

STATE OF SOUTH CAROLINA
In The Court of Appeals

Volume I of II
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APPEAL FROM HORRY COUNTY
Honorable Mark J. Hayes, Circuit Court Judge

Appellate Case No. 2023-000571

THE STATE, ...APPELLANT

v.

ANIJAH YARNELL, ...RESPONDENT.

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1 State of South Carolina,) Court of General Sessions
2 Plaintiff,) Fifteenth Judicial Circuit
3 vs.) CASE NO. : 2021-GS-26-02687
4 Anijah Yarnell,) Transcript of Record
5 Defendant. Stand Your Ground

6 -----

7 November 14, 15 & 16, 2022
8 Horry County, South Carolina

9 **B E F O R E:**

10 The Honorable, Presiding Judge Hayes

11 -----

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**(Whereupon proceedings convened Monday, November 14,
2022)**

THE COURT: We'll go on the record in the matter of State versus Yarnell. We're here on a Defendant's or Petitioner's motion pursuant to the immunity under the Protection of Persons and Property Act. Yes, sir?

MR. MARTIN: Your Honor, if it pleases the Court, you are correct. We are here with the defense's motion asking the Court for protection under the Immunity Act or Protection of Persons and Property Act, 1611 440, at sequence in that. Judge, let me say to the Court, or I don't know how you like to conduct them. I'd like to give you a bit of a brief opening statement about the facts to kind of acclimate to you to the extent that you need it, other than the brief that both the State and the defense filed that lets you know a little bit about the case.

THE COURT: Brief opening. I have reviewed both the brief from both sides. So, yes, sir, any brief on these, please do.

MR. MARTIN: Judge, let me just say this, to try to put it in a brief summary. Anijah Yarnell is a 20-year-old young man, and at the time, and he's seated here in court with me. At the time he was dating a young lady named Remi Hargrove, and at the time Anijah worked at Lowes Home

1 Improvement Center there in the Myrtle Beach area. He worked
2 this day from 5:00 a.m. until 3:00 p.m. and when he went to
3 work that day there were some plans, as I understand it, for
4 him to maybe to meet Ms. Hargrove and some of her family who
5 were from New York and around this area for dinner, and through
6 the course of the day those plans changed and he began
7 communicating by text with his girlfriend about those plans
8 about going or not going and about their relationship in
9 general. It does appear then that his girlfriend, Remi and her
10 family, and you're going to hear a lot of these names so I'm
11 going to try to tell you who a few of them are, but Remi went
12 to dinner that night with her cousin, Emily Cerio, her aunt
13 Jennifer her Aunt Jennifer's boyfriend, Darrin, and I'm not
14 sure who else might have gone other than, I think it was a
15 young lady named Ally, who may or may not be a witness in the
16 case, and they were met there by Mike Pennington and I think
17 one of Mr. Mike Pennington's friends at a little restaurant
18 called Handleys over in the Carolina Forest area. After that
19 they all went back to the Cross Gate Villas Apartment Complex
20 or condo complex where Emily's daddy and/or brother, I believe
21 it is, lived, and that is where Emily and Jennifer and the
22 folks from New York were staying, was over at that apartment
23 with one of them brother or uncle, so that's the reason that
24 this thing migrates its way back to Cross Gate Villas Apartment
25 Complex. So Anijah, after he got off work that day had gone

1 back to his apartment, and then about 8:30, 9:00ish, he drives
2 down to the Surfside area to the Cross Gate Villas Apartments
3 and he has some of Remi's clothes and things in it and he wants
4 to take her her clothes, according to his testimony, what it
5 will be, and see her briefly, and so that is why he went there
6 and he went there and waited a while to see them and they were
7 apparently still out to dinner and making their way back, but
8 they came back somewhere around 9:45ish at night and Anijah was
9 there and you've got, over there you've got Jennifer, her
10 boyfriend, Darrin, Emily -- well, let me back up just a minute,
11 Judge. You've got Emily and Remi, the two cousins that come
12 back to the apartment complex together, and Anijah is there and
13 they run into him briefly. He's pulled out to leave, maybe he
14 thinks they're not coming or not sure, but as they're pulling
15 in and he's pulling out, they stopped and talked briefly.
16 Emily and Remi pull on in to the apartment complex, he pulls
17 out, circles around and then does come back. Well, by the time
18 he comes back his girlfriend, Remi, has gone upstairs into the
19 apartment, but down in the parking lot are Jennifer, Remi, no,
20 strike that -- not Remi -- Jennifer, her boyfriend, Darrin,
21 Mike Pennington, and either there or coming back from the
22 apartment upstairs is Emily, so there's those four that are
23 there. Apparently, Mike Pennington is Emily's boyfriend, and
24 so Mr. Pennington is there in the parking lot with these other
25 three individuals when Yarnell drives up. He's driving a white

1 Toyota car and he pulls up in the car, and according to him
2 rolls his window down to ask if Remi's there or if Remi's
3 coming to get her stuff when he is approached by Pennington,
4 Michael Pennington, and the altercation occurs, and I won't try
5 to go into detail, you can hear all that from the witness
6 stand, but that's where the altercation, incident, shooting,
7 act of self defense, whatever you want to call it, it happens
8 there in the parking lot, driveway, of this apartment complex
9 where Mr. Pennington is there, approaches Mr. Yarnell's car
10 when he drives up and whatever happens, happens. Now, after,
11 and again, after the shooting occurs Mr. Yarnell drives back to
12 his home in Myrtle Beach and about 30 minutes later is arrested
13 by the Myrtle Beach Police Department and/or Horry County
14 Police Department and they are at his residence. And Judge,
15 our position on the whole case is is we really do think that
16 this is a classic case of Stand Your Ground, because our
17 position is, and we think supported by the evidence and the law
18 is that Mr. Yarnell was in his automobile at the time that he
19 was attacked, and of course you know the law, likely, better
20 than I do, but our legislature extended the Castle Doctrine to
21 the automobile, an occupied automobile, and in this case Mr.
22 Yarnell clearly, and we think the evidence will clearly show
23 that at the time all of this occurred that he was attacked as
24 he sat in his automobile in the driveway in a public place and
25 that his actions were to defend himself, that he is, in fact,

1 he was not at fault in bringing on the difficulty, that as an
2 occupant of his vehicle, in this case he had no duty to retreat
3 and that he's entitled to the presumption of fear and
4 reasonable fear in regards to the actions that he has. With
5 that having been said then I think that the facts, obviously,
6 become what you need to hear in order to make your
7 determination, but we think, and I tried to lay it out as well
8 as I could in my brief. One thing, Judge, I will say, I said
9 in the brief that this thing occurred about 9:55. That's
10 wrong, it happened about 9:50 to 55. I couldn't read military
11 time the way I should have been able to so when it said 21, I
12 misread that as having said been in the 7:50 time frame, it was
13 actually about 9:50 at night when this occurred. This was in
14 Horry County jurisdiction, not within the City of Myrtle Beach
15 or Surfside. Judge, again, we can conclude later, but that's
16 just a general outline of how this occurred and what
17 transpired. I won't get into the evidence with you at the
18 moment, but Judge, there may be a couple motions that we could
19 take up now that might save us some time as we get started. I
20 don't know what order you want to do that in.

21 THE COURT: What are the motions?

22 MR. MARTIN: Judge, first of all -- Judge, I don't
23 know whether they intend to offer evidence, but Mr. Yarnell
24 will testify on his own behalf, so if they are going to offer
25 it, it may come up with him, but I have filed a motion to

1 prevent them and exclude them from bringing up any physical
2 violence, allegations between him as relate between him and his
3 girlfriend Remi Hargrove. There's a motion in limine to
4 exclude, if the judge agrees, that will move the Court to
5 prohibit the State from introducing text messages between
6 Anijah Yarnell and Remington Hargrove taken from a search
7 warrant that executed on Yarnell's phone. Such messages are
8 not relevant under the South Carolina Rules of Evidence.
9 Contents of these messages make no mention of the victim and
10 have no relation to the events that occurred during the
11 altercation between the two parties. Any probative value that
12 these messages potentially have are outweighed by the
13 prejudicial effect that they may have on the defendant and we
14 would state, furthermore, that these messages would improperly
15 comment on the character of the defendant under Rule 404 A1,
16 which states that evidence of a person of bad character is not
17 admissible. So there is that motion, Judge, as well as a
18 motion, if they were, and this is a little bit maybe
19 anticipatory on my part, but to prohibit them from introducing
20 into evidence at the Stand Your Ground hearing allegations
21 related to any physical or verbal abuse of his girlfriend, Remi
22 Hargrove during their relationship. So that's the first
23 motions, Judge, which I believe are related to each other, I
24 would ask that that testimony be excluded from this hearing.

25 THE COURT: And on your second motion, it's 402, 403

1 and 404 1A and 404B?

2 MR. MARTIN: Yes, those Rules of Evidence are 402,
3 403 and 404.

4 THE COURT: Just for purposes of this hearing?

5 MR. MARTIN: Well, Judge, if it gets past this
6 hearing I'm going to have the same motions with regards to a
7 trial, but again, I think we've got a good case for Stand Your
8 Ground so I want to address this now. And I know, Judge, as a
9 trier of the fact you may become aware of all of this, but as
10 far as their introduction into evidence at the Stand Your
11 Ground hearing itself, we would object to it.

12 THE COURT: Okay. As a preface, it's hard as a judge
13 to do the balancing required prejudicial probative value or
14 vice versa, without hearing the evidence.

15 MR. MARTIN: Absolutely. Absolutely.

16 THE COURT: And I say that because it's probably
17 premature because I'm not going to be able to say, yeah, I'll
18 let it in or I'm not going to let it out, I haven't heard
19 anything. So does the State want to argue these now?

20 MS. LIVESAY: Your Honor, first of all, the State did
21 not get those motions if they are in writing regarding the 404
22 or the phone. I don't know, they may have been clocked in or
23 just never e-mailed to us. I would like to get a look at those
24 just so I can respond adequately on the record.

25 MR. MARTIN: We did file them. I thought we sent you

1 a copy of them, but if we didn't there they are.

2 MS. LIVESAY: So this is, the State's receiving today
3 a motion to exclude firearms.

4 MR. MARTIN: Well, I've got that, as well, but the
5 first two let me show you --

6 THE COURT: Right now he's just talking about
7 excluding the text message and excluding the prior acts,
8 allegation prior acts.

9 MS. LIVESAY: Yes, sir, Your Honor, just briefly in
10 reply, I'd like to reply first to the facts and then the
11 State's going to take just a few moments to read these motions
12 and to reply adequately back since I just received them from
13 defense counsel.

14 THE COURT: Let's do this. Give her any motions that
15 you intend for her to take a look at. You give him any motions
16 that have been filed. I'm going to step down. You all need to
17 have done this beforehand, okay, to exchange.

18 MS. LIVESAY: Sure. We haven't filed anything.

19 THE COURT: Okay. Give her any motions and let her
20 take a look at them.

21 MR. MARTIN: I gave them all to her, Judge.

22 THE COURT: Alright. I'll come back in five minutes.

23 MS. LIVESAY: Thank you, Judge.

24 (Recess taken.)

25 THE COURT: Yes, ma'am?

1 MS. LIVESAY: Thank you, Judge. I'm going to be
2 brief because I know we've already submitted a memo so I don't
3 want to just keep repeating myself to the Court, but I do want
4 to respond on the record to Mr. Martin's understanding of the
5 facts. First of all, the State agrees that there was a dispute
6 that afternoon. Remi Hargrove, the girlfriend of Anijah
7 Yarnell were living together at Winchester Circle, and at the
8 time the mother, Yarnell's mother was living there, as well,
9 all three individuals. Remi Hargrove had family in town from
10 New York so while family was in town they were staying in
11 Surfside Beach at a condo called Maddington Place and Remi was
12 over there during the day. An argument is really going on
13 throughout the day on the phone between her and the defendant
14 where the defendant is basically calling her a whore, saying
15 some pretty derogatory things to her, then in the course of the
16 day later in the afternoon, I'd say after lunch, like Mr.
17 Martin says, another argument ensues over going out to dinner
18 and Mr. Yarnell is mad because he thought that they were going
19 out to dinner at a different time so then the conversation
20 turns from that to very threatening texts from the defendant to
21 Ms. Hargrove, and what I think is particularly important, all
22 of it is important, but you see then his intent when he is
23 telling her, you better get to this house in 30 minutes or I'm
24 breaking your pictures, and he starts on the text messages
25 counting down, 29, 28, so along with that he's also constantly

1 calling her phone trying to reach her. Also, during this time
2 frame she's never responding back to the messages nor the phone
3 calls. It is clear she is trying to end any contact with him
4 at this time. He keeps calling. He calls approximately over
5 150 times before 9:00 when he takes off to go to Maddington
6 Place. So he calls her over 150 times. The majority of the
7 calls are blocked. You see on the phone where he's dialing
8 star 67 in an effort to block his phone number, so I guess
9 maybe if she didn't see his number she would pick up. She
10 never responds to the phone calls, it's clear she doesn't want
11 any contact with him. After these phone calls he then leaves
12 Winchester Place where he lives and he drives over to Surfside
13 to Maddington Place, of course he has a gun in the car. Now,
14 Mr. Martin's memo suggests that that gun is kept in the car.
15 We will submit testimony to the contrary, that all of the guns
16 were kept in his bedroom in like a bedroom dresser drawer, and
17 that will be corroborated by the fact that when the police
18 ultimately search one of the guns is found exactly in that
19 place. So there is a conflict on the facts as to where the gun
20 is kept, so the State believes and will have evidence to show,
21 it's normally kept in a dresser drawer, so he took the gun out
22 of the dresser drawer. There is going to be testimony that
23 somebody at the apartment complex hears him yelling, hollering
24 and then slamming the door leaving the apartment complex, so
25 he's clearly mad, he's called, he's yelling, he's hollering, he

1 can't get a response from her, he takes off to Maddington
2 Place. He arrives at Maddington Place somewhere a little after
3 9:00. I think it's also important to mention that Maddington
4 Place is a private residence. The drive going into Maddington
5 Place is private, the parking lot is private, so he has now
6 driven over to a private residence uninvited and unwelcome. I
7 think it's important to know that he gets there a little after
8 9:00 because, like Mr. Martin says, the incident does not occur
9 until almost 50 minutes later when these people arrived, which
10 means he's sitting over there in a private drive uninvited with
11 a loaded weapon for 45 to 50 minutes waiting for these people
12 to arrive back at the apartment complex. Now, there is this
13 idea that he's taking her clothes. Ms. Remington Hargrove has
14 a vehicle, she could have collected her clothes if she deemed
15 that necessary, so he went over there uninvited. Now, what's
16 also important is I've noted that there was approximately 150
17 calls, but when he gets to the apartment complex he calls her
18 approximately 50 more times, almost every minute that he's
19 sitting out there he's dialing her number. Now, if there's any
20 question as to whether or not -- again, she does not respond.
21 Now, if there's any question as to his mindset as to whether or
22 not he's welcome, the phone shows while he's sitting out there
23 he downloads an app on the phone that allows him to text her
24 from a different number. Again, clearly, he knows she does not
25 want any contact with him. The people finally come home from

