night and he was discharged to return home. Tr. 51, 70-71.

Johnson also testified that he was “grazed” or “burnt” in his “lower right leg” by a shot discharged in the club. Tr. 131, 139-140. He reported receiving medical attention from an ambulance on the side of the club. Tr. 131, 139-140.

Mason reported hearing firing of the weapon resume an unknown number of times and seeing Watts approaching the exit of the club. Tr. 156-157. However, he faltered back and forth between saying Watts arrived at the exit of the club with an already emptied firearm and claiming that he personally witnessed Watts fire the weapon as he was approaching the door, “walking backwards out the club.” Tr. 156, 160-162. He was also conflicted regarding when the shooting stopped – either before he approached the exit, as noted above, as compared to while Watts was “right at the front door,” or not “until he got outside.” Tr. 156, 160-162. He also described Watts shooting the “glass out” and the bottom of the door. Tr. 161-162. He offered his opinion that Watts was shooting at, “another person inside,” whom he assumed to be Evans, and denied it was possible Watts was shooting as a warning or for another reason. Tr. 161.

Detective Larry Brown also stated he saw Watts shooting “about four times” outside of the club, “swinging the gun,” in “a wild state,” and disobeying police orders, resulting in a bullet breaking the glass door. Tr. 191-192,195, 209-211. He did not believe he was shooting at anyone in particular, just “firing at anybody.” Tr. 211-212.

Watts’s Apprehension, Alleged Attempted Escape and Post-Apprehension Events

Detective Larry Brown reports Watts was being “covered” by two of his friends, in an attempt to prevent his apprehension; they made it to the car, where they were thereafter apprehended and handcuffed, and the gun was retrieved from inside the vehicle. Tr. 192.

Evans further reported witnessing Watts being apprehended and then handcuffed, and that, during that time, reports of further shooting were made, though he did not hear any more shooting. Tr. 50, 65, 72-73. Latoya first stated she did not see or hear anything else while outside, but later testified to hearing “maybe two more” shots. Tr. 81, 84. Johnson, Austin, Mason and Detective Brown each reported they did not hear any further shots. Tr. 130-131, 139, 163-164, 168, 192, 213. Detective Larry Brown was more adamant than anyone that he did not see or hear a second shooting, calling those who claimed otherwise confusing a car backfiring with gunfire. Tr. 192-193, 208, 213-215, 217-219. Because he disbelieved their contentions, he “did not search any of the patrons of the club” nor stop, detain or question them, because he felt he “didn’t see a need to” do so. Tr. 215, 217-218.

During the reports of additional shooting, Evans reportedly witnessed Watts running while handcuffed, causing Evans to “tackle” Watts. Tr. 50-51.

Latoya testified to reentering the club post-shooting to look for the people she was there with and described having no trouble gaining access to the club after the shooting, as it had not been secured even ten minutes later. Tr. 87.

The Investigation

Detective Larry Brown detailed the investigation he conducted, describing learning Funderburk was shot, but being unable to secure the crime scene until after detaining the individuals outside and clearing the parking lot. Tr. 193, 215-216.

Detective Brown collected, transported to and from S.L.E.D., and placed in evidence (under the control of Larry Leary), a firearm recovered from the Pontiac Bonneville Watts was apprehended in, “still cocked back,” and “on the passenger side seat between the seat and the console,” as depicted in a photograph he took, as well as a green jacket Watts was wearing. Tr. 199-203; *see also* State’s Exhibit 4 (jacket), 3 (photograph), 13 and 39 (firearm and its components).

Evans identified State’s Exhibits 5 through 8 matched the Pontiac Bonneville that the “suspects were all driving in.” Tr. 51-52. Detective Brown also identified Watts and his group arriving in a Bonneville. Tr. 185-186.

The firearm was identified by Agent Defreese as a “Springfield Armory Brand 1911A1 Model 45 Auto-Caliber Pistol” and the magazine was described as fitting that pistol and capable of holding eight rounds. Tr. 243-244, 250.

Evans and Latoya each identified the State’s Exhibit 4 as similar to the jacket they saw Watts wearing on the night of the shooting. Tr. 47, 60, 78-79. Charles, Johnson, Mason, Austin and Detective Brown agreed on the jacket’s description. Tr. Tr. 105-106, 113-114, 129, 133-134, 141, 156,

166, 189, 199-200. The green jacket was later tested for, and returned results consistent with, GSR. Tr. 238-240.

Agent Stoner was unable, however, to test the GSR swab of Watts' person collected by Detective Brown and/or his agents due to its inherent unreliability and potential for contamination, *i.e.*, it was collected using a wooden swab. Tr. 237-238, 240. She was not provided with Funderburk's clothing and, therefore, was unable to perform any analysis thereon, despite the fact that it would have been revealing regarding various factors surrounding the circumstances of the shooting, including the distance between the shooter and the person shot. Tr. 240-242.

Detective Brown "personally collected," transported to and from S.L.E.D., and placed in evidence (under the control of Larry Leary), several expended casings, including "four or five" near the middle door to the club and approximately two to three feet from the doorway, and one "live," unexpended bullet also in that area, as well as one "spent round" approximately "5 feet from the victim's body," but it was "pretty clean" and did not have blood on it. Tr. 194-199, 222-223; *see also* State's Exhibits 19 and 23 (spent casings), 17 (bullet) and 18 (spent round). All ammunition collected was reported to be .45 automatic. Tr. 217, 225. Detective Brown failed to "take any pictures" of the casing or bullet's locations, or to complete "trajectory" calculations prior to collecting such evidence, despite to admitting it is "normal procedure" to do so; he nonetheless formed his own conclusion that they came from "the bar area towards the dance floor" based solely on one witness's statement. Tr. 216, 223-225. Detective Brown further testified to personally checking the building for "any other bullets in the walls," and not finding any, but he failed to document as much in his notes. Tr. 216-217, 226.

These casings were examined by Agent Defreese, who testified to receiving them from Detective Brown, and reported his findings that the casings at State's Exhibits 18 through 23 were fired through the recovered firearm (discussed below), and the bullet at State's Exhibit 17 as being incapable of being identified as having been or not been in the firearm. Tr. 244, 248-249. He found State's Exhibit 18, the casing found near Funderburk, to be "not very badly damaged and ... not badly deformed," and showing "no trace materials..., no obvious blood or any other foreign materials," though clearly fired. Tr. 252. Agent Defreese's detailed report of his findings was introduced as State's Exhibit 41. Tr. 249-250.

Detective Brown reported he also personally photographed "of the floor where Mr. Funderburk was laying at" as well as, in a follow-up investigation, photographs of the Matrix club. Tr. 207-208; *see also* State's Exhibits 24 through 38 (Matrix photographs from follow-up). Evans identified State's Exhibits 9 through 11 as accurately depicting the Matrix's main entrance. Tr. 52-53. The audio from Unit 29, Officer Brown's vehicle, was collected and logged, as well. Tr. 205-207; *see also* State's Exhibit 16.

When questioned on his training in forensics, Detective Brown testified it was "very little" and he was "not an expert," but he nonetheless decided not to "call in a forensic team from SLED" because he "was on the scene from beginning to the end." Tr. 217, 224. He completed an incident report, but took no "notes contemporaneous with November 28, [2004]" and only had March 7, 2005 notes based on his "independent recollection of what happened that night," and drafted "[w]ithout the aid of some other handwritten notes to help [him]." Tr. 211-213, 225.

None of the percipient witnesses had ever been shown a photographic lineup or spread of Watts by investigators. Tr. 59, 91, 97-98, 103, 106, 110, 149, 151, 169, 229. Detective Brown testified

he found it unnecessary to do one. Tr. 217, 220. After preliminary questioning on the point, the court admonished defense to not bring the issue up again as it was not pertinent because Detective Brown personally witnessed the shooting outside; the court did not address that he had not witnessed any of the events occurring inside the club. Tr. 221-222. However, Tyrone reported Assistant Solicitor Joyner visited him while he was in custody in or around August 2006, showed him a photograph of Watts asked if he was the man who shot him. Tr. 97-98, 229-230. Tyrone reported it “didn’t look like him” in one photograph, but then identified him in another. Tr. 98, 229-230.

Evans testified to providing an informal and incomplete statement, discussing only the physical description of the shooter to Officer Mackey of the Pageland Police Department on the night at issue. Tr. 50. Dewayne reported being the one who called police but stated he did not speak with them again that evening. Tr. 145-147. Tresdale believed that he or someone he was with in the store across the street may have also called the police. Tr. 180-182.

None of the other percipient witness, however, provided any formal statements whatsoever to officers on the night at issue, though, they were each interviewed by SLED Agent Anderson on varying dates between several days later and more than a month later. Tr. 70, 74, 84-85, 88-90, 96-9, 146-149, 167, 229; *see also* State’s Exhibits 12, 14-15. When Dewayne was asked how, if he did not know Watts prior to the shooting, he could have included his name in the statement identifying him as the shooter without any physical description of the assailant, his attire or the weapon, he replied that Agent Anderson “told [him] his name” while he was giving his statement. Tr. 150, 153. Further, Dewayne, Tyrone, Charles and Latoya were family, but they denied ever discussing the

shooting between the time it happened in late November 2004 and when they gave their statements to Agent Anderson, as late as January 2005. Tr. 148-149.

The Autopsy

On November 29, 2004, Dr. Ross and Dr. Sexton conducted Funderburk's autopsy. Tr. 263-264; *see also* State's Exhibit 46. Dr. Ross testified to the "entrance wound" being in Funderburk's mid to left chest, an "oval" measuring ".45 by .46 inches," and entering at a downward angle. Tr. 266-267. It traveled through his lung, heart and left kidney before exiting the middle of his left side, exiting slightly towards the right and resulting in a ".4 ... by .65 inches" exit wound. Tr. 266-267, 269. She further identified the cause of death as "exsanguination" caused by the gunshot wound to the chest and resulting perforation of internal organs. Tr. 265. These findings were detailed in her November 29, 2004 autopsy report. Tr. 265; *see also* State's Exhibit 42.

Dr. Ross could not definitively identify the caliber of the bullet causing the wound due to the "elasticity of the body," but found it plausible that it could have been caused by a .40, .42 or .45-caliber bullet. Tr. 267-268. She was unable to determine "whether [the] gunshot was intentional or accidental." Tr. 268.

Defense Case

Watts was represented at trial by Jimmy Rogers, Esq. Tr. 1. His theory of the case was that, while Watts did fire a gun both inside and outside the club, there were multiple shooters present in the club on the night in question, presenting reasonable doubt regarding whether Watts' firearm had delivered the fatal blow to Funderburk, as well as regarding whether his gun caused Evans' injuries. Tr. 41-43, 323-325, 327-328, 332, 338-341, 346. As to the escape charge, it was the defense's theory that Watts was attempting to get to a place of safety upon hearing the shooting in

the club resume while he was exposed and handcuffed, it was not an attempt to evade lawful custody. Tr. 326-327, 362.

Relatedly, Attorney Rogers also challenged the State's theory that Watts possessed the requisite mental state of "malice aforethought" when he discharged the firearm. Tr. 328-329, 337, 346-347. Specifically, defense counsel argued that his mindset could not have been malicious as to either Funderburk or Evans, especially because he did not even know them nor were they in any way involved in the events leading up to the shooting, or as to anyone else, negating the applicability of the notion of transferred intent, as well. Tr. 328-329, 337, 346-350, 363. Rather, the defense contended that Watts' mental state was one of fear for his own safety, although Watts' response to such fear was, admittedly, irrational and immature. Tr. 318-321, 323-325, 328-329, 332, 337, 339-340, 347, 349-350.