1 dinner. Now, they've gone out to eat, including Mr.
2 Pennington, the victim. The victim went out, Remington
3 Hargrove went out, the girlfriend, Emily, went out with them to
4 eat, Pennington's girlfriend, the aunt, the uncle, I'd say
5 about eight or nine people go out to eat. They go to
6 Handley's. Ultimately, the victim brings a friend who is
7 intoxicated aggravating everybody, so he actually takes the
8 friend home and comes back to meet everybody at the condo.
9 Now, I think that's important because Mr. Pennington has been
10 out with those folks for dinner and coming back to the condo
11 and there's been no problem. There's been no aggressive
12 behavior. He never gets in an argument with anybody at the
13 bar. He never gets in an argument with anybody that he's out
14 to dinner with. So they are all having a good time. They come
15 back to Mr. Pennington is welcome and invited with the rest of
16 the family. They are out there trying to enjoy this time
17 together. When they roll in they know that Yarnell is in the
18 parking lot, Emily and the girlfriend, Remington Hargrove.
19 Upon seeing this there's going to be testimony that Ms.
20 Hargrove, the girlfriend of the defendant starts getting panic
21 attacks, anxiety, just is starting to fall to pieces. At that
22 time Emily drives them to a gas station where Michael
23 Pennington is, the victim, so Mr. Pennington can follow them
24 back to the condo. When they roll back to the condo they pass.
25 The defendant rolls the window down and says something to the

1 extent of, and this will come out in the testimony, are you
2 f'ing trying to block me in? So he's already cussing and
3 talking very aggressive to Remington Hargrove, his girlfriend,
4 who at the time is seven months pregnant and Emily Cerio, her
5 cousin. Remington immediately answers back and says, no, we're
6 just trying to get in, this is the only way to get in. She
7 immediately drives into the condo, gets out of the vehicle and
8 goes upstairs. Again, it's clear she wants no contact with
9 him. After passing her he wheels back around knowing she
10 hasn't responded, knowing she wants no contact with him, wheels
11 back around and starts creeping around the parking lot. The
12 rest of the family is down in the parking lot, which is a
13 private drive, and is visiting, talking, that sort of thing.
14 He then drives up to the family. The window is up in his
15 vehicle. He starts talking to Michael Pennington. The
16 testimony is going to show that Mr. Pennington, the victim, who
17 is unarmed, who is unarmed at the time, along with everybody
18 else in the parking lot, asked him to leave. He would not
19 leave. Then the argument ensues, and ultimately, Yarnell
20 shoots the victim who is unarmed through his car window. So
21 he's in the car, he is somewhere where he is not welcome, he is
22 driving over there to hunt his girlfriend down who will not
23 respond, and when she sees him she runs up to the condo to get
24 away from him. He's in his car with it running and the window
25 up, and ultimately, shoots the victim and then leaves the

1 scene. The State Police, these facts are not going to lend
2 itself to Stand Your Ground. Stand Your Ground is meant for an
3 immunity for people that are acting in an effort of self
4 defense, I can agree with that. I cannot agree with Mr.
5 Yarnell after commenting and getting no response drives over
6 there, after threatening this young lady, drives over there to
7 hunt her down is acting in self defense. When he leaves the
8 comfort of his home, his place to go somewhere uninvited,
9 unwelcome, that is a private drive to hunt this young lady
10 down, he is no longer acting in a defensive measure, but acting
11 as the aggressor. He was not welcome, he was not invited and
12 he was asked to leave and he would not leave. So the State
13 believes that he is acting, first of all, in an aggressive
14 manner. Second of all, defense counsel noted Section A, which
15 is part of Stand Your Ground. I ask that the Court look at
16 Section B. Section B is clear that the presumption provided in
17 Subsection A does not apply if the person against who the
18 deadly force is used has the right to be in or is a lawful
19 resident of the dwelling, so that is B1. We know Michael
20 Pennington was somewhere he was welcome and had the right to be
21 and was a private resident. So you cannot show up to somebody
22 else's house where they have a right to be and claim Stand Your
23 Ground. Also, not only under Subsection 1, but if the Court
24 would go and look at Subsection B3, it also says again, the
25 presumption provided in Subsection A does not apply if the

1 person who uses deadly force is engaged in an unlawful activity
2 or is using the dwelling, residence or occupied vehicle to
3 further an unlawful activity. The State believes its case will
4 show, that, A, he was engaged in unlaw activity when you call
5 somebody 200 times and there's no response, that's unlawful use
6 of the telephone, and then when you start creeping around their
7 house for 45 minutes that is harassmt and stalking. So not
8 only is he engaging in unlawful activity, but he is using that
9 occupied vehicle to further an unlawful activity. So we do not
10 believe he meets the requirements because he cannot get past
11 Sections B1 and B3. Now, this was not brought up by defense
12 counsel, but I do want to address it. Stand Your Ground also
13 allows immunity under Subsection C, a person who is not engaged
14 in an unlawful activity and who is attacked in another place
15 where he has a right to be. We do not believe, again, that the
16 defendant can meet Subsection C either because he was clearly
17 engaged in an unlawful activity and he was not in a place where
18 he had a right to be. He did not have a right to be at
19 Maddington Place. It was a private residence, it was a private
20 drive, he was uninvited and unwelcome, so I do not believe he
21 is entitled to immunity under C either, and again, he was the
22 one engaging in an unlawful activity. Now, so the State has
23 addressed why we believe on a skeleton scale why he is not
24 entitled to immunity because he cannot get past sections B1
25 and 3 and nor can he get past C. Now, I want to address, if I

1 can, I've had a few minutes to review. I want to address,
2 first, defense counsel's motion to exclude text messages since
3 I have already discussed them with the Court. These text
4 messages clearly show the state of mind this defendant was in
5 that day and when he drove over to Maddington Place. He
6 clearly was mad, angry, upset and was not going to accept "no"
7 for an answer. He called this young lady in excess of 200
8 times. The vast majority of those times, and when I say, vast
9 majority, I mean --

10 THE COURT: Is your argument that it shows the state
11 of mind?

12 MS. LIVESAY: Yes. Are you ready to move on?

13 THE COURT: Well, if you have anything else to tell
14 me, fine, but I do not need to hear the details of what's going
15 to come out during the evidence, otherwise, we're not going to
16 do this hearing.

17 MS. LIVESAY: I understand. It goes towards state of
18 mind and when we get to the trial I think it will go towards
19 malice.

20 THE COURT: Okay.

21 MS. LIVESAY: So I think it's definitely relevant
22 now. I have already touched on the firearms. That's going to
23 be a motion in limine to exclude firearms, evidence Bersa,
24 Glock model 17, Glock model gun, that is relevant because when
25 the police arrived one of the guns is in the dresser drawer,

1 where the testimony is going to be, that's where the guns were
2 normally kept. The murder weapon along with the other Glock
3 was placed in a black bag.

4 THE COURT: Alright. So you're saying the testimony
5 about the guns go to what?

6 MS. LIVESAY: I think it goes, again, towards malice
7 because I think there is a difference between if you have a gun
8 in the car --

9 THE COURT: Okay. She says it goes to malice.

10 MS. LIVESAY: Yes.

11 THE COURT: Okay.

12 MS. LIVESAY: The ammunition, the State agrees the
13 only thing we want to get into is the ammunition in the car
14 that matched the ammunition to the murder weapon. I believe
15 this .223 live round is going to go to a long gun. We never
16 recovered a long gun and we are not going to get into that.

17 THE COURT: Tell me again, the long gun evidence is
18 what?

19 MS. LIVESAY: We agree, yes, sir, we agree that this,
20 the ammunition box belonging to live rounds that a gun was
21 never recovered from is not relevant, we don't intend to get
22 into that.

23 THE COURT: Okay.

24 MS. LIVESAY: I still want to get into the other
25 evidence, but I agree that this particular evidence doesn't

1 come in. As to the motion regarding the jailhouse informant --

2 THE COURT: Now, he hadn't argued that yet. Do you
3 want to go ahead and tell me your side?

4 MS. LIVESAY: Okay. Sure. I don't think he argued
5 it yet.

6 MR. MARTIN: I haven't, Judge. I actually was going
7 to wait and see if she called it first, but I can discuss that
8 now, as well. Judge, that motion relates to the fact that
9 there is a statement they provided to us that says something to
10 the effect that he talked to Yarnell at the jail and among
11 other things that Yarnell said what I have in the motion and
12 that is: He wasn't worried about it, he had paid me \$50,000.00
13 and he was going to get out of it, and I object to that line of
14 testimony about his lawyer call, that kind of thing is not
15 relevant.

16 THE COURT: Is that all he said?

17 MR. MARTIN: Judge, he says, like I talked with him,
18 he said that he did shoot the guy. I take the position that
19 that entire statement that he made is not relevant, but I
20 particularly, and my motion at this time is directed at his
21 comments about having hired a lawyer, me, paid him a certain
22 amount of money, that he would get off because he had hired me,
23 and I don't think that's relevant, and I object to at least
24 that portion of the testimony, and the rest of his testimony I
25 would take it as it comes up. And Judge, the last thing I'll

1 say, let me just say, you're going to hear all of this and
2 we'll get into it, this didn't happen in a private drive. They
3 were not in a private residence, not a private drive, but you
4 take all that as we get into it. I just didn't want that
5 repeated assertion to go unresponded to.

6 THE COURT: Okay. Let's take a step back. Let's do
7 these one at a time. Let's go back to the text messages. She
8 says it goes to the defendant's state of mind. Now, let me
9 tell you what I'm thinking, under Stand Your Ground Hearing,
10 unlike what might occur in a trial, state of mind of the
11 Applicant or Petitioner or Defendant is relevant because it's a
12 determination, as I see it, whether or not he acted with the
13 concern that he was in fear of his life or fear that he was in
14 imminent bodily injury, so I think state of mind is relevant.
15 It's not before a jury and you would be able to argue to me
16 later at the end of this hearing where it's relevant, where
17 it's not relevant and that's not important, but I'm leaning
18 towards letting the text messages in. I have not seen the text
19 messages, I don't know what they say, other than what the State
20 has alleged they say.

21 MR. MARTIN: Well, Judge, certainly, I would object
22 to them. I understand what you're saying. I think you,
23 frankly, do have to see or hear some of them to make your
24 determination, so I'm good with that as long as you note my
25 objection as we go along.

1 THE COURT: Sure. And I'm saying leaning because I
2 haven't seen the statements so I can't make a ruling that
3 they're admissible or not because I really haven't seen them,
4 and again, under the proper analysis I can't do the proper way
5 to exclude or admit them, I just think I'm leaning to them.
6 Now, the State says as far as the guns are concerned that it
7 goes to defendant's state of mind. They're not going to use
8 the long gun evidence and they're going to limit the, my
9 terminology, the bullets at the scene, they are only going to
10 use those items that were found at the scene.

11 MR. MARTIN: Well, Judge, no, what she's saying is,
12 just so you'll note, the evidence will be that he had a gun
13 with him. That gun was used to shoot the victim, then he went
14 back his home where there were two other guns, I believe it
15 was, and then when the police come they recover all three guns.
16 My objection is to the fact that they get into evidence about
17 the other guns that he lawfully, he or his mother lawfully had
18 at their home, when that, frankly, I'll say, again, is not
19 relevant. This whole case revolves around the idea he's got a
20 gun, he shot him, they got what would be the weapon that was
21 used, relevant. The fact that he had other guns and/or
22 ammunition at home, not relevant, that's my objection.

23 THE COURT: I tend to agree with that.

24 MS. LIVESAY: Sure, Judge, if I can, and I'll try to
25 be brief. The relevance is two things. First of all --

1 THE COURT: And we're talking about the other guns,
2 not the gun that was used to do the shooting.

3 MS. LIVESAY: Yes. So as to the guns, the relevance
4 for us is one gun was recovered in the dresser drawer but we're
5 going to have a witness say all the guns were kept in the
6 normal course of everyday business. Ms. Hargrove lived there,
7 she knows where the guns were kept. Secondly, the planning --

8 THE COURT: Why is that relevant?

9 MS. LIVESAY: Because it's going to show that he
10 didn't have that gun in the car. He took that gun out of the
11 drawer and loaded it and took it over to Maddington --

12 THE COURT: I don't think there's going to be dispute
13 that he had a gun because he's on trial for shooting him.

14 MS. LIVESAY: I think it shows malice and planning
15 when you go to the drawer, take the gun out, make sure it's
16 loaded, carry it downstairs.

17 THE COURT: Okay. We're talking about the other
18 guns, though.

19 MS. LIVESAY: Yes. Because the other guns, two of
20 the guns were found in a black bag that the defendant put in a
21 black bag with two bills of sales. We're going to argue that
22 he was already trying to cover up and plan a defense. The
23 bills of sales have clearly been altered. They are for one
24 gun, in particular, removing the ownership of the gun from the
25 mother --

1 THE COURT: Okay. I'll stop you there. I'm not
2 going to let it in, I'll tell you why. This is a Stand Your
3 Ground Hearing, this is not the trial of the case. Alright?
4 And we're dealing with the specific incident of him shooting
5 this individual. Okay? And so it's a far stretch right now,
6 based on what I've heard, to link his intent to want to shoot
7 the victim of this crime. If you have something else that you
8 want to argue at trial, maybe, but for purposes of this hearing
9 we're focused on what went on at the time of the shooting.
10 Okay?

11 MS. LIVESAY: That's fine, Your Honor, yes, sir.

12 MR. HELMS: Your Honor, if I may be heard on this?

13 THE COURT: Are you going to double up on me?

14 MR. HELMS: No, no, sir.

15 THE COURT: He's standing alone over there.

16 MR. HELMS: I won't do it, and if I did I have no
17 doubt he could handle it, but the only concern I have is this,
18 Judge. When the law enforcement arrived and took photographic
19 evidence of the incident --

20 THE COURT: Let me caution you. I made a ruling.
21 Are you going to now argue against my ruling?

22 MR. HELMS: No.

23 THE COURT: Okay.

24 MR. HELMS: I wouldn't dare.

25 THE COURT: Alright. Thank you.

1 MR. HELMS: I just want a little guidance as to how
2 to address this, Judge. They took photographs of these guns
3 together, Judge, because they were put together by the
4 defendant and his mother in a bag, we would seek to introduce
5 the evidence of the guns at the defendant's home. They are
6 together, Judge, they put them together, so when we seek to
7 introduce those it would be --

8 THE COURT: For purposes of this hearing, I'm going
9 to tell you, no, because I feel like you're going against my
10 ruling. Okay?