The defense also defended against the State's case by challenging the credibility of the State's witnesses through citation to the notorious inherent unreliability of eyewitness identifications, the inconsistencies in their statements and presence of "motive or bias" of several witnesses, as well as the unexplained absence of others. Tr. 350-354, 360-361. He pointed out the several statements backing his client's contention that there were multiple shooters and that shots were still being fired while he was in police custody. Tr. 287-288, 290-291, 293-297, 320-321, 323-324, 326-328, 332, 339-340, 352, 354-356.

He also gave significant weight to the utter lack of physical evidence in the case due to the improper and inadequate investigation and documentation of the crime scene, as well as to the significant issues with the investigation into the shooting overall, including substantial questions about the procedures used for obtaining of witness statements, all of which the State utilized

individually and collectively to bring the case against his client. Tr. 353-361. He described this investigation and the related charges brought thereon as making only “half a case” against Watts. Tr. 362.

Based upon this version of the facts and evidence – or lack thereof – defense counsel contended that, at absolute most, the evidence supported multiple versions of events, rendering neither version capable of being found true beyond a reasonable doubt. Tr. 347-348, 363. In support of these arguments, the defense offered testimony Crystal Jones, Watts’ girlfriend at the time of the shooting, as well as the trial (Tr. 283-292), Ferman Mackey, a detective who was called in to investigate the shooting (Tr. 292-299), and Watts himself (Tr. 302-341).

Jones and Watts each testified that they went to the Matrix Club with friends on the night of November 28, 2004, when a verbal disagreement broke out, between one of their friends, Michael MacElwane, and Charles Miller. Tr. 284-285, 304-307. Jones asked Watts to intervene and diffuse the situation, and he did as she asked. Tr. 285-286, 290, 306-308, 311, 331-332, 335. However, such attempts were unsuccessful, and resulted in Watts, himself, being physically assaulted – grabbed, struck in his right eye and left jaw, causing him to fall the floor, where the assault continued. Tr. 285-286, 290, 312-313, 334-335. They both agreed Watts did not hit anyone first, or even at all for that matter, and the fight dispersed on its own for unknown reasons. Tr. 286-287, 290, 312-313. Watts suffered an injury above his right eye as a result of the assaults. Tr. 332-333.

Jones testified to losing track of Watts while looking for her sister and cousin, and, therefore, Watts’ testimony offered the defense’s sole account of his actions for the period beginning after the fight and lasting until he was handcuffed outside. Tr. 287-288, 314-326. Specifically, Watts testified

that he was assaulted twice more before he exited the club First, he was attempting help a friend, Shawn Robinson, who was also being assaulted, resulting in him being knocked unconscious and fall to the floor face first, and when he tried to help his friend up, he was again pushed to the floor. Tr. 314-315. In a rush to get out of harm's way, Watts began trying to pull a then semi-conscious Robinson outside, when Watts was, yet again hit, this time in the back of his head, causing him to fall to the floor once again. Tr. 315, 334-335.

Watts testified that he was finally able to make it outside after the third blow, though he was alone. Tr. 315-316. He made it to the car he had arrived in and wanted to leave but did not have the car keys, nor a phone or any other way to contact his girlfriend and friends aside from returning to the club. Tr. 315, 317, 336. Watts admitted he did not call police, but rather was focused on finding the people he was there with. Tr. 316, 335-337. Therefore, in an attempt to locate them, but also fearing for his own physical safety due to the repeated attacks he had just suffered, Watts quickly grabbed a firearm he had seen in the car they arrived in earlier and carried it with him back into the club to find his group. Tr. 315-318, 335-336. He had never seen the firearm before that night and only knew it to be in the vehicle due to being asked to place it under the front seat on the drive to the club. Tr. 318-319, 330-331.

Watts then testified that he "racked the chamber of the gun" – which he knew to mean it was "ready to shoot" – as he re-entered the club, holding the firearm pointed upward "the whole time," and making no attempt to conceal it. Tr. 318-320, 329, 337-338. Watts described intending to use the firearm as a deterrent and a tactic to dissuade his attackers from resuming their onslaught while he was searching for his friends and girlfriend. Tr. 318-320, 337. His only intention in firing the weapon, if needed, was to get his attackers away from him. Tr. 318-320, 337. He testified that it

was his plan, if he did have to discharge it, was to discharge it “in the ceiling,” which is why he had it “pointed at the ceiling when [he] walked into the club.” Tr. 337.

Upon reentry to the club, Watts did, in fact, begin searching for his girlfriend and friends as planned. Tr. 320-321. However, during his search he reports seeing something “with a very shiny effect” out of the corner of his eye, which he believed to be a handgun, approaching him. Tr. 320-321, 340. Fearful and believing someone was approaching him with a gun, Watts “fired a [single] shot” “at a right angle but upwards,” while “flinching at the same time” as he was “expecting to get hit” himself. Tr. 332. He did not fire his weapon in anyone’s direction. Tr. 338. After discharging his gun a single time, Watts then turned and ran back out of the club in the belief that someone with a firearm was after him. Tr. 332.

As he was running outside, Watts heard “two to four shots,” but was unsure of their source, however, he was certain people were “coming up behind [him] with a gun.” Tr. 323-324, 328, 339-340. Fearful for his life and in an attempt to dissuade them from further attack, Watts “started firing shots” “at a downwards angle towards the ground.” Tr. 323-325, 328, 339-340. He reports firing four or five shots in that manner before running to the safety of the car he had come to the club in. Tr. 324-325, 338-339.

Shortly thereafter, Watts was approached by officers, handcuffed and put on the ground in front of the car, with an officer “kneeling down” on his back. Tr. 325-326. While in that position, though he did not hear them himself, Watts heard and saw people running from the club saying more shots were being fired, causing the officers detaining him to run back into the club. Tr. 326-327.

While still separated from Watts, Jones also reports hearing gunshots while both inside and outside of the club, including while Watts was handcuffed and in police custody in the parking lot outside of the club. Tr. 287-288, 290-291. Another defense witness, Officer Ferman Dean Mackey with the Pageland Police Department, corroborated hearing what sounded like shots being fired from a “small caliber handgun,” estimated to be “a .22 or a .25,” near the club while Watts already in the custody of his fellow Pageland Police Department officers, Sergeant Brown and Officer Brown. Tr. 293-297. Officer Mackey likewise testified that people in the crowd were yelling out that they, too, believed that the shooting had resumed. Tr. 296. Officer Mackey also noted that the scene was loud and chaotic, he did not personally see a gun, muzzle flash, nor find shell casings in the parking lot, which indicated the sound could have been something other than a gun discharging, but he also noted that in his extensive knowledge of firearms, a .22 or .25 revolver would not leave casings behind. Tr. 297-299.

Because of the reports of ongoing gunfire causing him to feel exposed and vulnerable, Watts – still handcuffed – attempted to run 10-15 feet to a position of safety. Tr. 326-327. He states he did not “run in an attempt to escape custody.” Tr. 327.

Officer Mackey also testified to detaining another man who was physically unmistakable for Watts due to their significant difference in size, after the individual was identified as having been shooting in the club. Tr. 294-295.

When asked at trial, Watts repeatedly denied shooting Funderburk, even accidentally, and stated he did not know what occurred with regard to Evans’ injuries but stated he “did not recall” or “know” of him being shot as a result of his own actions. Tr. 327-328, 338-341.

As to his mental state, Watts denied coming to the club “ready to shoot” on the night of November 28, 2004, though, as described above, he admitted that, after he was repeatedly assaulted, he was ready to do discharge the firearm “in the ceiling” if he “was put in a position where [he] would have had to [do so]” for his own safety. Tr. 329, 337. However, he made exceedingly clear that he did not intend to shoot anyone, especially not Funderburk, as he not only took no issue with him, but he did not even know him. Tr. 328-329.

Prosecution’s Case-in-Chief

At trial, the State offered the testimony of numerous witnesses, beginning with David Evans, the complainant in one of the assault and battery with the intent to kill indictments. Tr. 43-75.

Testimony of David Evans

The State’s first witness was David Evans. Tr. 43-75. He testified working as a bouncer at the Matrix Club in November 2004. Tr. 44. He stated that he was not working on the early morning of November 28, 2004 but had gone to the club to celebrate his birthday. Tr. 44, 55. Upon Assistant Solicitor Hales’ inquiry, Evans provided a physical description of the layout and conditions of the club, describing it as moderately crowded on the night at issue, and “very illuminated” near the bar, but “pretty much dark” on the dance floor. Tr. 56-59.

Returning to the night in question, he recalled there being an “verbal altercation” on the dance floor and assisting the bouncer who was working that night, off-duty Pageland Police Detective, Eric Brown; he did not witness the physical portion of the altercation, as it had already occurred and/or it was in another part of the club. Tr. 44-45, 55.

At Detective Brown's orders, Evans recalls "watching" a guy by the last name of "McElwain" while the detective took another man named "Rick" outside. Tr. 45. He recollected seeing Watts accompanied by two females approaching the bar, and described Watts as appearing "intoxicated," and "moments later another staff member was dragging another [unknown] person out" to the lobby area after he "was found on the dance floor unconscious." Tr. 45-46.

Then Evans testified that someone "screamed, 'He's got a gun. He's got a gun,'" and Watts entered - or had already been in - the club with "a handgun that looked like a nine-millimeter or .45 [with] blue steel [and] wooden handles," which he believed to be manufactured by "[e]ither Springfield or Lama [sic]." Tr. 46, 62-63. Assistant Solicitor Hales showed Evans the State's Exhibit 3, which he described as being "the Springfield Model 118243 - well, Model 1911A1 Colt .45" and indicated that he recognized it as the firearm Watts had possessed on "[t]he night of the incident," however, he admitted he had "no way of knowing if it [was] the exact same weapon," though it appeared to him to be "similar." Tr. 47, 60-61.

Evans identified Watts as the defendant. Tr. 46. He had not previously "ever been shown a photographic spread of Michael Watts to make an identification of the person [he] saw that night," so his identification was based on "recollecting what [he] saw - the person that [he] saw from over two years ago[.]" Tr. 59. Evans also identified State's Exhibit 4 as a jacket Watts was wearing at the time of the shooting but similarly admitted that "[t]here are many green Army jackets" and he could not "say that that was the jacket [he] saw ... two and a half years" ago. Tr. 47, 60.

Evans reported that Watts "had the weapon in his right hand," pointed "down," and he "didn't have it pointed at nobody [sic]," but at no point was it concealed in his coat, pocket or

otherwise. Tr. 63. People were “panicked..., jumping over the bar, exiting the building ... before there was ever any gunfire.” Tr. 63-64. Evans then described the following events:

“He stood approximately four to 5 feet away from me and was looking around like he was looking, searching for someone. He walked towards the back of the dance floor..., stopped [and] look [sic] towards his right. He stared saying some words, raised the handgun up [sideways]. I could see it was somebody in the corner. I couldn’t tell who it was. And at the time he just said – I could see that he was mumbling something and then he fired one shot [striking Funderburk in the chest area]. Two females exited from the area that he shot at. At that time I seen [sic] a male victim [turn and hit the wall then] slide down the wall and on the floor and he moved several moment[s] and that was it.”

“Mr. Watts walked back through the club past me to the front of the club, exit[ed.]”

“I said, ‘Well, let me see what he’s driving so I can describe it to law enforcement.’ So instead of going behind him, I walked out the side door where he can’t make entry and at that time me and Mr. Watts ran into each other ...” coming “face to face.” “When I came out the door he was coming and, at that time, he said, ‘Oh, you swung on me?’ I said, ‘No.’ He said, ‘Yes, you did.’ He raised that weapon [which was still in his right hand] and fired at me four or five times, striking me in the [right] leg. ... One [time].”

Tr. 47-49, *see also* Tr. 63-67, 72.

On Assistant Solicitor Hales’ and then again on Attorney Rogers’ requests, he showed the jury and counsel his injured leg. Tr. 49, 69. On cross, he expanded upon this statement, indicating he believed the interaction between himself and Watts to be related to the “earlier altercation in the club,” though it was a case of mistaken identity, and describing the entirety of the interaction to have lasted “probably ten seconds.” Tr. 66, 68. He then continued by describing the shooting in more detail, as follows:

Watts “was moving to his right ... [a]nd he was raising the gun ... while he was moving.” Evans also “was moving,” and Watts “started firing.”

“The first shot hit the ground. I seen dirt coming up. ... The second shot, I’m not sure where it hit, but when I hit the door..., [t]hat’s when it shot out. The bullet hit me and went through the door and caught me in my knee.”

“It caught me right there. It hit me in my shin and ricocheted off.” Evans agreed that it “came from ... [the] side,” “not from the front.”

Evans heard the shot that struck him “and another shot..., [t]here were three bullet holes ... [in] the door. ... You can go right there now and the bullet hole is still in the door and the glass got shot out. The top and bottom piece of glass both was [sic] shot out.”

However, on the night at issue, Evans could “see where [a bullet] stuck the door” and “shattered the glass” and “hit [his] leg.”

Tr. 68-70.

When asked by Attorney Rogers where he was when he was shot, Evans replied:

“I was in the threshold of the door of the front entrance.”

Tr. 70.

Noticing that this recitation varied from his December 6, 2004 statement which he “prepared” and signed for police, in which Evans said he was “shot outside,” Attorney Rogers inquired into which version of event was accurate. Tr. 70, 74. Evans responded by saying:

“I wasn’t quite in the building. I was at the threshold of the door. That’s still considered outside.”

Tr. 70.

When asked about yet another version of events, one in which he told the “doctor or whoever ... treated” him the following:

“[T]he patient states that he was standing inside of nigh club when a person came in and started shooting up the place. Patient was hit by a stray bullet in anterior right leg.”

Tr. 71.

Evans responded by saying, “I don’t recall telling the doctor that I was shot inside” but after reviewing the medical record, he acknowledged, “That’s what it says,” but he also indicated that he did not believe the statement to have come from him and testified he did not “write,” “prepare,” type ... up,” or “sign it anywhere,” nor had he ever seen it before. Tr. 71, 73.

Returning to the events in question, it was Evans testimony that, after he was struck, he went back into the club to tend to his wound. Tr. 49. He reports speaking with Officer Mackey, asking him to call for emergency medical services, advising him of the injured man in the club, and providing him with a physical description of Watts. Tr. 50. He also reports trying to ascertain Watts’ location. Tr. 49-50. He then noticed Watts, MacElwane and another man being held at gunpoint by Officer Brown, Detective Brown and two other officers from the Pageland Police Department. Tr. 50.

Detective Brown reportedly asked Evans and another officer to assist him in handcuffing the three men. Tr. 50. While they were doing so, Evans testified that, “a female came around and said they were shooting in the back,” causing all of the officers to respond to that area of the club. Tr. 50. Evans did not hear any gunshots aside from the one fired inside the club, and the four or five fired outside, one of which he reported struck him in the leg. Tr. 65, 72-73. He did not “see any other weapons in the club,” “didn’t see a shot gun,” and did not “hear any other gunshots fired[.]” Tr. 72-73.

Evans stated that, when the officer left, “Watts jumped up while handcuffed and took off running down Number Nine East towards Chesterfield” and he “gave chase and tackled him at the end of the driveway,” before Pageland police “secured him in a vehicle.” Tr. 50-51. Evans then reports being transported to the Union Memorial hospital for treatment; his injuries did not require

an overnight stay. Tr. 51, 70-71. Evans also testified that the photographs described as the State's Exhibits 5 through 8 matched the Pontiac Bonneville that the "suspects were all driving in." Tr. 51-52. He also verified that the State's Exhibits 9 through 11 accurately reflected the Matrix's main entrance, and State's Exhibit 2 as being an image of the decedent, Funderburk. Tr. 52-54. These exhibits were each admitted into evidence. Tr. 53-54. Evans denied knowing Watts or Funderburk prior to or outside of the instant incident. Tr. 54-55.

Testimony of Latoya Miller

The State next called Latoya Miller, a percipient witness to the events occurring at the Matrix Club on November 28, 2004. Tr. 77. She recalled "standing on the side of the wall talking to ... Champ, [her] cousin, [Takisha Rhode], and her [cousin's] boyfriend, [Jodie]." Tr. 78, 81, 89. She identified "Champ" as Clifton Funderburk, who she described as "family." Tr. 78, 81-82. However, her statement to S.L.E.D. Agent Anderson, provided on January 13, 2005 at the Pageland Police Department (State's Exhibit 14), contradicted her testimony regarding the group's placement in the club at the time of the shooting – in her statement, she had indicated the group was initially together, but "then ... separated." Tr. 89.

In any event, Latoya offered her recollection of that night as follows: The group had just arrived and noticed that "[a] couple of guys had started to fight," and one of them "left out the club, came back in the club, walked across the club by the bar from the outside door, had a gun in his hand, had a green jacket on, came to the middle – went to the middle – not all the way to the middle of the dance floor," "started looking around like he was looking for somebody and then all of a sudden he just started shooting..., just shooting around." Tr. 78-80, 83, 89-90. This matched her statement to Agent Anderson in which she described "all the shooting" that was occurring (Tr.

90), however, she later testified she to the contrary, stating, in fact, she initially only “heard one” shot – which she also described as “the first shot” of three – and this time she stated that she “didn’t see [the individual] shoot,” nor did she “see the fire come out of the muzzle,” she only heard (a) gunshot(s). Tr. 84. This also contradicted her January 13, 2005 statement to Agent Anderson in another manner, i.e., she reported that the shooter “started making a loud noise with the gun, like a clicking noise” and that was when she heard “all the shooting start.’” Tr. 84-85, 90. Latoya told Attorney Rogers that this was a correct statement and that she did hear “the clicking noise” as he was looking around, though she admitted she could not “even ... say that the clicking noise ... came from that [same] direction.” Tr. 86. Clarity was never achieved on the point of how many shots she heard that night. Tr. 78-90.

Latoya then testified that the shooter “hit” or “shot” Funderburk, who was “right beside” her. Tr. 80, 90-91. She further testified that Funderburk did not have a gun and she did not see anyone else with a firearm, and Funderburk “was not involved in the fight at all.” Tr. 80, 82, 90.

On cross, Latoya instead stated that she had not yet start running until after hearing the first shot. Tr. 84, 86. Her earlier statement to Agent Anderson, matched the latter version of events – “Funderburk started to get out the side door” “after all the shooting started.” Tr. 90. However, in that statement, Latoya noted only that she “felt a large jerk on her pants like something fell” and she did not notice it was Funderburk until “[a]fter leaving out of the Matrix” and noticing “he was nowhere in sight.” Tr. 90.

Latoya was outside “[m]aybe not even five or ten minutes” before she “ran around and came right back in” “another entrance to the Matrix.” Tr. 80-81, 87-88, 90. When she came in, she reports seeing Funderburk, “laying there on the floor.” Tr. 81. During the time she was outside,

Latoya first testified that she did not see “[a]nything in particular” going out outside (Tr. 81), but on cross, said, “when I got outside I heard more shots..., [m]aybe two more” (Tr. 84). Latoya also noted that she had no trouble gaining access to the club after the shooting, as it “hadn’t been ... sealed or locked down or anything.” Tr. 87.

Before the night of November 28, 2004, Latoya “had [n]ever seen Michael Watts before” and did not know him at all. Tr. 81. She had not ever “looked at a photographic spread” and “at the time the shots were fired” she admitted she “didn’t see who was firing the shots.” Tr. 91.

When asked, she described the gun as “[b]lack and it had a brown handle ... [s]omething on the handle was brown” and stated the man “had it in his hand.” Tr. 78. She described the “Army green coat” as looking “exactly like” State’s Exhibit 4 and the firearm as “[s]imilar to” the State’s Exhibit 3. Tr. 79.

Testimony of Tyrone Miller

Next, Tyrone Miller was called to testify for the State. Tr. 91-100. He testified to his recollection of the night at issue, and that he “arrived at the [Matrix] club about 12:15 or 12:30” and he witnessed “a bunch of movement in the club.” Tr. 93. He then discovered that his cousin, Dewayne Miller, as well as Kevin Johnson and Charles O’Bryant Miller, were involved in an altercation, but “everything got clamed down” when Angelo Mason “came in and broke up” the fight. Tr. 94.

Tyrone then testified that, “[s]hortly after that, a guy came to me with a gun...[,] [a] black pistol in his hand, and pointed at my head and asked me who hit him.” Tr. 94. Tyrone said he did not know who hit him, and then went to the bathroom. Tr. 94. He stated, however, that he remembered what the guy who put the gun to his head looked like, specifically, like “[t]his guy right

here. ... Michael Watts. ... [Sitting] [r]ight here at this table,” in reference to the defense table in the courtroom. Tr. 94-95. He also testified that the man “had on a green field jacket.” Tr. 95. He also opined that the “black” gun “had to be a nine-millimeter or bigger,” an opinion formed based upon his previous personal ownership of a firearm. Tr. 95. When defense counsel inquired how he came to know Watts’ name, as he did not provide it in his December 6, 2004 statement to Agent Anderson. Tr. 96-97, 229. He “learned his name” from the “subpoena” served upon him containing Watts’ name, as well as “the girls that are around in Pageland” also told him his name; he “didn’t know other than what [he] was told.” Tr. 97, 229. He was also never shown a photographic lineup, and never identified Watts to Agent Anderson. Tr. 97-98, 229.

Tyrone also noted that Assistant Solicitor Joyner had come to see him in or around August of 2006, nearly a whole year after the shooting, and, during that visit, asked Tyrone if he could pick out the man who pointed a gun, to which Tyrone said, “if a man pointed a gun in my face I’ll always remember what he looks like.” Tr. 97-98. Tyrone stated that, during Mr. Joyner’s visit, he “showed [Tyrone] a picture and [Mr. Joyner] pointed [Watts] out, and he said, ‘Is that him?’” Tr. 98, 229. After seeing two or three pictures, one where his hair was in braids, Tyrone “told him that didn’t look like him.” Tr. 98, 229. However, on recall, Tyrone changed his testimony, now claiming he made the identification and “pointed [Watts] out” in another photograph, saying out of “only like three pictures” he was shown, one at a time, he “knew what he looked like from the night [he] seen [sic] him ... [and] pointed dead at him.” Tr. 229-230.

Tyrone stated, while in the bathroom, he “heard a shot fired, and after that shot was fired [he] got ready [to] come out of the bathroom and [he] heard some more shots” – “maybe anywhere from one to two gunshots” – so he “ran into the women’s bathroom” and then “heard two or three

more gunshots..., at least two or three.” Tr. 94-95, 99. When he exited the bathroom, Tyrone reported seeing “a guy [he did not know] laying on the floor ... on his face,” and he had been shot. Tr. 94, 96. 99-100. He “[d]id [not] ... see who fired those first shots,” nor did he “see who fired any of the shots [he] heard while ... in the bathroom.” Tr. 99.