11 MR. HELMS: Oh, no.

12 THE COURT: I've made it very clear that for purposes
13 of this hearing we're focused on what happened when the
14 shooting took place. Alright? And what was in the mind of the
15 defendant, that's what a Stand Your Ground Hearing is, it's the
16 law. Whether you like it or not, that's what the law says we
17 have to focus on, and I'm paying particular attention to the
18 case that the State cited to me in their brief. Okay?

19 MR. HELMS: Okay, Judge, I understand the ruling.

20 THE COURT: The Supreme Court, I thought, did a very
21 thorough analysis of what you have to do in these Stand Your
22 Ground hearings, okay? Yes, sir? Alright, that's the gun.
23 What next?

24 MR. MARTIN: Judge, I think that you have covered the
25 statement, the guns, the e-mails --

1 THE COURT: E-mails.

2 MR. MARTIN: -- and the issue about any violence that
3 may have occurred between Yarnell and his girlfriend,
4 Remington, before this date during their relationship.

5 THE COURT: Okay. Let me tell you where I'm leaning
6 on that one. I'm leaning to say, okay, the State can go into
7 it within limits. I don't want to hear a lot of it because,
8 again, the girlfriend is not the one who got shot. It is this
9 individual, Mr. Pennington who got shot, and so, I think the
10 State can paint their argument and their positions that go to
11 his motives to going over there, but I say paint it in a way
12 that I don't need to hear all the details of it. So if there's
13 10,000 text messages, 20,000 e-mails, I don't need all of that,
14 alright, especially, if they're not going to contest it. Are
15 you going to contest that on that night that they were having
16 trouble --

17 MR. MARTIN: No, sir. I'm not going to contest, I'm
18 not going to contest that they were arguing, that he was doing
19 most of the argument, that he was rude and that he was
20 repetitive. I would deny that there were any threats of
21 violence of that nature, but the fact that they were arguing
22 and that he was upset with her, we do not contest that.

23 THE COURT: And I figured that you wouldn't because
24 you've already argued that he has her clothes in the car that
25 he's taking back to her.

1 MR. MARTIN: Yeah, yeah.

2 THE COURT: So I think that is an issue that really
3 is not going to be contested in this hearing and that's why I
4 say I don't want to hear too much of that for purposes of this
5 hearing --

6 MS. LIVESAY: Yes, sir.

7 THE COURT: -- because I don't think it's a contested
8 matter. Okay. What's next?

9 MR. MARTIN: That's it, Judge. At this time that's
10 it.

11 THE COURT: So we've covered all your motions?

12 MR. MARTIN: Yes, sir.

13 THE COURT: Are you sure?

14 MR. MARTIN: Well, I do believe, Judge, we've covered
15 them --

16 THE COURT: Wait a minute. You already argued it, so
17 I'm looking at the State because I think the damages, if
18 there's going to be damage, damage is already done because
19 you've argued it in your motion. I tend to agree with him, his
20 comment about his client said whoever at the jail or through a
21 telephone that he paid Mr. Morgan this amount of money to
22 represent him. I don't see any relevance in that, and I also
23 think if we go down that path you lead to collateral issues to
24 where it affects his right to counsel.

25 MS. LIVESAY: I think it's relevant because it goes

1 towards the credibility that the jailhouse snitch was giving
2 accurate information and he received accurate information from
3 Mr. Yarnell --

4 THE COURT: Accurate information --

5 MR. MARTIN: I got a question. How does she know the
6 information is accurate?

7 THE COURT: Wait, wait, wait.

8 MS. LIVESAY: As to the fact that Yarnell told him
9 that Morgan Martin represents him. If Yarnell had said Johnnie
10 Cochran represents him, they would be using it to say, look,
11 this guy didn't know what he was talking about, he's up here
12 saying that Johnnie Cochran represents him, and that's not
13 true. Then all the sudden his credibility would be at issue
14 because the statement he's giving is inaccurate. So it would
15 be, hey, he's making this whole thing up, but the fact that,
16 clearly, portions of it Mr. Martin does represent Yarnell. It
17 certainly proves -- there is a plethora of attorneys in Horry
18 County. It certainly proves that he had this conversation with
19 Yarnell about this particular case, and Yarnell is the guy that
20 was talking to that jailhouse snitch, and it wasn't just all
21 made up and there's some credibility to the jailhouse snitch.

22 MR. MARTIN: Well, let me say, again, Judge, the
23 information in whole is not accurate, and in addition, in
24 trying to corroborate a witness before any attack had been made
25 on his reliability or his credibility, and so Judge, to get in,

1 to try to get in, and there's a prejudice to it, and that is if
2 thing eventually makes its way to a jury it wouldn't matter
3 what you already review, but to a jury he's gone out and hired
4 him a lawyer and he's paid him a bunch of money and he's going
5 to get off this, that and the other, that's not relevant, never
6 had been, never will be, and I object to it. The information
7 is not correct, I'm not going to get on the record about what I
8 was paid or not paid. I can tell you that number there is
9 incorrect. So if it's based on his credibility by knowing the
10 number, he's wrong, he's unreliable, if I were you I wouldn't
11 call it.

12 THE COURT: For purposes of this hearing, it's
13 already been argued to me. I think the State goes too far.
14 That goes into an area that is of constitutional ramifications,
15 that goes that no matter what happens at this hearing or at the
16 ultimate trial, if this defendant is convicted it opens a
17 Pandora's Box of constitutional issues when you start attacking
18 a defendant's lawyer or using his lawyer as piece of evidence
19 in the case, whether it be Johnnie Cochran, whether it be
20 Morgan Martin, or John Doe off the street. When you start
21 attacking a defendant's lawyer then you go into a realm of
22 constitutional issues that I don't think you need to go into,
23 especially if you got the other evidence that you have, but I'm
24 only making a ruling for purposes of this hearing. It's
25 already been argued, it's part of the record in this hearing, I

1 just think the State has gone too far with that.

2 MR. MARTIN: Judge, the last one, and I don't know if
3 you've covered in your ruling, was the motion to exclude any
4 evidence, not the text messages, but a physical violence of any
5 sort between Mr. Yarnell and Ms. Hargrove.

6 THE COURT: I'm viewing that type of evidence in a
7 way that I did the other evidence about what went on the night
8 before with the text messages. It's not, I'm hearing it's not
9 disputed that the defendant and his girlfriend, or
10 ex-girlfriend, were having problems that night. He's got the
11 clothes in the car, you've already argued that, he's taking
12 them back to her, so I'm going to let the State have some
13 leeway with it, they can go into it, but I don't need to hear a
14 lot of it because, again, the girlfriend is not the victim of
15 the act, you know, so I don't think I need that much of it.
16 Now, if it has something to do with Mr. Pennington who is the
17 deceased, that would be a different story, but I don't need to
18 hear a lot of it.

19 MS. LIVESAY: I understand, Judge.

20 MR. MARTIN: Well, and I understand your ruling, and
21 I would just want the record to reflect, as to the motion of
22 physical violence, it's evidence of other crimes, past bad
23 acts, which are not admissible under the rules.

24 THE COURT: That would be for another reason and if
25 we go down that rabbit hole I would have to have more

1 information. I'm just talking about the relevance right now
2 part of it.

3 MR. MARTIN: Okay. That's it, Judge.

4 THE COURT: Anything else?

5 MS. LIVESAY: There's nothing further from the State,
6 Your Honor.

7 THE COURT: Are you ready to call your first witness?

8 MR. MARTIN: I'm ready.

9 THE COURT: Yes, sir.

10 MR. MARTIN: And Judge, I would ask that the
11 witnesses that are not police officers be excluded. We've got
12 like a half of dozen: Missy, Jennifer, Emily, the only one in
13 the courtroom is Missy Cannon who would be the first witness,
14 but I'd ask that those witnesses be sequestered for the
15 purposes of this hearing.

16 THE COURT: Any objection from the State?

17 MS. LIVESAY: As far as sequestering the witnesses?

18 THE COURT: Outside of the police officers.

19 MS. LIVESAY: And the victim's family, yeah, his dad
20 is coming in, and Detective Wydra is the lead investigator, but
21 as to everybody else, I understand they've got to be
22 sequestered.

23 THE COURT: Okay. I don't know who they are so I'll
24 leave that up to you all.

25 MR. MARTIN: And Judge, my motion again, so we're

1 clear, I'm not to sequester police officers or expert
2 witnesses, just the lay witnesses, and I'll name them, make
3 sure she and I agree, I think that we agree on it, Missy
4 Cannon, Jennifer Tassone, Michelle Hargrove, Remi Hargrove,
5 Emily Cerio, and Ally Parish and Darrin Card. I would ask that
6 those be sequestered for purposes of the hearing. All other
7 witnesses I have no objection to their being present in the
8 courtroom.

9 MS. LIVESAY: I appreciate it. I think we just
10 sequester all of them except for the ones that have a statutory
11 right to be in here, that way there's no confusion.

12 MR. MARTIN: Well, I have no real objection to that,
13 other than I'd say that it's overkill in this particular case
14 and it may take longer to have the hearing, but --

15 THE COURT: Alright. Let's exclude those witnesses
16 that the State just announced. I don't know who they are so
17 you all got to get them out of here. Tell them not to go
18 anywhere except for outside in the hallway so we can find them
19 very quickly.

20 MS. LIVESAY: Yes, sir.

21 MR. MARTIN: Well, Judge, and again, we've got the
22 SLED fingerprint people, you want them out of the courtroom, I
23 take it?

24 MS. LIVESAY: Yes, sir. I think sequester everybody
25 except for the people that have a statutory right to be here.

1 MR. MARTIN: Melissa Cannon.

2 THE COURT: Yes, sir, Mr. Martin?

3 MR. MARTIN: Missy Cannon, come around.

4 THE COURT: Let the Clerk swear you in.

5 **Melissa Cannon being first duly sworn, testified as**
6 **follows:**

7 THE CLERK: Please be seated. State your full name
8 and spell it, please.

9 THE WITNESS: Melissa Cannon, M-e-l-i-s-s-a, last
10 name is Cannon, C-a-n-n-o-n.

11 **DIRECT EXAMINATION**

12 BY MR. MARTIN:

13 Q. Ms. Cannon, as you can see, we don't have a jury. This
14 is a hearing for the judge so I'd ask you to primarily direct
15 yourself to the judge in the case. Where do you live, Ms.
16 Cannon?

17 A. I live in Columbia, South Carolina.

18 Q. What kind of work do you do?

19 A. I work for Southern Anesthesia.

20 Q. Southern Anesthesia?

21 A. Yes.

22 Q. Alright. And of course you've been in the courtroom
23 while we were arguing these motions, but you know Remi
24 Hargrove, correct?

25 A. Yes.

1 Q. Did you know Anijah Yarnell?

2 A. Yes.

3 Q. And you know my Michelle Hargrove who is Remi's mother?

4 A. Yes.

5 Q. And Jennifer Tassone?

6 A. Yes.

7 Q. And Darrin Card?

8 A. Yes.

9 Q. And I understand that on the date that this happened
10 were you in Myrtle Beach or where?

11 A. I was in Columbia.

12 Q. In Columbia. And who were you with?

13 A. Michelle and I were there.

14 Q. Say that again.

15 A. Michelle Hargrove was with me.

16 Q. And on that occasion did you have an opportunity to
17 speak to Anijah Yarnell by telephone?

18 A. Yes.

19 Q. And before this incident occurred had you spoken to him
20 once or twice?

21 A. Yes.

22 Q. Okay. And then did you have an occasion to be on the
23 telephone at the time that this incident occurred?

24 A. Yes.

25 Q. And did you receive a call from who, or tell the judge

1 how that went down as to how you happened to be on the
2 telephone, to the best of your knowledge?

3 A. Michelle and I were watching a movie and Anijah had
4 called, I thought he had called, and you know, he was -- all I
5 could hear, he said, I just came to tell her stuff, I just came
6 to talk to her, and then all of the sudden I hear a bunch of
7 noise like somebody ran up on the car, and I hear, you know --
8 do you want me to cuss or I could tell you exactly what was
9 said, or I'm not sure what to say.

10 Q. For purposes of this hearing, please tell the Court
11 exactly what you heard.

12 A. Okay. I heard: Get the fuck out of the car, nigger,
13 I'm going to beat your ass, get out of the car, and then,
14 within like a couple of seconds I could hear the door like
15 somebody was trying to get into the car door, and then Anijah
16 said, am I supposed to be scared of that? And I was, like,
17 what is going on? I mean, I was home, I didn't know what was
18 going on, and he said, am I supposed to be scared of that, and
19 then it was like the phone dropped. I don't know if the phone
20 was -- where the phone was or if it was in his pocket or where
21 it was, but it fell and it sounded muffled, so I hung the phone
22 up at that point.

23 Q. And if you would, tell the Court, did you say that you
24 heard what sounded like somebody trying to open a car door?

25 A. Yes.

1 Q. Are you sure about that?

2 A. Yes.

3 Q. That sound unmistakable to you?

4 A. Yes.

5 Q. And you heard an individual say, get the fuck out of the
6 car, I'm going to fuck you up?

7 A. Yes.

8 Q. Is that accurate?

9 A. Yes.

10 Q. Did you ever hear at any time anybody ask Mr. Yarnell,
11 how about you just leave?

12 A. No.

13 Q. Did you talk to Mr. Yarnell later that night --

14 A. Yes.

15 Q. -- over the telephone?

16 A. Yes.

17 Q. He called you or you called him?

18 A. He called me, I think, but I'm not sure, it was two
19 years ago, but I'm not sure.

20 Q. Let me back up and ask you. How would you describe the
21 demeanor of the individual you heard talking to Yarnell over
22 that phone call that night?

23 A. When are you talking about, the initial phone call?

24 Q. Yeah, the initial phone call.

25 A. His demeanor, Anijah's?

1 Q. Well, first of all, what about Mr. Yarnell's demeanor,
2 how would you describe that in the conversation that you heard?

3 A. At first he sounded sincere, I mean in the very
4 beginning, and then at the end all I could hear was: Am I
5 supposed to be scared of that? And it was kind of just like
6 I'm saying it.