On recall defense counsel also asked Tyrone about his guilty plea in Federal Court, for which his “plea agreement ... had language that allowed [him] to get a reduction in [his] sentence for helping the prosecution.” Tr. 230. Tyrone denied knowing anything about a reduction based on his testimony in state court, and testified that was not why he was there. Tr. 230.

Testimony of Charles Miller

Thereafter, Charles O’Bryant Miller took the stand, again for the State. Tr. 101. He recalled being at the Matrix club on the night of November 28, 2004, and recalled arriving at 11:00 PM or 12:00 AM – or “maybe two hours” – before a “fight ensu[ed] and Clifton end[ed] up getting shot and killed.” Tr. 101-103.

Charles described the circumstances giving rise to a fight, specifically, an argument over a belt buckle and who its’ rightful owner was. Tr. 103, 112. Matter escalated, and Watts approached to ask what was happening, and Charles’ “cousin came up” and “they just started swinging,” though he was unsure if they hit Watts. Tr. 104-105. However, later he testified that he believed he, personally, hit Watts during the fight, but he really could not recall. Tr. 111-112. However, in regard to who instigated the fight, Charles claimed “I got hit first. I think it was him.” Tr. 112. He testified to his recollection that people were being taken out of the club by Detective Brown, the lights came on, and the fight broke up. Tr. 105, 112.

He continued, describing seeing “somebody [who he identified as Watts] come through with a gun,” between three and five minutes after the fight was broken up. Tr. 105, 112-113. He stated, Watts had a “pistol.” Tr. 113. “I saw Mr. Watts run to the dance floor with his pistol.” Tr. 112-113. He recalls telling officers he saw the man with the gun. Tr. 113.

Charles initially testified to seeing Watts shooting that night. Tr. 120. However, later he stated he only heard “a shot” and “took off running,” whereafter he heard “like two more shots” before he eventually got out of the club. Tr. 105-106. He again repeated, “Honestly, I didn’t see him hit anybody – cause I just heard the shot” and “took off running. I didn’t stay to see the impact or nothing [sic].” Tr. 106. However, he changed his testimony shortly thereafter, again claiming that “I seen one [shot]. I seen fire come out of the barrel. At least one.” Tr. 111, 113. He also “hear[d] .. [the] other shots. ... I know Mr. Watts had a pistol because seen fire come out of it and I seen the pistol.” Tr. 111-113. Moreover, it was not until he was cross-examined by defense counsel that he admitted the following:

“[T]here was a guy – a big, dark skinned guy that was kind of heavy set. The gun that he had I, honestly, I think it was a gun. Other people say it was a bat but I know he had it like over his shoulder. It if was a gun it was a shotgun. It wasn’t a hand gun.”

“I can remember seeking as I ran ... out, the dude with a gun. ... I looked at him with the gun.

“Honestly, I didn’t see the guy walk in with the shotgun. But I remember the guy having [it].”

Tr. 107, 113.

When asked if he was being honest about there being another gun, as he previously “left out th[at] part,” he confirmed he was being honest. Tr. 107-108. He stated there were no other guns, beyond the ones already discussed, in the club that night, to the beset of his knowledge. Tr.

108. He testified that he did not have a gun in the club. Tr. 113. In statement was originally provided to police, he also discussed the presence of a second firearm. Tr. 107-108.

Charles also testified about what Watts was wearing – a “green jacket” – and the firearm he possessed – “a black handgun ... automatic,” either a “nine or .40 caliber or .45 caliber.” Tr. 105-106, 113-114. He was unsure if the gun had “wood grain or not,” rendering it difficult for him to make a comparison to the State’s Exhibit 3, though he said it was “like that.” Tr. 114. As for the jacket, he testified, “It was like that, but – it was like that, but I don’t think that was it exactly. I don’t know if that was it exactly, but I know it was a green jacket. I can’t tell you the material it was made out of.” Tr. 114.

He also testified to meeting Watts for the first time the night of the shooting, prior to the altercation, and denied knowing Funderburk, seeing him that night, or being in close proximity to him when he was shot. Tr. 103, 106, 110. He likewise denied that Funderburk was involved in the altercation. Tr. 111.

Testimony of Kevin Johnson

The State’s next witness, Kevin Johnson, was likewise a percipient witness to the events of November 28, 2004. Tr. 126.

He was at the club sometime between midnight and 1:30 AM and recalled witnessing “[t]he fight in the club.” Tr. 126-127, 133-134. He described the circumstances surrounding the fight as involving a disagreement “[o]ver a belt buckle,” and the altercation – which started as “words being exchanged and then ... blows” to “the mouth” – being between Charles and “a few gentlemen.” Tr. 127, 135, 137-138. However, he later claimed Watts “started the fight” and was the one who

“approached [his] cousin about the belt buckle.” Tr. 136-137. He was certain Watts did not approach the already-occurring fight to intervene, but instead was the fight’s instigator. Tr. 137.

Johnson also purported to “know who landed the first lick” during the fight – his cousin Dewayne, and he hit Watts. Tr. 135-136. He also stated he saw Watts swing, though he did not include this latter portion of his statement in December 2004 when he gave a written statement to Agent Anderson. Tr. 136.

Johnson further testified to security breaking up the fight, and Watts’ being “escorted outside” by “Angelo.” Tr. 128.

Johnson then testified to witnessing “dudes” coming in “with a gun” and starting to shoot. Tr. 127, 131-132. Johnson said he heard “a couple” of shots, “[m]ore than two,” “[h]e shot more than twice.” Tr. 132-133, 138-140. He was very adamant that there were “more than two shots fired” inside the club. Tr. 139. However, he stated he did not see anything with regard to who perpetrated the shooting. Tr. 140. When asked who “came in with a gun,” he replied, “Michael Watts” and then identified him in the courtroom. Tr. 127. However, he also indicated that he had never seen Watts before that night. Tr. 127. Johnson also testified that the shooter was wearing a green “Army fatigue jacket” and had a “big, black gun.” Tr. 129, 133-134, 141.

Johnson testified there were no other people shooting and Watts was “the only one [he] seen [sic] with a gun,” which is how he arrived at the conclusion that Watts necessarily “fired all the shots.” Tr. 133, 139, 141. Therefore, despite not visually witnessing the shooting, when Johnson was asked, “Did he shoot [the] gun?” he replied, “He shot it,” in reference to Watts. Tr. 141. Further, he described what he saw as follows:

“I didn’t see exactly what – well, yeah, I did. He came through. He shot the door and he came in shooting. I mean there was no other way to describe it but he was shooting.”

“Honestly, I seen him come through. I didn’t see him come through the door...[,] I seen him pull the gun out – I mean out the car, and that’s when I went back to the dance floor area. ... I didn’t see him physically come through the door, like walk through the door..., I didn’t see that.”

However, he then reported he did see him inside the club with a gun and saw him discharge it – “when he shot he kind of turned and he shot off some more rounds and that’s when I ran out the club. He fired some rounds into the dance floor area and that’s when I ran out the club” and “quite a few” or a “handful” were also running out when he exited the club.

Tr. 128-130, 133-134, 140.

It was his testimony that, while he did not see Funderburk get shot, he “seen his body [sic].” Tr. 132. He also “didn’t see” what Watts “so called ... did to Tyrone.” Tr. 129. On cross-examination, Attorney Rogers pointed out that Johnson’s statement to Agent Anderson, he wrote that the shooter “walked up to Tyrone Miller and put a gun to his head.” Tr. 133-134. Johnson said he was only reporting what Tyrone told him, so he was “testifying ... based on what other people told [him],” but again stated he “didn’t see him put the gun to Tyrone’s head.” Tr. 134-135.

Johnson however, stated that he had also been “shot,” “grazed” or “burnt” “[i]n the club” in his “lower right leg” by “[w]hoever was doing the shooting,” and he received medical treatment at the “ambulance” on the “side of the club” for that injury. Tr. 131, 139-140. While outside of the club, Johnson testified to again seeing Watts when he was handcuffed; he denied hearing any other shooting after exiting. Tr. 130-131, 139.

When challenged as to the inconsistencies between his December 2004 statement to Agent Anderson and his in-court testimony, Johnson was adamant that he could “remember [his] statement like it was yesterday,” and told Attorney Rogers he got his statement wrong. Tr. 133, 135.

Testimony of Dewayne Miller

Dewayne Miller similarly testified for the State, discussing dancing with his cousin, Charles, and two unidentified females when he and Charles became involved a “commotion” or “altercation” with “some little black guy” he did not know over ownership of a belt buckle, when “this guy in the green jacket comes running up and holler[ing],” before “he swung” on Dewayne and Charles. Tr. 141-144, 152. He identified the man as Watts. Tr. 143-144. Dewayne testified that he “leaned back and swung back” on Watts, causing them to get “tangled or whatever, fighting” for “probably about ... a good 50 seconds.” Tr. 144. It was Dewayne’s contention that “some heavysset guy” he did not know picked Watts up and “walk – took him out the door,” “walking him to the car” – “they left the club.” Tr. 144. He reported also witnessing a second fight in the corner of the bar. Tr. 144.

Then “probably a good – I’d say from 15 to 20 minutes” later, he testified “Watts, Michael, or something” reentered the club “with a handgun.” Tr. 145. It was Dewayne’s testimony that he and his cousin, Tyrone, “were standing at the bar when he entered the club” and he “walked straight up to [Tyrone] and put the gun in his face and said, ‘Where’s that n****r at that hit me?’” Tr. 145. He testified that this was a direct quote, and that Tyrone did not know what or who he was referring to, causing Watts to turn away from him. Tr. 145. Dewayne reported “jump[ing] over the bar” to take “cover” and then hearing “a gunshot,” though he did not see who shot. Tr. 145-146,

152. However, he described the gun as “a big one,” but he could not determine if it was a 9-millimeter, .40 or .45 caliber handgun. Tr. 153.

He “didn’t see anything else or know anything else,” as he ran “inside the kitchen area” and “called the police.” Tr. 145-146. He stayed there until they arrived. Tr. 146. However, during that time, he “heard three shots” total, with the second two occurring after a “pause.” Tr. 146, 151-152.

When Pageland and Chesterfield County officers arrived, he did not “talk to the police” or “give a statement or anything like that” on November 28, 2004. Tr. 146-147. He did later speak with Agent Anderson in January 2005 at his home, as well as drafted and signed a statement for him, though he failed to mention the altercation in that statement for fear of “getting in some trouble” for being involved with the fight. Tr. 147-149. On cross, Dewayne testified that he, Tyrone and Charles were all cousins, and that Latoya had a baby by Tyrone. Tr. 148-149. However, he denied ever speaking about the incident with them between November 28, 2004 when it occurred and January of 2005 when he gave his statement. Tr. 149.

Dewayne was also “never shown a photographic spread” of Watts or “asked to pick him out.” Tr. 149, 151. Dewayne had never seen Watts “until the night of the shooting.” Tr. 150-151. However, they had been “locked up in Chesterfield County together” “after the fact,” i.e., while Watts was incarcerated awaiting trial for the instant offense, “about a year or two years” prior to the trial. Tr. 149.

Attorney Rogers then pointed out that, in his January 2005 statement, Dewayne wrote:

“On November 28th, I saw Lamont enter the club.”

Tr. 150.

Counsel also pointed out that in his statement, he did not provide any physical description of the shooter, the coat or the handgun. He “just said Lamont.” Tr. 153. Defense counsel asked, “You didn’t know the name yourself, did you?” Dwayne said, “No.” Tr. 150. When asked, “How did you know what name to write if you did not previously identify Michael Lamont Watts?” Tr. 150. Dewayne responded:

“Well, he told me his name when I give him the statement.”

“The SLED. agent.”

He said, “We have a Lamont Watts in custody or whatever for the murder or whatever and asked me what did I see and for me to give my statement.”

Tr. 150.

Testimony of Angelo Mason

The prosecution next called Angelo Mason, a Matrix club employee who had been working security “at the front door” of the club on the night of November 28, 2004. Tr. 154. He remembered being alerted that some guys “from uptown” were in the club and they were “told to watch” them. Tr. 154-155. About “45 minutes to an hour” later, they got a call about a fight on the floor, they “all responded,” and saw “a couple” or “eight [to] ten” “guys from Lancaster and a couple guys from Jefferson,” one of whom he identified as Watts, involved with the altercation, though he “didn’t see the fight on the dance floor” or Watts being hit. Tr. 155, 157-158.

Security then “secured the bar [and] got the guys separated,” before they “grabbed certain individuals and walked them to the door.” Tr. 155. Mason continued that he “grabbed” Watts (though he later said he did not “grab” him), and “escorted [him] out of the club” but stopped because “he said he was leaving.” Tr. 155, 158. He was unaware of a second fight in the club near the bar. Tr. 164.

Mason “didn’t see [Watts] enter the side door” but about 15 or 20 minutes later, after Mason had returned to the front of the bar, he “heard the gunshot,” a single shot, so he “stepped back” and inquired into what the sound was, at which time he was told by a patron, “he got a gun.” Tr. 156, 158-160.

People were exiting the club, and Mason “walked back towards the door” where he saw “Watts coming towards the door” so he “backed up and started hearing more shoots [sic] being fired until he came out with the gun,” though he did not know how many times. Tr. 156-157. Mason said, “When he came outside, the gun was empty,” which he knew because “the gun lock[ed] back.” Tr. 156, 162. Contradictorily, Mason later reported he not only heard, but also “saw him fire the weapon” as he “was coming towards the door,” “at one direct angle,” and while “walking backwards out the club.” Tr. 156, 160-162. Mason also conflictingly reported that Watts continued to shoot until he was “standing right at the front door” or “until he got outside,” not that he came out with the firearm already empty. Tr. 156, 160-162.

Mason additionally reported that Watts “shot the glass out and he shot the bottom of the door.” Tr. 161-162. He did not know what Watts was shooting at, surmised that there “was another person inside he was shooting at,” whom he “assum[ed]” to be Evans for the fact that “he was hit by a bullet.” Tr. 161. Mason did not believe he could be “shooting for nothing” or to “warn people away.” Tr. 161.

Mason testified that Watts was wearing “a green, military issued liked jacket” and the gun “was a blue steel or black .45.” Tr. 156. He did not see anyone else without a gun, though he did not ever look for another gun nor did he know about anyone else looking for one. Tr. 157, 164. It was Mason’s testimony that he did not hear any more shots fired after Watts emptied his weapon,

or when Watts was in handcuffs. Tr. 163. At that time, he had been outside and he believed that, if there were more shots fired inside the club, he would have heard them. Tr. 164.

Testimony of Tameka Austin

Tameka Austin also testified to being at the club on the night at issue, recalling a fight involving “a dude named Dwayne,” whom she knew “from high school.” Tr. 165. Austin also identified Watts as being involved in the fight. Tr. 166. She had “heard of” Watts, and had seen him in Lancaster before, but did not “know” him. Tr. 166. Per her reports, “[s]ecurity took Mr. Watts out and then” she recalled seeing “him entering back in the club” wearing “a green ... trench coat,” and “shortly after” she heard “gunshots ... going everywhere.” Tr. 166. She heard what she described as “a couple of shots,” possibly more than two, but less than seven. Tr. 168. She did not see anyone shooting. Tr. 166-167. More specifically, she “never saw [Watts] with the gun” and “never saw [Watts] fire the gun,” she “just saw him come back in and the next thing [she] heard was gunshots.” Tr. 168.

Upon hearing the shots, she “ducked behind the [DJ’s] speakers” for what she approximated to be 10 minutes, after hearing “the gunshots and stud clear and everybody else ... running out.” Tr. 167. She did not hear any shots beyond the first “series of shots.” Tr. 168. Austin testified to giving a statement to police. Tr. 167. She was never shown a photographic line up of Watts. Tr. 169.

Testimony of Danny Bennett

The State’s next witness was Lancaster County Sheriff’s Department Investigator Danny Bennett. Tr. 170. He testified to Mirandizing Watts and then taking his statement at the Pageland Police Department. Tr. 170-173. He then read Watts’ statement (Exhibit 1) into evidence. Tr. 174-

175. In sum, he stated that he and three others went to the club, and he met his girlfriend there. Tr. 174-175. On the way, Ricky Simpson handed him a firearm and asked him to place it under the seat; that was the first time he had seen it. Tr. 175. “‘After we got to the club and a fight took place, I went to the car and got the gun to get my buddies out of the club.’” Tr. 175.

Bennett reported that, as Watts was providing his statement, he typed what Watts was saying, printed it, and then Watts signed it, which was his department’s “normal procedure.” Tr. 176. He further testified that he would not take a statement from a witness that was bought in already typewritten, but “in Pageland P.D. ... that’s the way [they] did it.” Tr. 176-177. Investigator Bennett described Watts as “cooperative,” “forthright” non-evasive and responsive to all questions asked of him. Tr. 175.

Testimony of Michael Tresdale

Michael Tresdale testified as the co-owner of the Matrix at the time the shooting occurred. Tr. 177. He testified to his presence in the club at the time of the fight, but he did not see it occur; he only saw its aftermath. Tr. 178-179. He did not “know the details of the fight.” Tr. 180.

Tresdale stated knew of Watts through his cousin, Demarco MacElwane, and may have seen him in the club before, but he “didn’t know him like that.” Tr. 179-180. Tresdale reported seeing Watts go out to his car and believed him to be leaving, but then he saw him “standing out in the parking lot and ... saw him with a gun.” Tr. 180. He saw Watts “cock a gun” and say, “‘F that. F that.’” Tr. 180. The last thing Tresdale saw was Watts entering the club from the side door; he ran to safety at a store across the street. Tr. 180-181. He did not return to his club until after “the shooters were apprehended.” Tr. 182. Tresdale did not “see anybody get shot” nor “gunfire,” but he “heard the gunshots.” Tr. 182. He heard “three, four or five” gunshots. Tr. 183. He did not see

anyone else with a gun. Tr. 183. From the store, Tresdale believed he or someone in the store “might have called” the police. Tr. 181-182.

Testimony of Larry Brown

Former Pageland Police Department detective and current Assistant Chief, Larry Brown, testified next, stating he was moonlighting as a private security guard at the Matrix club on November 28, 2004. Tr. 184-185.

Detective Brown recalled a white Bonneville with four men inside pull up to the club “probably around 12:00 [AM].” Tr. 185-186. He recognized one of the men, Watts, as Jones’ boyfriend. Tr. 185.

Detective Brown saw a “commotion on the dance floor,” and he responded with other security guards, separating the people involved. Tr. 186-187. He identified Watts as one of the men involved in the disagreement, as well as another “dark skinned male” whose name he believed to be “Shawn Demorris” and/or another man named “Rashad.” Tr. 187, 189. He also identified “Ricky Simpson” as a “big guy, about 6’7” or 300-pounds” as involved. Tr. 187. Detective Brown and Evans, along with other members of the security team, broke the fight up; he was particularly concerned about Simpson. Tr. 187-188.

While outside, Detective Brown reported seeing Watts exit the club wearing “a green jacket” and entered the “white Bonneville” from the passenger side back seat. Tr. 189, 199-200. One to two minutes later, Watts exited the vehicle and, Brown heard a “click, click” and he said to Tresdale, “he got a gun.” Tr. 189-190, 209. Detective Brown called for backup; he did not “hear a shot fired inside the club.” Tr. 190-191, 209. Backup arrived “[a] few minutes later,” and everyone was running out of the club. Tr. 191.

Watts exited the club, “swinging that gun in the air and shooting...[,] [j]ust shooting.” Tr. 191, 209-210. He was “still shooting” when he came out the side door, he was not responding to orders to “get down” or “[d]rop the gun,” and neither Detective Brown nor Officer Brown could get a shot at him. Tr. 191, 195, 209-211. Detective Brown estimated that Watts shot “about four times” when he was outside of the club, breaking the glass in the main door. Tr. 191-192, 210. He did not see him shooting at anyone specific, but he was acting in “a wild state” and he was “bound to hit somebody.” Tr. 210. However, he could not say whether he was shooting at anyone in particular, and he was not even aware at the time that Evans or Crowder were hit. Tr. 192, 210-211. He testified, “I think he was firing at anybody. I don’t know who he was firing at. He was just firing the gun at people coming out the club and people running everywhere around him.” Tr. 211-212.

After Watts’ gun was empty, Detective Brown reports he was being “covered” by two of his friends, in an attempt to prevent his apprehension; they made it to the car, where they were thereafter apprehended and handcuffed, and the gun was retrieved from inside the vehicle. Tr. 192. Detective found them to be “trying to resist arrest.” Tr. 193.

While this was occurring, someone began yelling, “Somebody’s shooting. Somebody’s shooting.” Tr. 192, 213. However, Detective Brown “didn’t see nothing about no shooting incident,” there were “only like five or six people in the club” when he went back in who “didn’t hear any shots,” and he did not see or find anyone else with a gun, however he also “did not search any of the patrons of the club” because he felt he “didn’t see a need to search them.” Tr. 192-193, 208, 213-215, 217-218. Detective Brown also did not stop, detain or question anyone. Tr. 218. He indicated he disbelieved that people heard anyone else shooting, and instead opined they “overheard a car backfiring” or they were referencing the shots fired outside, and he felt certain

that the “shooting was all over.” Tr. 218-219. He also failed to look into reports of an additional person possessing a firearm in the gun, specifically a shotgun. Tr. 219.

However, when they returned to the club to investigate reports of further shooting, they became aware Funderburk had been shot. Tr. 193. The officers made their arrests and placed the individuals in custody in their car before they “started collecting evidence before people trample[d] all over everything.” Tr. 193. However, he did not secure the scene until after the individuals were arrested and the parking lot was cleared. Tr. 215-216. He reported they recovered the following:

“[S]everal live cases outside the building where he was standing shooting at. Got four live cases. When he came out the door, four in that area there. Four cases they were shooting at. Four or five cases when we got right behind the middle door, the time you walk in the door of the club. They were on the floor there and the rack, it was already one in the chamber. He racked it out. You got that one.”

“It was on the floor area. We found one casing inside the club not too far from the victim’s body. We found a spent round in front of the victim’s body on the floor. It was through him.”

It was “[p]robably about 5 feet from the victim’s body.”

Tr. 194-195, 199, 222-223.

However, on cross-examination, Detective Brown indicated that the “projectile” found near the decedent did not have blood on it and was “pretty clean.” Tr. 222-223.