7 Q. And would it be fair to say that he appeared calm
8 initially in the conversation?

9 A. I mean, he didn't say much, so I mean, it was loud.

10 Q. Without talking about how he appeared when this started,
11 when you first heard, how about the other individual? How
12 would you describe the demeanor of the individual that was
13 yelling to get out of the car?

14 A. Angry. At first I didn't know that it was one person, I
15 thought it was more than one person because it was aggressive
16 and you know, I didn't know who it was until after.

17 Q. Belligerent, angry?

18 A. Yeah, very.

19 Q. Belligerent?

20 A. Yes.

21 Q. What affect did what you heard have on you?

22 A. I mean, it scared me, I didn't know what was going on
23 because he said, am I supposed to be scared of that, and I
24 thought, you know, who all's over there, what's going on?

25 Q. If somebody had been talking to you the way it appears

1 Mr. Pennington was talking to Mr. Yarnell, would that have
2 scared you?

3 A. Yes.

4 Q. Now, let me move on. Did you talk to Anijah again a
5 little later that night?

6 A. Yes.

7 Q. And how would you describe -- well, let me ask you this
8 this: Did he tell you during that conversation that he had
9 been hit by Mr. Pennington?

10 A. Yes.

11 Q. What did he say to you?

12 A. At that conversation?

13 Q. Yeah.

14 A. He said that he had punched him in the face maybe more
15 than once, a couple times, I think, that he wanted to leave but
16 he couldn't get out of the parking space.

17 Q. Could you discern from the conversation you had with him
18 whether or not he had actually shot Mr. Pennington?

19 A. Yeah, he said that he -- Mike, he said that he shot him,
20 yeah, and he didn't know, I don't think he knew he killed him,
21 he knew he shot him.

22 Q. You don't think he knew what?

23 A. That he had killed him.

24 Q. That he had killed him?

25 A. Yeah.

1 Q. Did he indicate to you or did you have any conversation
2 with him about the fact that he should turn himself in or that
3 he was going back home so that the police would know where he
4 was?

5 A. Yeah, I told him, I said, if you're telling the truth,
6 you know, you need to go home and turn yourself in.

7 Q. In that conversation about, get the fuck out of the car,
8 I'm going to fuck you up, was that said once or multiple times?

9 A. It was several times.

10 Q. Say that again.

11 A. It was couple of times.

12 Q. A couple of times?

13 A. Yes.

14 Q. Do you know whether that conversation, those statements
15 were made before or after you could hear someone trying to open
16 the door?

17 A. It was kind of simultaneously.

18 Q. Kind of simultaneously.

19 A. Yes. It was a very short time.

20 MR. MARTIN: Just a moment, Judge. That's all the
21 questions I have for Ms. Cannon.

22 THE COURT: Yes, ma'am?

23

24

25

CROSS-EXAMINATION

1

2 BY MS. LIVESAY:

3 Q. Good afternoon, Missy, how are you?

4 A. I'm good. How are you?

5 Q. Good. So your testimony with Mr. Martin was what you
6 heard from the defendant was, am I supposed to be scared of
7 that, that's what you heard?

8 A. Yeah, I heard he said am I supposed to be scared of
9 that, yeah.

10 Q. Does that sound like somebody that's afraid to you?

11 A. I don't know, I wasn't there so I'm not really sure
12 about that, but I mean, I could barely hear and he did say that
13 several times.

14 Q. Am I supposed to be scared of that?

15 A. Yes.

16 Q. Okay. And to you, you don't know if he's afraid or not?

17 A. I don't know, I didn't know what was going on. Like I
18 said, I wasn't there, so I had no clue what was going on.

19 Q. Okay. But you can agree you never heard him say, I'm
20 afraid, I'm scared?

21 A. No, he never said that.

22 Q. Did he ever say let me leave this parking lot?

23 A. At that time, no.

24 Q. Okay. All you could hear him say was, am I supposed to
25 be scared of that? Right?

1 A. Uh-huh.

2 Q. Okay. Now, Mr. Martin got into it with you that you
3 were in Columbia with Michelle during the fact that this
4 happened, during this phone call, and that was May the 14th of
5 2020?

6 A. I guess, I'm not sure.

7 Q. Well, do you remember after the conversation you looked
8 over at my Michelle and thought it was a black guy that was
9 approaching the car, isn't that what you told my Michelle?

10 A. I had no idea who that was, I had no clue who it was.

11 Q. Well, did you tell her that you thought it was a black
12 male?

13 A. I thought it sounded like -- I thought it was Trey.

14 Q. I'm sorry?

15 A. I thought it was Trey, because I knew that Trey was
16 leaving, I thought Trey was there, so I thought it was Trey.

17 Q. And is Trey black?

18 A. Yes.

19 Q. And, look, we're just trying to get out the facts. To
20 say that you thought he was black don't mean anything.

21 A. Okay.

22 Q. But you did turn around to Michelle, and you thought the
23 guy that was talking to the defendant was a black male?

24 A. I mean, it sounded like a couple people, but yeah.

25 Q. It sounded like a black male? Okay. And you know Mr.

1 Pennington is white?

2 A. Yes.

3 Q. Okay, good. And you also told Michelle that very night
4 again right when you got off the phone when it was fresh in
5 your mind that you thought several people were running up to
6 the car?

7 A. I did.

8 Q. It sounded like several people were running up to the
9 car?

10 A. Uh-huh.

11 Q. So you thought it was a black male and you thought
12 several people were running up to the car?

13 A. It was loud like it was a couple people, yes.

14 Q. Okay, like several people were running up to the car.
15 Okay. And do you know now that, in fact, neither one of those
16 things are true, do you know that now?

17 A. Yes.

18 Q. Okay. So you also talked to Yarnell before he went over
19 there, didn't you?

20 A. Yeah, earlier.

21 Q. You and him texted back and forth?

22 A. Yeah.

23 Q. And at the time your phone number was (803)206-8144?

24 A. Yes.

25 MS. LIVESAY: Would you mark this for me, please?

1 (State's Exhibit 19 was marked for identification.)

2 MR. MARTIN: Judge, I believe these are text messages
3 that Ms. Cannon --

4 MS. LIVESAY: This wasn't all of them.

5 MR. MARTIN: -- text messages that Ms. Cannon was
6 involved in, and to the extent that they are I have no
7 objection to her testifying about them.

8 Q. State's Exhibit 19, if you don't mind, look through
9 there and tell me whether or not that's your phone number in
10 the conversation that you had with the defendant the night
11 before the shooting. Is that accurate?

12 A. Yes.

13 Q. Is that a conversation between you and him?

14 A. Yes.

15 Q. If you don't mind, publish that so the judge can hear
16 it, what you said and what Mr. Yarnell said via text.

17 A. I said, call me please, I know how you feel so call me.
18 Michelle is medicated. She had had an MRI that day so she was
19 on medications and he had been calling her so I told him to
20 call me. I said, hey, you should go get her pictures and know
21 that this just -- and she wanted -- she's with her family, she
22 wanted to see them. She loves you, but they are her family so
23 you just got to make the best of it. He said -- do you want me
24 to read this part too?

25 Q. Please.

1 A. Remi doesn't care about the stuff so I guess I'm staying
2 there. Hey, if Remi wants the rest of her stuff I need to know
3 because next to her clothes and stuff I'm not playing games
4 with her.

5 Q. I'm sorry, what was that last thing?

6 A. I'm not playing games with her.

7 Q. Okay.

8 A. She claims she doesn't care so I need to truly know if
9 she does not. He said, does Remi want those crystals --

10 Q. What time is that? Does it reflect on the message?

11 A. Yeah, it's 7:23.

12 Q. Okay. At night, p.m.?

13 A. Yes, ma'am.

14 Q. Okay.

15 A. And I said, Michelle says please don't throw anything
16 out. We'll come tomorrow and get it in the morning. I said I
17 have not talked to her but I know she cares. He said, it's out
18 now, tell Remi to respond to see if she -- says, no, it's gone.
19 Okay. She said she doesn't care so I'm gonna -- so I'm gone,
20 sorry for bothering you all. Hey, can you tell Remi I'm
21 outside? She told me to bring the stuff to Andrew's and she's
22 not answering.

23 Q. What time was that?

24 A. That was at 9:22 p.m.

25 MR. MARTIN: What time? I'm sorry, what time?

1 THE WITNESS: 9:22.

2 Q. And before that he told you before that she wasn't
3 responding, correct: Tell her if she wants this stuff she
4 better respond.

5 A. Yes.

6 Q. What time was that?

7 A. That was at 6:53.

8 Q. 6:53. And again, at what time she still won't respond
9 back to him?

10 A. 9:22.

11 Q. So clearly he's upset?

12 A. Yes.

13 Q. I'm sorry?

14 A. Yes.

15 Q. And in the course of those text messages, I know it's
16 hard to read them, and if you want to kind of interpret them as
17 you're reading them, but it sounds to me like he's telling you,
18 hey, I'm throwing her stuff out?

19 A. Yeah, he did.

20 Q. Okay. And you all were begging him not to throw it out,
21 am I right?

22 A. Yeah, we told him not to.

23 Q. And at one point he said, look, you better tell her to
24 respond or I'm throwing this stuff out, right?

25 A. Yes, ma'am.

1 Q. And that was around 6:53 you said?

2 A. Yes, ma'am.

3 Q. Then he drives over there and he tells you again, she
4 won't respond, reach out to her for me; is that right?

5 A. Yeah, he said he brought stuff to her. We didn't know
6 if he had or not. So Michelle called Remi and told her that he
7 brought stuff over for her.

8 Q. But you knew that she was not responding to his phone
9 calls and messages; is that correct?

10 A. Yes.

11 Q. And you knew he was throwing her stuff out, correct?

12 A. That's what he said, yeah.

13 Q. Okay. Now, you also talked to the police while you were
14 in the car or in the room with Michelle Hargrove and Remington
15 Hargrove; is that correct? The three of you all were there and
16 you were passing the phone around and you were talking to
17 Detective Wydra?

18 A. In the beginning it was me and Remi, yes, yes.

19 Q. Okay. So you remember talking to the police?

20 A. I do.

21 Q. And you and Remi were in the room together?

22 A. We were in the car together, we were on our way back to
23 Columbia.

24 Q. And you were passing the phone back and forth to talk to
25 the police?

1 A. Yes.

2 Q. And do you remember you told the police in that
3 conversation: And they had already eaten when he got home but
4 they had plans so he was upset about that. Do you remember
5 that?

6 A. Yes.

7 Q. So you told the police he was upset?

8 A. Yeah, he was upset.

9 Q. Then you told the police: I tried to talk to him and
10 calm him down a little bit. Do you remember telling the police
11 that?

12 A. Yeah.

13 Q. And you said: But you know, I mean, I don't know, I
14 felt during the conversation, and this is what's weird with it.
15 Do you remember that?

16 A. No, I'm not sure.

17 Q. Do you remember telling the police during the incident
18 and the conversation: I heard them yelling at each other but
19 it, again, sounded like Anijah was still sitting in the car and
20 the window was still up? Do you remember telling the police
21 that?

22 A. No, I don't actually remember, but I probably did.

23 Q. Do you want to review your transcript?

24 A. No. I was saying I probably did, I just literally don't
25 remember that, but yes, that's fine.

1 Q. So you would agree you told the police: I heard them
2 yelling like at each other, but again it sounded like Anijah
3 was sitting in the car and the window was still up, is that
4 right?

5 MR. MARTIN: Objection.

6 THE COURT: What's the objection.

7 MR. MARTIN: The objection is I think that she's
8 adding to the statement she's got. Is she would let her look
9 at her statement if wants to cross-examine her on it, that
10 would be appropriate. What page of the transcript is that on?

11 MS. LIVESAY: Eight.

12 MR. MARTIN: Well, we got different numbers, but go
13 ahead.

14 MS. LIVESAY: It's the conversation with Detective
15 Wydra.

16 Q. Here you go. Read that whole page, see if it refreshes
17 your memory. Does that refresh your memory?

18 A. Yes.

19 Q. So did you tell the police that you heard: You heard
20 like, them yelling at each other?

21 A. Yes. I mean, I did say that, yes.

22 Q. So now it's that they were yelling at each other; is
23 that correct?

24 A. Yeah. Anijah was saying, am I supposed to be scared of
25 that, at the same time, that was all at the same time.

1 Q. So both of them were arguing. It wasn't just one of
2 them; is that right?

3 A. I mean, I guess. I don't know if that -- I don't know.
4 I mean, I guess so.

5 Q. But you told the police you heard them, like, yelling,
6 like, at each other; is that correct?

7 A. Yes.

8 Q. Okay. And you told the police that it sounded like
9 Anijah was still sitting in the car with the window up?

10 A. It did, yes.

11 Q. So you hear them yelling at each other and one of them
12 is in a car with the window rolled up, correct?

13 A. No, I can't guarantee that, but yeah, that's what it
14 sounded like.

15 Q. Is that what you told the police?

16 A. Yes.

17 Q. Okay. Now, you and Anijah clearly had contact just you
18 and him, correct?

19 A. Yes.

20 Q. And you liked Anijah, kept in touch with him?

21 A. I mean, somewhat, yeah.

22 Q. And during some of those text messages he would tell you
23 that Remington Hargrove was a whore, do you remember that?

24 A. Yes.

25 Q. Yes?

1 A. Yes.

2 Q. And you kept talking to him, correct?

3 A. A little while.

4 Q. It didn't make you mad enough to cut contact with him;
5 is that right?

6 A. I would tell him to calm down and stuff like that, but
7 no, but no, I talked to him.

8 Q. So clearly you like him. Now, did you talk with him
9 after had he got out of jail?

10 A. Yes.

11 Q. And did you talk to him about the incident that we're
12 here today for?

13 A. Yes, I have.

14 Q. And didn't at that time he tell you that the victim took
15 his belt off and wrapped it around his hand and was hitting him
16 with it?

17 A. He told me that he had taken -- that Mike was taking his
18 belt off like he was going to hit him like a gang thing or
19 something.

20 Q. So he had taken his belt off to use it as a weapon?

21 A. I guess that's what he meant, yeah, he said he was
22 taking it off, yeah.

23 Q. So he said he was taking his belt off?

24 A. Yeah.

25 Q. Did you know in all of the pictures his belt was buckled

1 up, it was not taken off, it had not even unbuckled?

2 A. No, I didn't know that.

3 Q. But he told you after he had got out of jail that the
4 victim had taken his belt off?

5 A. Yeah.

6 Q. And do you remember him telling you that he wrapped it
7 around his hand, that the victim had wrapped it around his
8 hand?

9 A. It seems like maybe, yeah.

10 Q. Okay, that he had wrapped it around his hand, and that
11 he was hitting Yarnell with the belt wrapped around his hand?

12 MR. MARTIN: Objection.

13 A. I mean, he had told us that --

14 THE COURT: The objection?

15 MR. MARTIN: I'll withdraw it. I'm sorry.

16 THE COURT: Go ahead. You can answer.

17 Q. Is that correct, is that what he told you?

18 A. Yes.

19 Q. So he told you way later after he got out of jail that
20 the victim took his belt off, wrapped it around his hand and
21 was hitting Yarnell with it?

22 A. Yes.

23 Q. Yes?

24 A. Yeah, he said he punched him, yeah.

25 Q. Now, Missy, in those text messages, and I'll give them

1 back in case you need to look at them to review them to answer
2 the question, but I know that's been two years ago. In the
3 course of the text messages you're saying, and correct me if
4 I'm wrong, don't throw this stuff out, we will drive from
5 Columbia and pick it up?

6 A. Yes.

7 Q. So when he said he was going to throw that stuff out,
8 you believed him, correct?

9 A. Yeah.

10 Q. And you were willing to drive from Columbia to get it?

11 A. Yeah.

12 Q. And do you remember the stuff that he was telling you he
13 was going the throw out?

14 A. Yes.

15 Q. And what were those items?

16 A. Pictures of her dad.

17 Q. And why is pictures of her dad significant?

18 A. Because he's dead.

19 Q. He passed away?

20 A. Yes.

21 Q. And is that the only thing she had of her dad?

22 A. I think so, yeah.

23 Q. And he was telling you, I'm throwing those pictures out?

24 A. Yeah.

25 Q. And do you remember him saying, I'm throwing her

1 crystals out, too?

2 A. I don't remember that, but I do remember the pictures.

3 Q. And you know those pictures are significant to Ms.

4 Hargrove?

5 A. Yes.

6 Q. Two more questions. What were you and Michelle doing
7 that day?

8 A. We were watching a movie.

9 Q. How about earlier?

10 A. I don't really know. I have no idea.

11 Q. Do you remember why you told him to call you and leave
12 Michelle alone?

13 A. Oh, because she was sitting on the couch and she was
14 kind of drugged up because she had had like an MRI or something
15 that day so she was kind of drugged up.

16 Q. Okay. So she had had an MRI?

17 A. Yes.

18 Q. And he was calling her about this, correct?

19 A. Yes.

20 Q. And you had to say, hey, look, leave her alone, just
21 call me?

22 A. Yeah, because she was, like, kind of freaking out a
23 little bit so I told him to call me instead of messing with
24 her.

25 Q. So she could get some rest?

1 A. Well, I mean, that didn't happen, but, yeah.

2 Q. Did ultimately, you drive down there?

3 A. Yeah.

4 Q. When?

5 A. After everything happened. We went to get Remi.

6 Q. And from what you heard and what you relayed close in
7 time to Michelle is that you thought it was a black male and
8 several people were running up to the car?

9 A. Initially, yes.

10 Q. And but you did think from the sound of the conversation
11 that Yarnell's window of his car was rolled up?

12 A. It did sound that way, yes. Do you want this back?

13 MS. LIVESAY: No further questions, Judge.

14 THE COURT: Any Redirect?

15 MR. MARTIN: Just a couple of questions.

16 **REDIRECT EXAMINATION**

17 BY MR. MARTIN:

18 Q. As to the window being rolled up, you could clearly hear
19 the conversation that you have described to the judge, am I
20 correct?

21 A. Yes, yes.

22 Q. And you didn't have any trouble hearing what Mr.
23 Pennington was saying to Mr. Yarnell, even though you thought
24 it might be a black person at the time, you didn't have any
25 trouble hearing that did you?

1 A. No.

2 Q. Your were not there?

3 A. No.

4 Q. You don't know whether the window was, frankly, up or
5 down?

6 A. No, I do not.

7 Q. It just struck you that it might have been up, but that
8 still doesn't mean you couldn't hear what you heard?

9 A. No, I did hear it.

10 Q. And as to the conversation that you heard, was the guy
11 who was saying, get out of the car, I'm gonna fuck you up, was
12 he the aggressor in that conversation?

13 A. From what I could hear on the phone, yeah.

14 Q. He was, right?

15 A. Yes.

16 Q. Okay. Now, as to Anijah and Remi arguing, that wasn't
17 unusual for them to be bickering or fighting, was it?

18 A. No.

19 Q. This wasn't the first time that had occurred, was it?

20 A. No.

21 Q. It wasn't the first time that one or both of them had
22 called Michelle or you about their squallers?

23 A. No, lots of times.

24 MR. MARTIN: That's all the questions I have.

25 THE COURT: Thank you, ma'am. You may step down.

1 Watch your step as you're stepping down. Are you
2 ready to call your next witness?

3 MR. MARTIN: We've got to get him, Judge.

4 THE COURT: Who is it?

5 MR. MARTIN: Darrin Card.

6 MR. HELMS: Your Honor, while we're waiting on Mr.
7 Card to enter, I have an inquiry of the Court, if you don't
8 mind. Judge, and I only ask because different judges have
9 different practices. What is your practice as it concerns
10 examination of the witnesses, Your Honor? I know that direct
11 examination comes first followed by cross then redirect. Is
12 the State allowed or able to recross?

13 THE COURT: Only on any new issue that was brought
14 up.

15 MR. HELMS: Understood. Thank you, Judge.

16 MR. MARTIN: Judge, how late do you anticipate
17 working today, and I ask that because I've got out of town
18 witnesses and different things.

19 THE COURT: Well, I try to knock it off at 5:00
20 because people that work in the court system have lives as
21 well.

22 MR. MARTIN: Okay. Can we approach just a second?

23 (Off the record discussion was held at the bench by
24 Court and counsel.)

25

1 Darrin Card being first duly sworn, testified as
2 follows:

3 THE CLERK: Please be seated. State your name for the
4 record and spell it, please.

5 THE WITNESS: Darrin Card. My first name is spelled
6 D-A-R-R-I-N, last name, Card, C-A-R-D.

7 THE COURT: Mr. Card, for some reason you're coming
8 in awfully soft. Can you slide up to that microphone? See
9 that lady down there in front has got to be able to hear, and I
10 do, you need to speak up. Okay?

11 THE WITNESS: Okay.

12 THE COURT: If you ever can't hear the lawyers or me,
13 you just let us know, we'll speak up as well.

14 **DIRECT EXAMINATION**

15 BY MR. MARTIN:

16 Q. Mr. Card, give the judge your name and address, please.

17 A. Darrin Card, 119 Kings Park Drive, Liverpool, New York.
18 13090.

19 Q. And Darrin, if you would, tell me what is your
20 connection with the family that is involved in this incident?

21 A. My girlfriend is Remington and Emily's nieces.

22 Q. Your girlfriend is Remington and Emily's aunt?

23 A. I'm sorry, yeah.

24 Q. And you were with them the night that this altercation
25 occurred, correct?

1 A. Correct.

2 Q. And you were visiting down from New York?

3 A. Yes.

4 Q. And you all had gone out to dinner that night?

5 A. Correct.

6 Q. And at some point in time after dinner you come back to
7 the parking lot of the Cross Gate Villas Apartment Complex?

8 A. Correct.

9 Q. Who were you riding with when you come back?

10 A. My girlfriend.

11 Q. Jennifer?

12 A. Jennifer.

13 Q. You and she are in the car together?

14 A. Correct.

15 Q. Anybody else but the two of you?

16 A. No.

17 Q. Emily and Remi are in a car together, correct?

18 A. Correct.

19 Q. And do you know Anijah Yarnell, or did you know him at
20 that time?

21 A. I seen him a couple times, yes, met him.

22 Q. And so when was the first time you saw Anijah Yarnell
23 the night that this all occurred?

24 A. When he pulled up.

25 Q. When he pulled up. Did you know or did you see his car

1 parked in the parking lot when you all first arrived, or not?

2 A. Parked? I seen him pull up.

3 Q. You saw him pull up.

4 A. Right.

5 Q. And that's the first time that you had seen him or his
6 car that night?

7 A. That I seen him.

8 Q. And you had no conversation with him yourself prior to
9 that time?

10 A. What time?

11 Q. That he pulled up and that he and Mr. Pennington
12 engaged.

13 A. Be more specific.

14 Q. Well, let me back up and ask it this way.

15 A. Sure.

16 Q. When you and Jennifer pull up into the parking lot out
17 there, do you park your car?

18 A. Correct.

19 Q. Do the two of you go into the apartment?

20 A. No.

21 Q. What do you do?

22 A. We're waiting for everyone to arrive.

23 Q. And now had Emily and Remi, did they arrive?

24 A. Well, they were coming in to the parking lot.

25 Q. And all I'm trying to do, Darrin, is to get to the idea,

1 did you and Jennifer get there before Emily and Remi?

2 A. Correct.

3 Q. And so when did Mike Pennington arrive?

4 A. After we did.

5 Q. After you did?

6 A. Right.

7 Q. After Remi and Emily?

8 A. No. He was there before.

9 Q. He was there before Emily and Remi?

10 A. Right.

11 Q. When Emily and Remi pull up do they go upstairs into the
12 actual apartment?

13 A. When they pull in, no.

14 Q. But Remi is upstairs when all of this occurs, is she
15 not?

16 A. No.

17 Q. She's not?

18 A. No. You're talking about when -- I'm going back to the
19 fact that when they pull into the parking lot. They weren't
20 even over to Andrew's apartment yet. They had just pulled in,
21 like, not even to where you would normally park, they just had
22 pulled in, which was, you know, a couple, three, four hundred
23 feet away, the entry way, and they were stopped.

24 Q. I'm confused and I'm probably confusing you, I'm sorry.

25 A. Okay.

1 Q. This is when who pulled up? Let me go back and start
2 over.

3 A. Okay. Well, I think -- if I may speak?

4 Q. Into the parking lot that night after dinner --

5 A. Right.

6 Q. -- everybody's kind of coming back to Cross Gate Villas?

7 A. Not all at the exact same time, Jennifer and --

8 Q. Who was comes first?

9 A. Jennifer and I were there.

10 Q. Alright. You and Jennifer pull in and you park?

11 A. Correct.

12 Q. Do you pull in normally or did you back in to a parking
13 place?

14 A. Pulled in.

15 Q. Did you get out of your car at that time or just wait in
16 the car?

17 A. Waited a few minutes and that's when Mike pulled in.

18 Q. Then Mike pulled in?

19 A. Right.

20 Q. Did he park his car there somewhere?

21 A. He parked his car, yeah, and we all got out and, you
22 know, had a conversation because we were waiting for the girls.

23 Q. So at that time there's you and Jennifer and Mike are in
24 the parking lot?

25 A. Right.

1 Q. And still waiting on Emily and Remi to come?

2 A. Correct.

3 Q. And you guys are just in the parking lot?

4 A. Yes.

5 Q. Does Mike have some beer?

6 A. He had brought, because we had asked him to stop to
7 grab, I think he had an eight-pack of Mic. Ultra beer.

8 Q. An eight-pack of Mic. Ultra?

9 A. I believe that's what it was.

10 Q. And who set it in the parking lot, did you do that or
11 did he do that?

12 A. I think he handed it to me and I just set it on the
13 ground because we were just standing there talking and waiting
14 for the girls to arrive.

15 Q. And when the girls arrived what did they do?

16 A. When they arrived they had pulled into the parking lot
17 and stopped because Remington's boyfriend was going out as they
18 were coming in, and I guess, you know, they had a conversation
19 which, of course, I didn't hear.

20 Q. You couldn't hear that conversation? In other words,
21 they passed each other?

22 A. No, they stopped and --

23 Q. Okay. They stopped for a short period of time?

24 A. Uh-huh.

25 Q. Apparently had a conversation, but you couldn't hear

1 what was said?

2 A. No.

3 Q. Because you were some distance away?

4 A. Right.

5 Q. And but whatever was said you couldn't hear any of it?

6 A. Right.

7 Q. Couldn't hear any yelling or screaming or threat at that
8 time?

9 A. No, too far away.

10 Q. Okay, too far away. Alright. And then, so they passed?

11 A. No, they didn't pass.

12 Q. Well, they stopped --

13 A. Right.

14 Q. -- but didn't Yarnell then drive on out and Remi and
15 Emily come on in?

16 A. Right. But then a short while later he had came back.

17 Q. And so my point to you is when Remi and Emily came in
18 and parked the car who was driving the car, do you recall?

19 A. I don't recall.

20 Q. What did Remi and Emily do? Did they come to the
21 parking area where all of you were or walk up to the apartment?

22 A. They ended up going up to the apartment.

23 Q. Okay. And so that leaves the three of you at the time,
24 Jennifer, Mike and you in the parking lot when Anijah pulled
25 up?

1 A. Right. But before that Emily had come back downstairs,
2 too.

3 Q. Alright. So by then Emily is back down and there's four
4 of you there, correct?

5 A. Uh-huh.

6 Q. Alright. Now, when Anijah Yarnell pulled up, because
7 you gave a statement which you and I have talked about, to
8 Investigator Steve Brown, you said that, would it be correct
9 that Yarnell's window was about two thirds of the way down and
10 his door was shut?

11 A. As far as exactly how far it was up or down, I believe
12 that it was down maybe halfway.

13 Q. Give or take a little bit, that's what you observed?
14 Did Yarnell get out of the car?

15 A. No.

16 Q. Did Mike approach the car?

17 A. Yes.

18 Q. And the window, did Mike hit Yarnell?

19 A. I don't know if he landed, but he attempted to.

20 Q. He attempted to hit him through the window that was
21 partially down?

22 A. Correct.

23 Q. And then Mike pulled on the door handle to try to open
24 the door; is that right?

25 A. He did.

1 Q. Is that right?

2 A. He did.

3 Q. Okay. He couldn't open the door, apparently, could he?

4 A. Uh-uh.

5 Q. And he was telling Yarnell, you know, get the fuck out
6 of the car, I'm gonna fuck you up?

7 MS. LIVESAY: Your Honor, I think open-ended
8 questions wouldn't be appropriate since it's defense counsel's
9 witness.

10 THE COURT: Do you consider him a hostile witness?

11 MR. MARTIN: I do, Judge.

12 THE COURT: I'm going to let him do it, go ahead.
13 Sir, if you would, give verbal answers. You've answered a
14 couple of questions with uh-huh, uh-uh, and shake your head,
15 she can't take that down, it's got to be verbal.