Detective Brown “personally collected” the casings and “put them in th[e] [evidence] bag” and “personally took them to SLED at “the police station” and also later “personally brought them back from SLED” and put them in “the evidence locker,” which is under the control of Larry Leary. Tr. 195-199. He failed to “take any pictures of where [he] found the shell casings” or complete “trajectory” calculations, despite to admitting it is “normal procedure” to do so. Tr. 216. Nonetheless, despite lack of testing, he offered his personal opinion on the trajectory of the bullet

– “towards the bar area from the dance floor” – which he formed based upon the fact that the one witness told him “Funderburk was running from the dance floor area where he got shot from, and the bullet entered his back and exited his front,” however he had no information regarding the angle the bullet came from. Tr. 223-225.

He described “full round[s]” as “still in the casing,” “not shot” or “not fired” and again said he found “some shell casing and the bullet still intact,” approximately two to three feet from the doorway. Tr. 194-197. He identified Exhibits 19 and 23 as “the spent casings that [he] found on the scene, crime scene, that night.” Tr. 195. He identified Exhibit 17 as the “bullet” he found on “the night of the shooting inside the club.” Tr. 197. He also identified Exhibit 18 as a single “spent round,” or “exit bullet.” Tr. 198-199. “[A]ll of the ammunition was .45 automatic,” though he looked to see if there were others. Tr. 217, 225.

Moreover, Detective Brown stated he also personally collected, put into evidence, and transported Watt’s green jacket to SLED, brought it back and placed it in evidence, where it has remained. Tr. 199-200; *see also* State’s Exhibit 4. Likewise, he personally photographed, collected, and transported to and from S.L.E.D., and placed in evidence a firearm, “still cocked back” from “on the passenger side seat between the seat and the console” in the Bonneville. Tr. 200-203; *see also* State’s Exhibit 3, 13 and 39. He reported he also photographed “of the floor where Mr. Funderburk was laying at.” Tr. 207.

It was Detective Brown’s report that he personally checked the building for “any other bullets in the walls,” but he did not document doing so or indicate his findings in his notes. Tr. 216-217, 226.

Detective Brown testified that Officer Brown was his “first back up” and his Pageland Police Department-issued vehicle was “equipped with a video recorder[]” that it was recording upon Officer Brown’s arrival, the tape from which was identified on its label as “Matrix Shooting Audio.” Tr. 205-206; *see also* State’s Exhibit 16. He reported it was removed from the car and given to him by Officer Mackey, and thereafter placed in evidence. Tr. 206-207.

Detective Brown further testified to Watts saying the following after being read his rights:

“I remember getting the gun, going in to get my boys, but I don’t remember shooting anybody. I thought I was shooting in the air.”

Tr. 195.

Detective Brown reported that he made an incident report but did not recall making any “notes contemporaneous with November 28, [2004]” and only had March 7, 2005 notes based on his “independent recollection of what happened that night,” and drafted “[w]ithout the aid of some other handwritten notes to help [him].” Tr. 211-213, 225.

As part of a follow-up investigation, Detective Brown also personally took photographs of the Matrix club, identified as State’s Exhibits 24 through 38. Tr. 207-208.

Detective Brown indicated he was the “main case investigator,” but when asked if he “had any training in forensics,” he replied, “[v]ery little,” and he admitted he was “not an expert.” Tr. 217, 224. Nonetheless, he did not “call in a forensic team from SLED” or anywhere else, nor did he nor do “a photographic line up,” because he “was on the scene from beginning to the end” and heard people identify the shooter as a “black male involved in a fight wearing a green jacket,” and Watts was the only one he saw in a green jacket. Tr. 217, 220. However, the court intervened on its own accord and told defense counsel to discontinue questioning on the issue of a line-up because it

was not relevant, as Detective Brown personally saw Watts shooting outside the club; he did not address the fact that he did not witness the shooting inside. Tr. 221-222.

Testimony of Jennifer Stoner

Jennifer Stoner next testified for the State as an employee within the Trace Evidence Division of SLED. Tr. 233. After testifying to her credentials (Tr. 233-234), she testified to the procedure for completing a GSR analysis (Tr. 234-238). Specifically, she noted that the lab will not complete testing on wooden swabs due to the potential for contamination from the elements of the wood itself. Tr. 237-238. In the instant case, a wooden swab was used in swabbing Watts and, therefore, “no analysis was performed” on the samples. Tr. 238, 240. However, Agent Stoner reported that Watts’ green jacket was tested, and the results showed round “lead particles on the left sleeve and on the chest region,” as well as “non-round particles containing barium, antimony, and lead” which she found to be “consistent with gunshot residue.” Tr. 238-240.

Agent Stoner continued her testimony, noting that the absence of GSR on a person’s body could “indicate the shot came from some distance away,” among other things. Tr. 240. However, she was not provided with Funderburk’s clothing in the instant case and, therefore, it was not tested. Tr. 240-242. However, had it been collected and tested, information pertinent to the circumstances of the shooting could have been ascertained – i.e., the distance between the shooter and the decedent. Tr. 241.

Testimony of Frank Dan Defreese

A SLED Forensic Services Laboratory employee, Frank Dan Defreese, testified for the prosecution as a firearms identification expert. Tr. 243. He was qualified as an expert (Tr. 243), testified to firearms identification procedures (Tr. 244-247) and, when shown the firearm and its

components – State’s Exhibits 3 and 13 – he testified to them being a “Springfield Armory Brand 1911A1 Model 45 Auto-Caliber Pistol” and a “magazine assembly that fits [that] pistol” and is capable of holding eight rounds, respectively (Tr. 243-244, 250).

He also discussed receiving from Detective Brown and thereafter testing State’s Exhibits 17 through 23 (casings and bullets). Tr. 244, 248-249. Agent Defreese reported that he found the casings in State’s Exhibits 18 through 23 had been fired through the firearm identified at State’s Exhibit 3; he did not find any markings capable of identifying whether the bullet at State’s Exhibit 17 had been in the firearm at State’s Exhibit 3. Tr. 248-249. His report of his findings was introduced as State’s Exhibit 41. Tr. 249-250.

On cross, Agent Defreese described that, in some cases, “the placement of cartridge case can indicate or tend to indicate where the shooter was.” Tr. 251. He also testified that State’s Exhibit 18, the casing found near Funderburk, was examined for blood tissue, DNA and bone, but he “found no trace materials..., no obvious blood or any other foreign materials.” Tr. 252. He also agreed that it was “rather pristine,” “not very badly damaged and ... not badly deformed,” though it looked like it had been fired due to the “rifling impressions on it.” Tr. 252.

Testimony of Dr. Janice Ross

The State’s final witness was forensic pathologist, Dr. Janice Ross, with Newberry Pathology Associates. Tr. 259. Dr. Ross described her qualifications and experience and being qualified as an expert, as well as to general autopsy procedures. Tr. 260-262, 264.

Dr. Ross testified to conducting an autopsy on Funderburk, along with Dr. Sexton, on November 29, 2004, beginning at 2:30 PM and taking one and a half to two hours to complete. Tr. 263-264; *see also* State’s Exhibit 46 (photograph of Funderburk, identified by Ross).

Dr. Ross described the “entrance wound” as being “in the left chest between the nipple and middle of the body,” “going downwards slightly towards the midline and backwards.” Tr. 266. The “entrance wound was measured [to be] a little bit oval, .45 by .46 inches” and traveling “down..., through the lung,” contusing the left lung, “through the heart [and] through the left kidney” before it “came out the left side of the back just a little bit closer to the midline than the front..., [g]oing slightly towards the right.” Tr. 266-267. The exit wound’s dimensions were “.4 inches by .65 inches” and Dr. Ross was certain as to which wound was associated with the entrance and exit. Tr. 266, 269. The cause of death [heart] identified as “exsanguination” or “bleeding out due to perforation of the gunshot wound of the part and also hit the kidney due to gunshot wound of the chest.” Tr. 265. These findings were detailed in her November 29, 2004 autopsy report, admitted as State’s Exhibit 42. Tr. 265.

Dr. Ross further testified on cross that, based on the type of wound described, she “would ... have expected to find” “some” blood “leaking from the bullet” “in the area where you would find the body laying for some period of time.” Tr. 267. She was also unable to definitively “give an opinion ... as to the caliber of the bullet that made the wound,” but it was “a large caliber consistent with a .45 caliber” but “it could be consistent with a .40 or .42 based on the elasticity of the body.” Tr. 267-268. She also noted that it could not “give an opinion ... whether [the] gunshot was intentional or accidental.” Tr. 268.

At the close of the State’s case, the defense moved for a directed verdict. Tr. 271. The court granted the motion as to the ABWIK indictment as to Evans (05-GS-13-0474), as well as the indictment for firearms in a public building (05-GS-13-0475). Tr. 271, 274. The balance of the charges went to the jury after the defense put on their case, as described below.

The Defense Case

The defense countered the State's arguments by offering testimony from Crystal Jones (Tr. 283-292) and Ferman Mackey (Tr. 292-299) as well as Watts, who testified in his own behalf (Tr. 302-341).

Testimony of Crystal Jones

The first witness for the defense was Crystal Jones, Watts' girlfriend of three years. Tr. 284, 289, 292. Jones testified that the two were "still dating" and "in love" at the time she testified at trial. Tr. 292.

Jones was with Watts at the Matrix Club on the November 2004 night at issue. Tr. 284, 287, 289. They were also with her cousin, "Keisha," "Tony and MacElwane" as well as "Robinson and Rickey" at the club. Tr. 285. She recalls being "on the floor dancing" with Watts, who she referred to as "Mont," when MacElwane and Charles Miller began "arguing about a belt," also on the dance floor. Tr. 284-285. Jones told Watts "to go over there and see what was going on and stop it" because they "came to have a good time," and he did as he was told. Tr. 285-286, 290. Suddenly, "[Charles] hit [Watts] and Fuzz came over and jumped on him." Tr. 285-286, 290. Charles hit Watts several times, then "Buzz jumped in" and Charles and Fuzz jumped on him, as well. Tr. 286. Jones never saw Watts "swing at anybody." Tr. 286, 290. The fight dispersed on its own. Tr. 287, 290.

Jones never saw Watts leave the club; she had begun looking for her "sister, Tanesha," and her "cousin, Keisha." Tr. 287. She did not see Watts, nor "any of the other people that were in the fight with him." Tr. 288. While she was searching for Keisha, Jones "heard gunshots." Tr. 287. She "didn't know who was shooting, what was going on" and, when she "seen [sic] everybody running

outside,” she “ran outside, too” to discover “MacElwane and Robinson” at “the door in handcuffs” and Watts “in the parking lot in handcuffs.” Tr. 288. She then testified that she “heard more shooting when he was on the ground in handcuffs.” Tr. 288, 290.

She could not tell if they shots were coming from in or outside of the club, but “it sounded like inside.” Tr. 289-290. On cross-examination by the State, when asked “You said you came out of the club and you heard more shots?” she reiterated, “When he was in handcuffs, yes.” Tr. 290-291. She was not sure how many gunshots she heard. Tr. 288-290.

Testimony of Ferman Mackey

The defense’s second witness, Officer Ferman Dean Mackey, a patrol sergeant with the Town of Pageland, South Carolina. Tr. 293. On November 28, 2004 he responded to a call of “shots being fired” at the Matrix Club. Tr. 293. When he arrived, there were other officers already on the scene, but he noticed “large number” of people “running in all directions away from the building and away from the parking lot.” Tr. 293. As he was looking for his officers, he exited his vehicle, and “a black male pointed at a subject” who was “about 6’7” and “weighed about 300 pounds,” and said, ‘That’s the one,’” which he took to mean the one “that had been doing the shooting.” Tr. 294-295. He drew his weapon and ordered the identified man to the ground. Tr. 294. He “was in the middle of handcuffing him when the pretty big crowd of people” “began to approach” him where he “had him down on the ground.” Tr. 294. Fearful for his safety and/or attempting to avoid a dispute, he asked a local Pageland resident he recognized to “help ... finish handcuffing him while” Officer Mackey “warded the crowds off.” Tr. 294.

When asked, “The person you were handcuffing, was it Michael Watts?” he replied “No, sir.” Tr. 294. However, Officer Mackey heard Officer Eric Brown “on the radio calling for help”

and indicating he and Detective (Sergeant) Larry Brown had “two suspects in custody at the time.”

Tr. 294-295. Watts was one of the individuals in their custody. Tr. 296.

He testified:

It “was after Sergeant Brown and Officer Brown had identified the fact that they had people in custody,” including Watts, that he “heard probably a total of four small pops.”

“There was a pause and then four small pops,” which he “assumed was small caliber handgun rounds,” “estimated ... to be a .22 or a .25.”

Tr. 296.

He testified the shots had come from “the east,” or “the Chesterfield side of the Matrix” and he believed they came from outside the club. Tr. 297. On cross, when asked, “You say you heard four small pops?” Officer Mackey replied by again confirming:

“Yes, sir. After Sergeant Brown” and “Officer Brown had identify [sic] the fact that they had two people in custody.”

Tr. 297.

When Officer Mackey heard the pops, a “half dozen people” to his left, or north, started saying, ““They’re shooting again,”” or other “words to that effect.” Tr. 296. He also stated he “absolutely [did] not” “see any muzzle flash” nor did he “see a gun” nor “find any shell casings,” despite officers “walk[ing] the parking lot over several times.” Tr. 297-298. On cross-examination, Officer Mackey also testified that the scene was “chaotic,” “loud” and people were “screaming and running around,” making discussion at a conversational level not possible. Tr. 297.

Therefore, when asked by Assistant Solicitor Hales, “So it’s possible that wasn’t a gun?” Officer Mackey responded it was “very possible.” Tr. 298. However, he also conceded that, in his significant experience with firearms, a “.22 or .25 revolver wouldn’t leave shell casings.” Tr. 299.

Testimony of Michael Watts

Finally, after being advised of his Fifth Amendment rights by the Court, Watts agreed to waive that right and testify on his own behalf. Tr. 300-302. Counsel quickly moved to the night in question. Tr. 304. He recounted that, after having a “a couple of beers,” himself, Ricky Simpson (the driver), Jamarcus MacElwane (the vehicle’s owner), and Shawn Robinson drove to the club and arrived around midnight, and he was planning to meet his girlfriend, Crystal Jones, upon arrival. Tr. 304-305. He met Jones as planned, as well as her sister, Tanesha. Tr. 305. Charles bought Watts a “cup of Hennessy” at the bar. Tr. 305-306. That was the “only thing” he “had to drink at the club.” Tr. 306.

About “20 minutes” after they arrived, Watts and Jones “were in the back corner of the club” dancing, when she “turned around” and told Watts to ““Stop Briston,”” which he took to be a reference to Michael MacElwane, as that was his “nickname.” Tr. 306-307. Watts looked over “towards the door of the club” and he saw “him in an argument” but he did not know that the argument was with Charles. Tr. 307. He saw that Charles’ “friends [were] crowding around” Charles and “standing behind him,” but “still bouncing around” as if they were “dancing.” Tr. 307. He did not initially realize “how many people were with” Charles but he walked up to “MacElwane” to ask him “what’s going on?” Tr. 307, 311. MacElwane was “trying to explain,” but it was “loud” due to the “music” and “people screaming,” so Watts could not understand what MacElwane was saying. Tr. 307-308, 311. Charles then said “something” in Watts’ ear. Tr. 308. In retrospect, Watts opined that Charles took him asking, “what’s going on” as a “gesture” “challenging him to a fight” and he may have been responding to that. Tr. 312.

Watts said that attempts to diffuse the situation were unsuccessful. Watts testified he was unexpectedly “grabbed” by his “left arm,” spun around, “hit” in his “right eye,” and he started to “fall backwards,” but while he was falling, he was “hit” a second time, this time in the “left side” of his “jaw,” by another individual. Tr. 312-313. He landed “on the top of [his] head,” “slid” on his “back” and “started to cover up,” while “the two guys that had hit [him] before” “were still engaged in hitting [him].” Tr. 312-313. He was unable to tell if they were landing any blows because he was covering himself. Tr. 313. The men eventually stopped hitting him, though he was unsure why, and his girlfriend’s sister came to help him up off the floor. Tr. 313-314. When asked if he ever swung first, Watts replied, “No, sir.” Tr. 312.

As they walked toward the bar area, Watts noticed another friend, Shawn Robinson, “walking back and forth like he had too much to drink,” then he witnessed “somebody standing at the bar” strike him, knocking him unconscious and “causing him to fall ... face first.” Tr. 314.

Watts was “still half dazed” as a result of suffering his own assault, and he became separated from his girlfriend’s sister, so he decided to “reach down to pick [Robinson] up,” but in doing so, he got “pushed down” by one of the “guys that was standing right [t]here when [he] got hit” the first time. Tr. 314-315. Watts was struggling to get a or semi-conscious Robinson to his feet, so he began instead trying to “pull him” toward the door. Tr. 315. As he was doing so, another guy that was at the bar “hit[]” him “in the back of [his] head,” causing him “to drop to the floor.” Tr. 315.

Watts “exited the club” and went to the car he had arrived in, and got a gun he believed to belong to Simpson “out of the back seat of the car.” Tr. 315-317. He knew it was in the car because he had seen it earlier, but that night was the first time he had ever seen it. Tr. 318-319.

Watts said he did not “just leave” because Simpson had the keys, and he had to go “back in the club to get [his] friends out” before he could do so, and his girlfriend was also still in the club.

Tr. 317.

When asked by his attorney why he got the gun, Watts replied:

“Because I was going back in the club to get my friends out, but at the same time, I didn’t want them to assault me any further.”

Tr. 317.

Watts testified he had “no way of knowing who the authorities were at the time” and he did not have a “cell phone such that he could have called” anyone “to come out to the car.” Tr. 317.

Watts did not have time to pause between running to the car and returning to the club, he “opened the car and grabbed the gun off the floorboard up under the front seat” and went “right back in.”

Tr. 318. He “racked the chamber of the gun” as he was “walking to the club,” with the intention of garnering the attention of the persons who had assaulted them, telling them without words that if they “attempted to jump on [him] again,” he would “fire a shot just to get them away from [him].”

Tr. 318, 320. He believed doing so would cause them to “back ... away” from him, and “the whole time” he had the “gun pointed upward,” making no attempt to conceal it, because it was intended to be used only as a deterrent while Watts located his friends. Tr. 318-319.

Upon entering the club, Watts began looking for his girlfriend in the last place he had seen her – on the dance floor. Tr. 320-321. As he was looking round, he reports as follows:

“I seen [sic] something with a very shiny effect which I feel was a handgun.”

“I catch out of the corner of my eye what I think to be a firearm cause like I said, it had a very shiny effect.”

“I’m thinking that a gun [is] coming up at me[.]”

Tr. 320-321.

Feeling certain that it could not be someone raising one of Matrix's cups, as they served drinks in small, red styrofoam cups," he "fired a shot" "at a right angle but upwards." Tr. 321-322.

He said he shot "once." Tr. 322. As he was firing, Watts reports he had the following response:

"I'm firing and flinching at the same time, understand, expecting to get hit myself. I was thinking at the time I could get hit myself."

"Soon as I fired I turned and ran ... back out the same door I came in the club."

Tr. 322.

He reports that he discontinued his search for his friends and girlfriend because he was thinking "this guy has a gun." Tr. 322. After he exited, he states:

"I hear shots ... like as soon as – soon as I fired I turned around..., while I'm running I'm guessing them people behind me are running, too."

"I heard shots being fired from behind me so I'm thinking that this guy is coming up behind me with his gun."

"I don't know if it was somebody coming from that area shooting a gun or if somebody was standing in that area shooting a gun, but I did hear the shots being fired."

"I say [there were] probably two to four shots."

So "[a]s I was coming out the side door, I started firing shots towards the ground."

"I started firing. ... I started firing as I was walking out the door...[,] [f]our" shots."

"I was firing at a downwards angle towards the ground ... [b]ecause somebody on the dance floor [was] firing shots so I was firing shots to keep whoever was in the club from coming outside shooting at me. I'm assuming whoever is in this club with a gun, if they hear me firing shots that would keep them away from me."

Tr. 323-325.

Watts went to the car and got in. Tr. 325. Thereafter, a law enforcement officer "had a gun pointed towards [Watts] telling [him] to put [his] hands up in the air." Tr. 325. He was thereafter

“handcuffed” “[o]n the ground in front of [the] car” and the officer who was arresting him “was kneeling down on [his] back.” Tr. 326. While Watts “didn’t actually hear more shots fired,” people “started exiting the club stating that more shots were being fired” so officers ran back into the club. Tr. 326-327. Because “everybody [was] running from the club saying shots [were] being fired,” and Watts felt exposed because he was “left” “lying on the ground in handcuffs,” so he attempted to run to safety, too. Tr. 326-327. He testified he did not “run in an attempt to escape custody.” Tr. 327.

Defense counsel and Watts then engaged in the following discourse:

Counsel: “Did you intentionally shoot Mr. Funderburk?”

Watts: “I didn’t shoot Mr. Funderburk at all, sir.”

Counsel: “Do you think your bullet could have struck him accidentally?”

Watts: “No, sir. I don’t.”

Counsel: “And what about the person that was shot on the outside; that was grazed in the leg; that was shot in the leg? Did you intentionally shoot him?”

Watts: “Honestly, I’ve heard from their statements and the other statements that have been given several different ways he was shot. ... I don’t recall him being shot. I don’t know which story is actually the true story of him being shot, so I don’t know about him being shot. I don’t recall him being shot.”

Counsel: “Did you intend to shoot anybody when you were on the outside?”

Watts: “No, sir.”

Counsel: “Your purpose for shooting was what?”

Watts: “Because somebody was firing shots in the club as I was coming out the door.”

Counsel: “Is there anything else that you want the jury to know about what happened that night?”

Watts: “I don’t honestly know what happened that night. I don’t really understand most of the things that happened that night.”

Counsel: “But it is clear that you did not go back in that club with an attempt to shoot Mr. Funderburk?”

Watts: “Honestly, if I was going back in the club with an attempt to seek revenge it would have made more sense to shoot somebody at the bar because that’s where I was hit at least.”

Counsel: “When you went back in with the gun did you even see the people you had just had the fight with?”

Watts: “I didn’t see the people that I had just had a fight with on the dance floor, but the people that was [sic] standing by the bar...[,] they were still standing in the same position. That’s the reason for me cocking the gun[,] in case they wanted to jump on me again.”

Counsel” “Did you even know where Mr. Funderburk was in the club?”

Watts: “No, sir.”

Counsel: “Do you know Mr. Funderburk?”

Watts: “No, sir.”

Tr. 327-329.

When asked on cross-examination if he “came ready to shoot that night,” Watts denied the accusation. Tr. 329. When asked why he “brought a gun” with him, he again stated it did not belong to him and he did not “handle” it on the way to the club – “I didn’t bring it with me. The gun was in the car. ... The gun was handed to me. I put the gun under the seat of the car.” Tr. 330. When pressed that, in placing it under the seat, he necessarily had “a gun in [his] possession at some time,” and asked if “taking guns” to the club was his “idea of a good time,” Watts replied again

stating, “I didn’t take a gun to the club..., [and] Simpson was driving the car. The gun was in the car. The gun was handed to me in the car. I never said I was handling the gun inside the car.” Tr. 330-331.