16 THE WITNESS: Sure.

17 MR. HELMS: Your Honor, was the witness just declared
18 hostile?

19 THE COURT: Yes, sir.

20 MR. HELMS: Thank you.

21 BY MR. MARTIN:

22 Q. And in the course, again, go back -- he tried to -- Mike
23 Pennington tried to open the car door to get Yarnell out; is
24 that correct?

25 A. Well, he tried to open the door.

1 Q. The door didn't open?

2 A. Yes.

3 Q. It was as though it were locked even though it wouldn't
4 open, right?

5 A. I would think it would be locked, yes.

6 Q. The window was partially down. I'm not sure exactly how
7 far, but it's halfway give or take a little bit down?

8 A. Uh-huh, yes.

9 Q. And Mike clearly tries to hit him, hit Yarnell through
10 the partially down window, right?

11 A. Yes.

12 Q. At the same time saying something to the effect, get
13 out, I'm gonna fuck you up?

14 A. No, I don't remember hearing that.

15 Q. You don't remember hearing that?

16 A. No.

17 Q. It was clear to you that Mr. Pennington was aggressive
18 and belligerent towards Mr. Yarnell in as much as he was trying
19 to hit him and get in the car on him, would you agree with
20 that?

21 A. No, I think he was upset because I could not hear what
22 Remi's boyfriend was saying, I could only hear what Mike was
23 saying.

24 Q. Well, for some reason, regardless of what was said, who
25 was trying to get into Mr. Yarnell's car?

1 A. I wouldn't say he was trying to get into the car, I
2 think he was trying to open the door.

3 Q. Okay. He's trying to open the door. Would you think
4 that it's reasonable that that would be then to try to get Mr.
5 Yarnell out?

6 A. I wouldn't want to speculate on that.

7 Q. But clearly he's trying to open the door, right?

8 A. Yes. He tried to open the door.

9 Q. And he's trying and/or is hitting him?

10 A. Yes, he took a swing at him.

11 Q. And he's getting his arm through that door, right?

12 A. Right.

13 Q. Mr. Yarnell never does get out of the car, does he?

14 A. No.

15 Q. You never see him trying to hit Mr. Pennington, do you?

16 A. No.

17 Q. You never saw the weapon yourself?

18 A. No.

19 Q. But would it be correct to say that your statement to
20 Investigator Brown was that Mike pulled on the door handle and
21 it didn't open and he took a step back and he was shot?

22 A. No, that's not right.

23 Q. That's not right?

24 A. No. He tried to open the door and he went back, and
25 Mike apparently seen that he had a gun because he said, you

1 know: You have a gun? And then that's when he just shot him.

2 Q. And of course, at the time that he was shot, that was
3 all happening when he was at or immediately after the time he
4 was trying to open the door and that he was hitting Yarnell
5 through the car door window?

6 A. Yeah, that was after.

7 Q. After that. Alright. So Yarnell didn't drive up and
8 roll down the window and shoot somebody, did he?

9 A. Yeah, he did.

10 Q. Well, he didn't drive up, roll down the window, and
11 without a word being said or anybody moving he did didn't shoot
12 anybody, did he?

13 A. No.

14 Q. And you never went to the car yourself, did you? You
15 didn't see the need to do that, did you?

16 A. I wouldn't say that.

17 Q. Well, you didn't go.

18 A. Right, but --

19 Q. Did you have any conversation with Yarnell?

20 A. No.

21 Q. Did he have any conversation with you?

22 A. No.

23 Q. Did he have any conversation when he pulled up other
24 than: Is Remi around?

25 A. I didn't even hear that.

1 Q. Did you hear Yarnell say anything?

2 A. Nothing.

3 Q. Alright. The first one that you heard say anything when
4 he pulled up would have been Mr. Pennington?

5 A. Yes.

6 MR. MARTIN: That's all the questions I have for Mr.
7 Card.

8 **CROSS-EXAMINATION**

9 BY MS. LIVESAY:

10 Q. Good afternoon, Mr. Card. Am I saying that right?

11 A. You are.

12 Q. Okay, good. Mr. Martin just asked you some questions
13 about the night that Michael Pennington was killed, do you
14 remember that?

15 A. Yes.

16 Q. Okay. Now, talk to me a little bit about what was going
17 on leading up to this between the defendant and Remington
18 Hargrove, because you were with Remington and the family all
19 day, correct?

20 A. Right.

21 Q. You all were spending time together?

22 A. Uh-huh.

23 Q. And you all were down from New York?

24 A. Yes.

25 MR. MARTIN: Objection.

1 Q. And you all were in the Surfside at Maddington Place; is
2 that correct?

3 A. Yes.

4 THE COURT: When he says an objection, stop the
5 question. What is the objection?

6 MR. MARTIN: I object that the questions were
7 presupposed that he knows what was going on between Yarnell and
8 Remington, and if it takes hearsay to get that answer out, I
9 object that. I asked him if he had any conversation with
10 Yarnell, he said, no, and so I object to questions that he
11 doesn't have the foundation or the knowledge to answer directly
12 without hearsay input.

13 THE COURT: I give a lot of leeway on
14 cross-examination. You are going a little bit too far, so
15 watch your question.

16 MS. LIVESAY: I understand.

17 BY MS. LIVESAY:

18 Q. Do you remember the night of the murder?

19 A. Yes.

20 Q. And were you with Remington Hargrove?

21 A. Yes.

22 Q. And were you with the family all day?

23 A. Yes.

24 Q. And did you see what was going on since you were right
25 there with her all day?

1 A. Yes.

2 Q. And tell this Court what was going on leading up to the
3 night, or the time when Michael was shot?

4 A. Well, we were all out to dinner, and I know Remington
5 was very upset. I know she was scared. I know that she was
6 telling her aunts and her cousins just how bad things were and
7 how violent he was.

8 MR. MARTIN: Objection. Again, Judge, I know this is
9 not the jury and it's you, but for the record, I do object to
10 him talking about what Remi knew regarding his violence or her
11 fear that night, other than as he goes back into detail what he
12 saw, but I object to his testimony that Remi was this and Remi
13 was that. Remi is here and can testify.

14 THE COURT: Alright, I'm going to allow. Put
15 guardrails on it, but I'm going to allow it.

16 MS. LIVESAY: I understand.

17 BY MS. LIVESAY:

18 Q. So Mr. Card, just so we can get back on track, that
19 night at dinner Remington Hargrove appeared afraid to you, and
20 she was voicing that to the other family members?

21 A. Yes.

22 Q. And who was she afraid of?

23 A. Her ex-boyfriend.

24 Q. And who was that?

25 A. Yarnell.

1 Q. That's the defendant?

2 A. Yes.

3 Q. Now, who always asked -- and what transpired for her to
4 be afraid at this dinner with her family?

5 A. Well, she talked of violence and abuse and very
6 controlling behavior.

7 MR. MARTIN: Objection. Again, I don't think this
8 witness has the foundational basis or knowledge to testify to
9 what he's testifying to.

10 THE COURT: Well, I don't know if he does or not, but
11 you may explore that on redirect.

12 MR. MARTIN: Okay.

13 MS. LIVESAY: I understand.

14 BY MS. LIVESAY:

15 Q. And so she was afraid that night and you've testified
16 she was afraid of the defendant?

17 A. Correct.

18 Q. Who all was at dinner? Bring me to that place. Who was
19 all at dinner?

20 A. It was me, Jennifer, Emily, Remi, and Michael, and his
21 friend showed up because Emily had, you know, let him know
22 where we were and he was going to stop by.

23 Q. And how long was Michael Pennington, the victim, at
24 dinner with everybody?

25 A. Thirty minutes or less.

1 Q. And how was he at dinner?

2 A. Fine. Everything seemed good.

3 Q. And did he get in an argument with anybody in the
4 family?

5 A. No.

6 Q. Did he get in an argument with anybody at Handley's?

7 A. No.

8 Q. And he left early from Handley's?

9 A. Yes.

10 Q. Do you know why?

11 A. He had a friend there and the friend was -- had some
12 drinks --

13 Q. Okay.

14 A. -- and Emily asked him nicely, you know, can you take
15 your friend home because, you know, it's family, we want to
16 hang out.

17 Q. Right. And did he take him home?

18 A. Yeah.

19 Q. And was there any kind of altercation about that?

20 A. Oh, no, no.

21 Q. And did you have any hesitation of Michael taking the
22 friend home?

23 A. No.

24 Q. Okay. So he wasn't so drunk he couldn't drive?

25 A. No.

1 Q. Was he drunk at all?

2 A. No.

3 Q. And so he takes the friend home, there's no problems at
4 dinner, everybody's getting along, you feel comfortable with
5 him driving the friend home. When was the next time you see
6 Michael Pennington, the victim?

7 A. When he pulled up, when me and Jennifer, you know, were
8 there and he was coming over to Andrew's for us, you know, as a
9 family to get together and hang out.

10 Q. I understand. And so everybody was then at Andrew's at
11 Maddington Place?

12 A. Yes, at some point, I mean, at some point, yes.

13 Q. Was Michael welcome over there with the family?

14 A. Oh, yes.

15 Q. And was he invited over there?

16 A. Yes.

17 Q. And was Anijah Yarnell invited to be over there at the
18 condo with the family?

19 A. No.

20 Q. Was he welcome over there with the family?

21 A. No.

22 Q. And that night was anybody in the group of the family
23 that was at the condo, was anybody there at all afraid or
24 apprehensive of the victim, Michael Pennington?

25 A. No, no.

1 Q. Okay. And when he was at the condo visiting with you
2 and the family, before any interaction with Yarnell, describe
3 that, was there any problems at all?

4 A. No, none.

5 Q. Alright. Now, when is the first time you see the
6 defendant that night?

7 A. When he had pulled up, and as I said before, when the
8 girls were pulling in he was -- they were parked next to each
9 other at the entrance coming into the parking lot. They said
10 whatever they said and then the girls, you know, came in to
11 pull up in the area to park, and then Yarnell turned around and
12 came in.

13 Q. And so was Yarnell already at the apartment before
14 Remington Hargrove and that crowd got there?

15 A. Yes, I believe he was.

16 Q. Okay. And as they were pulling in they pass Yarnell?

17 A. They didn't pass -- they ended up, but they had stopped
18 and they had somewhat of a conversation, for, you know, a
19 minute, maybe.

20 Q. Okay. And after -- and who was in the car that had that
21 conversation with the defendant?

22 A. That was Emily and Remi.

23 Q. And after that conversation what do Emily and Remi do?

24 A. When they came in and parked, Jennifer, I believe, told
25 them to, you know --

1 MR. MARTIN: Object to the hearsay.

2 THE COURT: That, I'll sustain.

3 BY MS. LIVESAY:

4 Q. It's okay, just tell me what they did.

5 A. Emily brought Remi upstairs.

6 Q. To the condo?

7 A. To get her out of the area and up into Andrew's
8 apartment.

9 Q. And when they passed by and they parked, Remi doesn't
10 stay down there to wait for Yarnell?

11 A. No.

12 Q. She goes up on the condo?

13 A. Yes.

14 Q. And after they pass and she parks, he swings back around
15 and comes back into the parking lot; is that correct?

16 A. Yes, yes.

17 Q. Now, do you remember whether or not Emily and Remi went
18 to the gas station to meet Michael?

19 A. That, I don't remember that.

20 Q. Okay. that's fine. And so you remember Remington goes
21 up to the condo, the defendant swings back around into the
22 parking lot?

23 A. Yes.

24 Q. Okay. And who was standing out in the parking lot
25 there?

1 A. Me and Michael, Jennifer was there, but she had got back
2 into the van because she had gotten phone calls, she was on the
3 phone.

4 Q. And at the time was Michael acting aggressive?

5 A. No.

6 Q. And who approached who? Did the defendant approach you
7 all or did you all approach him?

8 A. Michael walked over to the driver's side and told him,
9 you know, hey, why don't you just go home, you know, you're not
10 welcome here at this time.

11 Q. And you say he walked over to the driver's side. Was
12 Yarnell parked or was he kind of in the roadway there?

13 A. He's in the roadway between the parking spaces.

14 Q. And when he pulled up in the roadway was he pulling up
15 close to where you all were standing?

16 A. Yeah. I'd say where we were standing, maybe 10 feet,
17 roughly, from where we were standing.

18 Q. Okay. And when Michael walked up to him was Michael
19 being aggressive at that time?

20 A. No.

21 Q. And did he ask Yarnell to leave?

22 A. Yes.

23 Q. Did Yarnell leave after he was asked by the victim to
24 leave?

25 A. No.

1 Q. At any time in the course of the discussion between the
2 victim and Yarnell did the victim ever pull away?

3 A. No.

4 Q. Did the victim ever pull his belt off to use it as a
5 weapon?

6 A. No.

7 Q. So tell me what happens after Mr. Pennington asked the
8 defendant to leave and he did not leave?

9 A. Well, I don't know what Yarnell said because I couldn't
10 hear that, but Michael, you know, stated in stronger terms, you
11 know: Why don't you just go home, no one wants you here, go
12 home.

13 Q. Then what happened?

14 A. Then Michael said, you know what, why don't you just get
15 out of the car, come on, because in my opinion, there was
16 something being said that would make Michael get pissed off,
17 basically, and he said that, Yarnell didn't do nothing. I
18 mean, I didn't see him -- I couldn't hear him, so I don't know
19 what he said, but Michael, you know, didn't like what he heard,
20 I'm sure, and then Michael said, you know, come on, let's go,
21 come on tough guy, you know, that type of thing.

22 Q. Right.

23 A. And he didn't, so he got closer to the car, and that's
24 when he took a swing into the car, and he backed away and he
25 said, come on, let's go, let's go, come on, get out of the car,

1 and then he went over to try to unlock -- or not unlock, open
2 the door, but his hand slipped off it, and that's as he was
3 going back, that's when Michael said, oh my God, you got a gun?
4 What are you -- you know? Just, I think, shocked, and that's
5 when he fired at him.

6 Q. Was Michael's arm in the car when the fatal shot was
7 fired?

8 A. I don't know, I did not see that.

9 Q. Was he touching the car at all when he was shot?

10 A. No.

11 Q. After he was shot what did Yarnell do?

12 A. Nothing that I seen, I just remember Michael, when he
13 got shot, you know, he grabbed his chest and he said: That
14 mother f'er just shot me, and he turned toward me and he
15 started running, kind of stumbled, so I started running at him
16 because, you know, you're kind of in shock, and he fell into my
17 arms and I kind of bear hugged him, and Emily's father's car
18 was the closest vehicle, I believe, that was there, then it was
19 an open spot and then another vehicle, so I took him and I kind
20 of pulled him over and laid him behind the car because I
21 thought, well, what if more shots are gonna start ringing out,
22 and I laid him on the ground and tried to put pressure and talk
23 to him.

24 Q. Did Michael Pennington ever -- first of all, did anybody
25 ever invite Anijah Yarnell to the condo?

1 A. No.

2 MR. MARTIN: Objection. He doesn't know if
3 anybody -- he doesn't have the --

4 THE COURT: Do you want to rephrase the question?

5 BY MS. LIVESAY:

6 Q. Did you invite him?

7 A. I did not invite him, and nobody invited him, in fact,
8 Remi was saying she did not want him there and for us to help
9 to make sure he doesn't come over, because she was afraid of
10 him.

11 Q. And did she have a car there?

12 A. I don't know if they were -- which car they were in.

13 Q. Okay. So you didn't invite him, and to your knowledge,
14 nobody else invited him?

15 A. Correct.

16 Q. And it was clear consent amongst the family that nobody
17 wanted him over there?

18 MR. MARTIN: Objection, again.

19 A. Correct.

20 MR. MARTIN: I hate to belabor, but he can't speak.

21 THE COURT: I understand the objection. You rephrase
22 the question.

23 MS. LIVESAY: Sure.

24 BY MS. LIVESAY:

25 Q. To your knowledge, did anybody want Yarnell over there?

1 A. I didn't, and nobody else did.

2 Q. And when Yarnell got over there did he ever get out of
3 the car and say, hey, guys, what's going on?

4 A. No.

5 Q. Did he ever even park the car?

6 A. No.

7 Q. Okay. So he, certainly, never got out of the car to
8 speak to anybody in the family?

9 A. Correct.

10 Q. So maybe he knew he wasn't welcome?

11 A. Oh, I'm sure he knew that, that's what I think.

12 Q. And he rolls up and Michael goes to the car. Now, when
13 Michael goes to the car is he running towards the defendant's
14 car?

15 A. No.

16 Q. Is he doing like this, is he doing anything aggressive?

17 A. No.

18 Q. What is the first thing the victim said to the
19 defendant, was it to ask him to leave?

20 A. Yes.

21 Q. And during this little verbal altercation, at any point
22 did the victim threaten the defendant with any kind of weapon?

23 A. No.

24 Q. Did he ever pull any kind of weapon?

25 A. No.

1 Q. Did he ever threaten to kill the defendant?

2 A. No.

3 Q. Did he ever take his belt off to use it as a weapon?

4 A. No.

5 Q. And what was he doing when he was shot that night? What
6 was Michael Pennington doing?

7 A. Trying to get him to leave.

8 Q. Were there any kind of issues at all that night
9 regarding Michael Pennington with anybody in the family?

10 A. No.

11 Q. Was he welcome to that condo to spend time with the
12 family?

13 A. Absolutely.

14 Q. You said earlier that he walked up to the defendant's
15 car; is that correct?

16 A. Yes.

17 Q. Could the defendant -- was anybody blocking his car that
18 night?

19 A. No.

20 Q. Was his car running when the incident took place?

21 A. Yes.

22 Q. Was it locked when the incident took place?

23 A. Locked? Yes.

24 Q. And was the window rolled up to some extent?

25 A. Yes.

1 MS. LIVESAY: No further questions, Judge.

2 THE COURT: Any Redirect to what she went into?

3 MR. MARTIN: Yes, a couple questions in response to
4 that.

5 **REDIRECT EXAMINATION**

6 BY MR. MARTIN:

7 Q. Mr. Card, first of all, you gave a statement to
8 Detective Wydra that night in connection with what you saw, do
9 you remember that? You don't remember?

10 A. What's the question?

11 Q. I'm going to hand you a copy of your transcript of your
12 statement.

13 MS. LIVESAY: Your Honor, the objection from the
14 State would be this is outside of our cross-examination.

15 MR. MARTIN: No, it's not.

16 THE COURT: He just asked him if he gave a statement.
17 I don't know if it's outside or not. He just asked if he gave
18 a statement and he's showing him a statement.

19 MS. LIVESAY: I understand, but I never mentioned a
20 statement in my cross-examination.

21 THE COURT: I don't know what he's going to use the
22 statement for as to where it's outside of what you went into or
23 not.

24 MS. LIVESAY: I understand.

25 THE COURT: Okay. Ask the question.

1 BY MR. MARTIN:

2 Q. Let me just ask you, and I'll get directly to this. You
3 made a statement with the question with Ms. Livesay that
4 Michael approached the car and asked him to leave?

5 A. Uh-huh.

6 Q. And I'm asking you if you ever told that to law
7 enforcement before, because I don't see it in your statement.
8 So first of all, did you ever tell law enforcement before that
9 when Mr. Pennington approached the car that what he says was,
10 you need to leave?

11 A. I don't know, I would have to read it.

12 Q. Well, then let me direct you to page six, I believe it
13 is, in your statement to Detective Wydra, right here
14 (indicating.) Would you agree that when Detective Wydra, you
15 were talking to him that your statement was: And you know,
16 Mike just said to him, he goes, you know, what's your problem?
17 What's the deal? What's going on, and from that point I didn't
18 see it. Do you see that?

19 A. Yeah, I'm reading it now. I'm reading it now. Okay.
20 Yeah, I guess I don't understand your point.

21 Q. Well, the question is -- the point is this, when you
22 talked to the detectives that night and gave a statement, you
23 didn't mention Mr. Pennington nicely asking Mr. Yarnell to
24 leave, did you?

25 A. Do you want me to read what this says?

1 Q. Yeah. Well, I'll read it for you and then you tell me
2 if it's right or wrong: And you know, Mike just said to him,
3 he goes, you know, what's your problem? Is that correct?

4 A. I can look over here. Just give me a second.

5 Q. Okay. Keep looking.

6 A. Yeah, what is written here, I don't see that.

7 Q. But so it is clear that when Mr. Pennington approached
8 him that he did so and he initiated a conversation; is that
9 right?

10 A. Who initiated?

11 Q. Mr. Pennington did.

12 A. Yeah.

13 Q. And in your statement of the 6th here, not the 6th, but
14 the date of Detective Wydra, what you said, he says: Hey, you
15 know, what's your problem? Is that what you said?

16 A. That's what this says, right.

17 Q. Yeah, but is that what you said? That's your statement.
18 I mean --

19 A. Right.

20 Q. I mean, it's reasonable to say that --

21 A. Yes.

22 Q. -- is that what you said?

23 A. Right.

24 Q. Yeah: What's your problem? Right? Not, we need you to
25 leave, sir, you're not welcome here.

1 A. Put it this way, I did not give a long answer, if you
2 want to say.

3 Q. I got you. Well, let me ask you this, would you agree
4 with me that Mike Pennington was somewhat fired up that night,
5 wasn't he?

6 A. No, not in the beginning.

7 Q. Not in the beginning, okay.

8 A. No. Not when he asked had him to leave.

9 Q. Tell me a little about your understanding.

10 A. Uh-huh.

11 Q. So is it your understanding that Emily went and asked
12 Mike to come over --

13 A. Yes.

14 Q. -- to deal with Yarnell if she needed him to?

15 A. No, that's not how I got it.

16 Q. How did you get it?

17 A. I think she came over -- or he came over to make sure
18 that Emily was okay.

19 Q. How about Remi?

20 A. And Remi, too, yes.

21 Q. So his purpose for coming over was to make sure that
22 they were okay?

23 A. That the situation was okay.

24 Q. And okay from who?

25 A. Okay from who?

1 Q. Well, if he came over to see if they were okay why would
2 he be needed to come over to see if they were okay?

3 A. Probably because Remi was very scared, she was --

4 Q. Of what?

5 A. Of Yarnell.

6 Q. So Emily -- again, that's where I'm getting. Emily, and
7 Emily will testify, but Emily was concerned, Emily was scared,
8 Emily got her boyfriend, Mike Pennington, asked him to come
9 over to deal with Yarnell --

10 A. No.

11 Q. -- if he needed to --

12 A. No.

13 Q. -- or to make sure Remi and she were safe?

14 A. Yes.

15 Q. Well, were they scared of you? You weren't no danger to
16 Remi, were you?

17 A. No.

18 Q. Alright. And so, I mean, the idea was, if anything,
19 Mike came over to deal with Yarnell if Yarnell became a
20 problem?

21 A. No.

22 Q. Would that be a fair statement?

23 A. No. He was there because his girlfriend asked him to
24 come over --

25 Q. Asked him to?

1 A. Yes. And there was plans for him to come over anyways.

2 Q. And this, everybody is standing again, clearly, you're
3 not in a condo or a residence, are you? This doesn't happen in
4 a private residence or in the condominium, does it?

5 A. No, in the parking lot.

6 Q. It happens in the parking lot?

7 A. Right.

8 Q. As a matter of fact, that's not your parking lot, is it?
9 Is it your parking lot?

10 A. No.

11 Q. Obvious question.

12 A. Right.

13 Q. Not your parking lot, is it? It wasn't Mike
14 Pennington's parking lot either, was it?

15 A. Correct.

16 Q. It was a public parking lot.

17 A. Uh-huh, yes.

18 Q. Lots of cars parked there?

19 MR. HELMS: Objection.

20 MS. LIVESAY: This witness would not know if it was a
21 private or a public parking lot. He was here from New York
22 visiting with his family. That would be outside of the scope
23 of his knowledge.

24 MR. MARTIN: Alright. I'll move on and ask another
25 question.

1 THE COURT: Okay. He'll move on.

2 Q. Now, and so that night when Mike came you said he got
3 the beer out of the door. As a matter of fact, he opened and
4 started drinking a beer, didn't he?

5 A. I don't remember him drinking --

6 Q. You don't remember that?

7 A. I don't remember him drinking.

8 Q. Do you remember him opening a beer?

9 A. I don't remember that.

10 Q. Do you remember an open beer being set down on the
11 parking lot before he walked over to Anijah's car by him?

12 A. I don't remember that.

13 Q. Was he smoking marijuana in the parking lot?

14 A. No.

15 Q. Were you smoking marijuana in the parking lot?

16 A. No.

17 Q. Did you see Mike Pennington use cocaine that night?

18 A. No.

19 Q. Did you know he had cocaine in his wallet that night?

20 A. No.

21 Q. And as a matter of fact, when this shot occurred or when
22 they hit him by Mr. Pennington into the car Mr. Yarnell was in,
23 Mr. Yarnell was, in fact, slowly trying to back out of the
24 parking lot, wasn't he?

25 A. No.

1 Q. He wasn't?

2 A. No.

3 Q. You don't recall that at all? Are you sure?

4 A. Oh, I remember, yeah, I'm sure.

5 Q. You didn't see him trying to back out at all?

6 A. No.

7 Q. But he had pulled in to the parking lot, correct?

8 A. Yes.

9 Q. And of course, you've got to turn around to get out
10 because if you keep driving straight you run into what, the
11 building?

12 A. Yeah, if he was going straight.

13 Q. So he couldn't drive out, he had to turn around or back
14 out?

15 A. Correct.

16 Q. You never heard Anijah Yarnell threaten Mr. Pennington,
17 did you?

18 A. I didn't hear anything he said.

19 Q. And you never got out of the car to approach him,
20 clearly?

21 A. No.

22 Q. The reason they were having any contact at all is
23 because Mr. Pennington went to him?

24 A. Yeah. Michael walked over to ask him to leave.

25 MR. MARTIN: That's all I have.

1 THE COURT: Any new matters?

2 MS. LIVESAY: Just a few questions, Your Honor.

3 **RECROSS-EXAMINATION**

4 BY MS. LIVESAY:

5 Q. Do you remember Mr. Martin talking to you about the
6 statements to the police?

7 A. The name, I spoke to somebody, yes.

8 Q. Okay, I understand. Did you remember the fact that you
9 didn't tell the police that Anijah Yarnell and Remington passed
10 each other, you never told them that, as well?

11 A. Again, I was only answering questions --

12 Q. I understand.

13 A. -- and you know, it was not a pleasant night, so I
14 wasn't asked.

15 Q. Did you ever tell the police that Michael had been out
16 to eat with you and everything was fine. He was never
17 aggressive, he was never drunk?

18 A. No, because, right, it was never asked.

19 Q. And did you ever tell the police that Michael was
20 unarmed out there that night?

21 A. No, I was not asked.

22 Q. So at that interview you were only answering the
23 questions that the police were asking you?

24 A. Correct.

25 Q. And you would agree there was additional information?

1 A. Right. And this is a new process to me. I don't know
2 how this stuff works. You just answer what's asked of you --

3 Q. I understand.

4 A. -- and that's what I did.

5 Q. I understand. Now, Mr. Martin asked you about who
6 approached who that night in the parking lot. Do you remember
7 that?

8 A. No, I don't remember him asking me that.

9 Q. Do you remember him asking that Mr. Pennington
10 approached Yarnell?

11 A. I really don't remember -- I remember talking to the
12 person that was asking me questions, but it was, you know.

13 Q. I understand. So let me ask you this about that night.
14 The question is, after Remington and the defendant pass, does
15 the defendant wheel back around and come back into that same
16 parking lot where you and that victim are standing?

17 A. Yes.

18 Q. Does he ever attempt to leave the parking lot, ever,
19 until after the shooting?

20 A. No.

21 Q. So during this argument Yarnell's car never moves?

22 A. I did not see it move.

23 Q. And the shot is fired, then he takes off?

24 A. Then he left.

25 Q. So he never attempted to go forward or back at all?

1 A. Correct.

2 Q. Until after the fatal shot is fired?

3 A. Correct.

4 Q. Okay. And was anybody blocking Yarnell's vehicle?

5 A. No.

6 Q. Now, Mr. Martin asked you some questions about Mr
7 Pennington out there drinking in the parking lot. Was the
8 victim ever at any point out of the way or drunk that evening?

9 A. Absolutely not.

10 Q. Okay. And in fact, he drove from Handley's all the way
11 to Surfside Beach that night?

12 A. To drop off his friend, wherever that was, and then he
13 came over, calm, cool, everything just seemed like a normal
14 evening.

15 Q. Okay. And was he welcome to be there?

16 A. Yes.

17 Q. When Yarnell and Remington pass, is Yarnell able to get
18 out of the parking lot?

19 A. Yes.

20 Q. Is he able to get back on 17?

21 A. Yes.

22 Q. Is that what he does?

23 A. No.

24 Q. He wheeled right back into that parking lot. Now, is
25 this a condo complex, condominium?

1 A. Yes.

2 Q. So there's more than one parking lot?

3 A. Yes.

4 Q. But he wheels right back into the one you all were
5 standing at?

6 A. Right, yes.

7 MS. LIVESAY: No further questions for this witness,
8 Your Honor.

9 THE COURT: Thank you, sir. You may step down.
10 Watch your step as you're stepping down.

11 MR. MARTIN: Dr. Robert Bennett, Judge, I've got Dr.
12 Robert Bennett who is a toxicologist and we're at 3:30. I'm
13 going to do some of this out of order in order to try to keep
14 witnesses from coming back tomorrow.