Then, when asked about the altercation on cross, Watts responded that he did not have an “altercation” with Charles, nor did he accuse Charles of hitting him, but rather it was his friend and Charles. Tr. 331-332. He repeated that he did not start the fight nor was he initially involved, and that he was “the victim of that fight.” Tr. 335. When asked if he was hit “hard,” Watts replied in the affirmative, and when questioned about the degree, he stated he was hit hard enough that he “fell to the floor” and had a “mark” or “bruise” “over [his] right eye.” Tr. 332. In response to that statement, the State introduced a [December] 2, 2004 photograph of Watts (Exhibit 49), and Watts identified his injury by stating, “you can clearly see ... my left eye is fully open ... [but] my right eye is not fully open up here on this area.” Tr. 333. In response to Assistant Solicitor Joyner’s questioning, he also again testified about being struck on his “left jaw” as he was falling, covering himself up while on the floor, then being hit again “in the back of the head” “while [he] was trying to take [Robinson] out the door.” Tr. 334-335.

The State asked why Watts did not contact police after being assaulted, and he replied that doing so “wasn’t possible” and he admitted that he did not go to any of the stores in the area to make the call. Tr. 335-336. He stated he did not do so because his “girlfriend was still inside the club.” Tr. 336.

Watts then repeated that he went out to the car only “long enough to walk outside and come back,” and admitted, as he previously had, that he returned to the club in possession of a firearm. Tr. 335-336. Watts agreed that if there was “a bullet in the chamber” that “makes [the gun] ready

to shoot,” and reiterated that he “was going to fire [the] gun as a warning if somebody had tried to come and jump on [him]” again.” Tr. 336-337. When repeatedly asked if his intention to shoot, Watts responded as follows:

“I went back in the club with the intent to go make sure my girlfriend was already and my friends already and get them out that club and intent not to be further assaulted [sic].”

“I’m not denying that I had no intention to shoot. What I said is if I was put in a position where I would have had to fire the gun, I was going to fire a gun in the ceiling. That is why I had my gun pointed at the ceiling when I walked into the club.”

Tr. 337.

The prosecution pressed the issue of the firearm’s readiness to shoot at the time he entered the club, although Watts responded affirmatively each time to its thrice repeated question – “yes or no...[,] [y]ou went into the club with a gun ready to shoot? ... The gun was ready to shoot? ... The gun was ready to shoot?” Tr. 337-338. He also again admitted that he “fired the gun out of the dance floor” but denied firing in anyone’s direction. Tr. 338. He also again admitted that, after he ran outside, he continued to shoot four to five more times, though he denied that he “shot more people.” Tr. 338-339. He again stated, “I shot at the ground” and the reason he did so was “because somebody inside the cub was firing shots” and he could not “see where they were shooting at” and he “was firing to keep the person inside the club from coming outside and shooting” at him but was not firing at anyone. Tr. 339.

He also restated his summary of reason for discharging the firearm outside of the club as follows:

“All I know was that this person was raising a gun at me on this dance floor and when I shot and I ran I heard more shots fired. The point of [me] shooting more shots is because this guy’s in the club, if he’s going to make an attempt to come out

behind me with his gun and shoot me in my back, by me shooting shots and he hear[s] that I'm firing, it's going to cause him from coming out of the club [sic].”

Tr. 340.

Finally, when the State asked him if “that shot [he] fired ... killed Clifton Funderburk,” Watts responded by saying, “Well, if I'm correct the S.L.E.D. agent yesterday said that there was nothing found on that bullet to say that bullet killed Clifton Funderburk.” Tr. 340-341. When the prosecution replied by saying Watts' answer was non-responsive to his inquiry, Watts said “Well, then I can't answer that question, can I?” Tr. 341. And when asked again if he killed Funderburk, Watts said, “No, I didn't.” Tr. 341. Disbelieving Watts' contention, the State offered replied with its observational statement, directed at Watts, that “it's just funny how this bullet was found by Cliff's body. This bullet matches that gun that you had, that you shot in the club. It's funny how the casing that was found beside Cliff's body matches the gun that you shot while you were inside the club.” Tr. 341.

The defense rested at the conclusion of Assistant Solicitor's cross-examination of Watts.
Tr. 341.

After the court charged the jury, the case went to the panel at 2:57 PM on August 1, 2007.
Tr. 402. At 4:21 PM, the jury came back before the court, posing the following questions to Judge Burch, and he responded to the inquires as indicated:

- (1) “Number One, on time for murder 05-GS-13-0471, states that Michael Watts is charged with shooting a firearm at Cliff Funderburk in the back. An autopsy states shot in the chest.”

Tr. 403. Judge Burch replied that indictments are based upon the original arrest warrant and are generated by the Solicitor's Office “to the best information available to the State at

the time that it is drawn” to go before a grand jury. Tr. 404. Conversely, autopsy reports may not “come[] to the information of the State some months after the indictment has been issued.” Tr. 405. Upon the request of the defense that the court elucidate that the “Solicitors have the authority and right to amend an indictment at any time prior to trial” (Tr. 407), and the State’s responsive request that the court clarify that “the indictment itself is not evidence in the case” (Tr. 407), the court provided such clarifying admonishments to the jury. Tr. 407-408.

(2) “Number Two, do we have to stick to the charge against Michael Watts or can they be lessor [sic] charges?” Tr. 403. “In this case there is no charge to you of any possible lessor [sic] included offense. You have to base your decision on the charge before you and the evidence that has been presented to you in Court.” Tr. 405.

(3) “Number Three, where is the rest of the evidence? *I.e.*, specifically, the videotape, etc. Can we see these?” Tr. 403. Judge Burch advised the jury they could not view the additional items because they were “not introduced into evidence.” Tr. 405-406. *See also* Tr. 404 (Court’s Exhibit 1 – “Jury Questions”).

The jury was excused to continue deliberations at 4:30 PM. Tr. 406-408. At 7:15 PM, after approximately four hours of deliberations, the jury announced they had reached a verdict. Tr. 410. The jury found Watts guilty on all remaining counts before it, to wit, escape (05-GS-13-0477), discharging firearms into an occupied building (05-GS-13-0476), assault and battery with the intent to kill (05-GS-13-0473), murder (05-GS-13-0471), and possession of a weapon during the commission of certain crimes (05-GS-13-0499). Tr. 410-412. The jury was excused at 7:22 PM. Tr. 413.

The court then imposed sentence as follows: a term of confinement in the State Department of Corrections for a period of Watts' natural life on the murder charge (05-CR-13-0471), as well as additional concurrent terms of 20 years on the assault and battery with the intent to kill charge (05-CR-13-0473), 5 years on the possession of a weapon during the commission of a crime charge (05-CR-13-0473), 10 years on the discharging a firearm into an occupied building count (05-CR-13-0476) and 1 year on the escape charge (05-CR-13-0477). Tr. 416-417.

II. After- discovered evidence

Since Watts's convictions in this case, he hired a private investigator, Brian Setree, to review the evidence and other matters related to his conviction. Pursuant to a FOIA request made by Setree on October 13, 2021 and received on November 6, 2021, Watts became aware of a letter sent to the lead investigator in this case, Larry Brown, that indicated Brown was not allowed to work at the Matrix on the date these events occurred. In relevant part, the letter, dated December 4, 2004, stated:

Dear Sgt. Brown:

This correspondence shall confirm a conversation we had on **December 02** (emphasis in original), regarding the Matrix Club on E. McGregor Street.

I had addressed an issue of you working private security at that location without my authorization or knowledge which was in violation of department policy. You in turn advised me that you had informed me of such which I disagreed. At that point you ask me didn't I remember you telling me a couple of weeks back that the week after second and third shift worked the club until it closed on a Saturday night that you were going to help them out at the Matrix this weekend. This is when I responded that I did remember that but I thought that you meant that you were going to help second and third shift again as you had several weeks ago.

With the above being clarified, we will close with the topic of the rest of our conversation. You will do no security work at the Matrix in the future. There are liability issues on your part and the Town's part in which both parties could be potential losers and the business not lose a thing.

Be reminded that department policy with regard to off duty employment will be follows.

Respectfully,
John W. Sowell, Jr.

Chief

This letter-- indicating that Larry Brown was working that night at the Matrix in violation of the police department's policies was not disclosed to trial counsel. Had it been, it certainly would have been used to challenge the already sub-standard investigation into these events by trial counsel and would have undermined the jury's faith in the investigation that resulted in Michael Watts's arrest and conviction. Brian Setree testified to his investigation that uncovered this critical information at the evidentiary hearing in April 2023 and the letter was admitted into evidence. Counsel was unable to call trial counsel to testify at the 2023 hearing because he is deceased but clearly evidence tending to undermine the quality of the investigation that centered on Watts as the sole suspect in this case would have been used strategically by trial counsel to challenge the State's case. The circuit court judge erred in finding this evidence was not material.

III. Legal Principles

Rule 29(b) of the South Carolina Rules of Criminal Procedure provides that a motion for a new trial based on after-discovered evidence must be made within one (1) year after the date of the actual discovery of the evidence by a defendant or after the date when the evidence could have been ascertained by the exercise of due diligence. The motion for a new trial was filed before November 16, 2022 so it was timely filed.

A *Brady* claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. *Kyles v. Whitley*, 514 U.S. 419, 432-42; *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *State v. Von Dohlen*, 322 S.C. 234, 241, 471 S.E.2d 689, 693 (1996). This rule applies to impeachment as well as exculpatory evidence. *United States v. Bagley*, 473 U.S. 667 (1985); *Von Dohlen, supra*; *Gibson v. State*, 334 S.C. 515, 514 S.E.2d 320 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Von Dohlen, supra*; *Riddle v. Ozmint*, 369 S.C. 39, 631 S.E.2d 70 (2006). There is no question but that this was evidence that should have been disclosed to trial counsel and it was not. Watts is entitled to a new trial.

In *Clark v. State*, 315 S.C. 385, 434 S.E.2d 266 (1993), this Court held that to obtain a new trial based on after-discovered evidence, the party must show that the evidence:

- (1) would probably change the result if a new trial is had;
- (2) has been discovered since the trial;
- (3) could not have been discovered before trial;
- (4) is material to the issue of guilt or innocence; and
- (5) is not merely cumulative or impeaching.

See also McCoy v. State, 401 S.C. 363, 737 S.E.2d 623 (2013); *State v. Spann*, 334 S.C. 618, 619-20, 513 S.E.2d 98,99 (1999).

Additionally, the PCR Act provides that "[a]ny person who has been convicted of, or sentenced for, a crime and who claims . . . that there exists evidence of material facts, not previously

presented and heard, that requires vacation of the conviction or sentence in the interest of justice" is entitled to seek post-conviction relief. *S.C. Code Ann.* § 17-27-20(A)(4) (2014).

The evidence discovered in this case meets the definition of after-discovered evidence. But for Watts's investigator's actions in this case, this information would never have come to light. The circuit court judge erred in finding the evidence presented at the evidentiary hearing and included as an exhibit to the motion for a new trial was not material. It clearly was and Watts is entitled to a new trial. This Court should reverse the court's order denying the motion and remand Watts's case for a new trial.

CONCLUSION

This Court should reverse the circuit court judge's order denying Watts's motion for a new trial based on after-discovered evidence, and remand for a new trial.

Respectfully submitted,

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Dated this 9th day of July, 2024
Columbia, South Carolina