15 THE COURT: Okay. Sir, come right up here, if you
16 would, and let the Clerk of Court swear you in.

17 **Dr. Robert Bennett being first duly sworn, testified**
18 **as follows:**

19 THE CLERK: State your full name for the record and
20 spell it, please.

21 THE WITNESS: My name is Robert Bennett.

22 MS. LIVESAY: Your Honor, if I may, if this is going
23 to be the toxicologist, the State is going to object. Justice
24 James who sits on the Supreme Court in State v. Washington just
25 a couple years ago ruled that a victim's toxicology is

1 inadmissible and what the ruling was is that toxicology
2 evidence is inadmissible where it's mere speculation that the
3 victim's intoxication would have exhibited in him a decreased
4 sensitivity to pain, lower inhibitions, a tendency towards over
5 reaction to a perceived a front and aggressive or violent
6 behavior. That case is actually -- it was originally in front
7 of Judge Harrington, and Judge Harrington allowed the attorney
8 in that case to proffer the testimony, the testimony, of
9 course, the guy was convicted and it made its way up to the
10 Supreme Court on that issue. The Supreme Court looked at the
11 proffered testimony and the facts in the case and at that time
12 came down that the toxicologist, that testimony was
13 inadmissible, and also, I think it's going to be inadmissible
14 under 404, that is character evidence, Your Honor. The only
15 time, as we know, that character evidence is allowed is going
16 to prove motive, intent, those type of behaviors. It is not
17 meant to just merely tarnish an individual's character, and
18 that's what its gone towards here. The State absolutely
19 allowed and did not object, even though it's completely
20 inadmissible and inappropriate, the question about the victim
21 having cocaine in his pocket, that is absolutely irrelevant, it
22 is absolutely what 404(b) has intended to keep out, but the
23 Supreme Court just recently ruled on this in 2020, that's cite,
24 Your Honor, is going to be 431 SC 394.

25 THE COURT: Can I have a copy?

1 MS. LIVESAY: I can give you my copy, Judge.

2 MR. MARTIN: Can I look at it just a second? Judge,
3 let me hand this up to you, I'm familiar with this case, and I
4 disagree with Ms. Livesay about what the holding of the Court
5 was. That's a case in which Judge Harrington down in
6 Charleston did rule that the State couldn't enter a toxicology
7 report about a blood alcohol result. The Court of Appeals and
8 then the Supreme Court both said that -- well, Judge Huff for
9 the Supreme Court -- I mean for the Court of Appeals, said that
10 they did not consider that an abuse of discretion. They did
11 not hold nor rule that it was not relevant or inadmissible, per
12 say, but it did say that under the facts of that particular
13 case and in view of the light of all of the evidence involved
14 that they did not consider it an abuse of discretion to rule
15 that Judge Harrington did. That's totally different from
16 saying it's inadmissible or, frankly, that it's not relevant,
17 and that's exactly what Judge James said, we're not going to
18 review that at this time. Judge, to say in this case, and you
19 will hear it when the doctor testifies, that Mr. Pennington
20 whose toxicology report is that he had a blood alcohol content,
21 not a high one, I think five to 5.56, something like that, that
22 he had marijuana, Xanax, cocaine, metabolites, and frankly,
23 cocaine, as Dr. Bennett will explain to you, but to say that an
24 individual who has that toxicology report, to say that that is
25 not relevant in a case where the question is who was at fault

1 in bringing on the difficulty, who was belligerent, who was --
2 who started it, for, lack of a better word, who was acting
3 irrationally, clearly this is relevant. I mean, it defies
4 logic to argue, and frankly, I think Judge Harrington's issue
5 was an error, but that's not for me to deal with, but to say
6 just from a mile-high perspective that a toxicology report of
7 that sort is not relevant in a Stand Your Ground Hearing, is
8 frankly just ridiculous, because we all know on a base level
9 you don't need a toxicologist to know -- you as a judge and I
10 as a parent, I, as a lawyer, when people come in and there has
11 been trouble in a fight in a dispute, the first thing I want to
12 know, who was drinking, because it does have something to do
13 with it. In this case one of the decisions you're going to
14 have to make is who was the aggressor, who was at fault?
15 Clearly, that is relevant. This has nothing to do with the
16 character of Mr. Pennington. The fact that he drank alcohol
17 and/or used cocaine or marijuana, frankly, I don't know if in
18 today's world that's an assault on his character or not, but I
19 have no interest in assaulting his character and I don't mind
20 you telling a jury that if it goes that far, and of course, you
21 know that. But in this particular case, clearly, it's
22 relevant, and I'm frankly surprised that the State has objected
23 to it because they routinely enter into evidence these
24 toxicology reports, and I'll bet you if they had evidence that
25 Mr. Yarnell had this same drug combination in him they would

1 think it was relevant to introduce against him, but be that as
2 it may, I don't want to belabor the fact, but that to me it's
3 clearly admissible, it's it in my opinion would be a reversible
4 error not to let it in, but because they raised an issue about
5 it I went through the trouble to get Dr. Bennett here who can
6 testify specifically as to the relevance of it.

7 THE COURT: Any reply?

8 MS. LIVESAY: Yes, sir, Your Honor, just very
9 briefly. I appreciate everything that defense counsel believes
10 and says to be helpful to his case, but the Supreme Court has
11 spoken, they have spoken recently. There was nothing after
12 Washington, and Washington is clear that it's inadmissible.
13 It's inadmissible because it's speculation and it wasn't only
14 irrelevant, but was also ruled under 403. There was more
15 prejudicial than probative. The alcohol level in the victim's
16 blood in that particular case was .235. The victim's alcohol
17 level in our case is .53, significantly lower than in
18 Washington, and in Washington at .235 they have said that that
19 is inadmissible. It is more prejudicial than it is probative.
20 Let me read. It says here, it was mere speculation that
21 victim's intoxication would have exhibited him in a decreased
22 sensitivity to pain, lower inhibitions, a tendency towards over
23 reaction to have perceived a front and aggressive or violent
24 behavior. That's right out of Washington, and that was decided
25 by the Supreme Court in 2020, and in fact, originally, they

1 were trying to use a pathologist and the pathologist actually
2 said, look, you cannot predict the victim's behavior based on
3 the intoxication. Christy Harrington at that time ruled that
4 it was inadmissible. She proffered the testimony that
5 testimony was taken by a Dr. Presnell from MUSC, of course the
6 defendant was convicted and appealed and the Supreme Court
7 spoke. Now, I don't know why defense counsel would be
8 surprised that the State is trying to abide by the rules the
9 Supreme Court gives us. These are the rules that the Supreme
10 Court has given us. Justice James has said this testimony is
11 inadmissible. Now, if defense counsel has something more
12 relevant than 2020 from the Supreme Court, I'll look at it.

13 MR. MARTIN: Judge, let me just say, so I'm clear,
14 that we're clear, I don't have nor do I need anything more
15 relevant than that case, because the case does not hold that
16 this evidence is inadmissible. It says in the particulars that
17 case, and they cited there that in that case, and this is out
18 of the case itself, that evidence concerning victim's
19 intoxication, whether the victim provoked the altercation or
20 instigated the fight of prosecution for manslaughter if there
21 was no evidence that the victim was the aggressor in the
22 physical altercation, here there is evidence of that, and there
23 will be more evidence of that. And I got to say again, Judge,
24 I know you know this, and I'm not debating it, but that ruling
25 does not mean that the Supreme Court says that toxicology

1 results are inadmissible or not relevant in each and every
2 case. It doesn't say that. They just said what she did didn't
3 rise to the level of an abuse of discretion in that particular
4 case. That's what it says, it don't say it's inadmissible.
5 There's a big difference in those things. This case is as
6 totally different case, and again, clearly, clearly, it is
7 relevant and it is admissible and the testimony of Dr. Bennett
8 will make that all the more evident.

9 THE COURT: Anything further from the State?

10 MS. LIVESAY: Yes, sir, Your Honor. Defense counsel
11 is trying to tell this Court that the fact that it was, I
12 guess, the fact that the toxicology was not inadmissible, but
13 that is exactly what the Supreme Court said. Kristi Harrington
14 did not allow it. It then went to the Supreme Court. The
15 Supreme Court said, that is correct, that should not have been
16 allowed in the trial of the case, and the case was upheld. So
17 to say that the ruling didn't say that that evidence is
18 inadmissible is just not at all true from the case. In that
19 case the victim had a blood alcohol level, I believe, of .235,
20 and our victim had a blood alcohol level of the equivalent of
21 .053, significantly lower.

22 THE COURT: Alright. I'm going to have to say any
23 new arguments you wanted to present, you already made that
24 clear. Anything else?

25 MS. LIVESAY: No, sir.

1 THE COURT: Alright. I'm going to allow the
2 testimony at this time. There has been evidence already
3 presented to me that is conflicted. If I view the evidence in
4 a light most favorable to the nonmoving party, which I have to
5 do when I make these types of rulings, there is evidence
6 already presented to me that is conflicted as to who was the
7 aggressor in this case. I think, that, alone would allow this
8 testimony to be able to be admitted. Plus, if your going to
9 use prejudice/probative value analysis, it's way too early to
10 get me to, when I don't even know what the witness is going to
11 testify to, to be with able to do that type of analysis. I've
12 just done a brief review, nothing to digest, State versus
13 Washington. I'm straining what I read to read it as strongly
14 as the State wishes me to read it. I will read it this evening
15 or in the morning. If it is that the State is correct, then
16 the testimony then would be not considered by the Court, but I
17 think at the state that we are now with the testimony that has
18 already been presented from the other witnesses, I'm going to
19 allow the testimony at this stage.

20 MR. MARTIN: And Judge, let me hand up to you, as
21 well, for your review, the Court of Appeals version of State
22 versus Washington, which I think fits hand and glove with the
23 Supreme Court version in my argument to you.

24 THE COURT: So I need to read that one, too?

25 MR. MARTIN: Yes, sir.

1 THE COURT: Okay. Thank you, sir.

2 MR. MARTIN: Well, maybe you don't, maybe you don't,
3 but I wanted you to have the full picture.

4 THE COURT: Okay. I'll read it over.

5 MR. MARTIN: May I proceed with Dr. Bennett?

6 THE COURT: Anything else from the State before we
7 proceed with the witness?

8 MS. LIVESAY: The Court's already ruled.

9 THE COURT: Okay. I meant anything else, any other
10 issues you want to raise before we begin with the witness?

11 MS. LIVESAY: No, sir. Just we've objected, you
12 ruled.

13 THE COURT: Alright.

14 (Defendant's Exhibit No. 35 was marked for
15 identification.)

16 MR. MARTIN: Dr. Bennett, let me show you what is
17 marked as Defendant's Exhibit No. 35. And Judge, let me say
18 that this is an identical copy of the autopsy report that was
19 entered into evidence without objection at the video deposition
20 of Dr. Proctor, but they did object to the toxicology portion
21 of it of the report, but this is the same toxicology report. I
22 don't have the other one, but --

23 THE COURT: Tell me that one more time.

24 MR. MARTIN: Well, I'm trying to say that there is an
25 exhibit that Dr. Proctor entered into evidence at the video

1 deposition, of this document, the autopsy and the toxicology
2 report. They objected to the toxicology portion of it, and of
3 course, that's what we're dealing with here now.

4 **VOIR DIRE**

5 BY MR. MARTIN:

6 Q. So with that, let me hand that up to, Dr. Bennett, and
7 ask you if you had opportunity to review the toxicology portion
8 of that autopsy report?

9 A. Yes. I've reviewed page one, two and three of the
10 toxicology report.

11 Q. And I think I need, first of all, to qualify you. You
12 are an expert in what field, Doctor?

13 A. The field of forensic toxicology.

14 Q. And how long and how long have you been an expert in
15 that field?

16 A. Over 30 years.

17 Q. Have you testified and been admitted in the courts of
18 South Carolina in the field of toxicology?

19 A. Yes, many times, including this court.

20 Q. Including this court?

21 A. Correct.

22 Q. And the field of toxicology is what exactly?

23 A. It's the study of the adverse reactions mainly the toxic
24 reactions of drugs in the human body and using that information
25 for legal cases.

1 MR. MARTIN: Judge, I think that's all the questions,
2 but we would submit him as an expert in the field of toxicology
3 for the purposes of the Stand Your Ground Hearing.

4 MS. LIVESAY: The State has a few questions just as
5 to his qualification.

6 THE COURT: Alright, yes ma'am?

7 VOIR DIRE

8 BY MS. LIVESAY:

9 Q. I'm sorry, what was your last name?

10 A. Bennett, B-e-n-n-e-t-t.

11 Q. Mr. Bennett, tell me a little bit about your education.

12 A. Sure. I attended the College of Charleston and
13 transferred to the Medical University of South Carolina, I
14 obtained a Pharmacy Degree in 1980 and after practicing
15 Pharmacy I returned to the Medical University of South Carolina
16 to obtain a Doctorate Degree in essentially the same field,
17 Pharmaceutical Sciences, Drug Sciences, which included
18 toxicology.

19 Q. And then where did you work? You worked in pharmacy
20 first, correct?

21 A. Yes.

22 Q. You worked where in pharmacy?

23 A. Between 1980 and when I went back to school in 1985 I
24 worked in research and development at a major pharmaceutical
25 company.

1 Q. And what?

2 A. A major pharmaceutical company.

3 Q. What company was that?

4 A. That's now known as Pfizer, maybe you've heard of them.

5 Q. Okay. And how long did you stay at Pfizer?

6 A. Five years.

7 Q. And then where did you go?

8 A. Then I came back to Charleston to go back to school and
9 get my Doctorate at the Medical University of South Carolina.
10 Upon graduating I have been doing this type of work ever since.

11 Q. And what is "this type of work?"

12 A. Forensic toxicology type work.

13 Q. What do you mean?

14 A. I do all the forensic services as well.

15 Q. Testifying?

16 A. Pardon?

17 Q. Testifying?

18 A. Yes.

19 Q. And so you don't work for any particular law enforcement
20 agency?

21 A. I do not.

22 Q. Have you ever worked for a law enforcement agency?

23 A. I have not.

24 Q. And so since about what year have you just been kind of
25 touring around giving testimony?

1 A. I'm not sure what you mean by "touring around," but I do
2 provide testimony in a variety of places around the country and
3 even overseas since, approximately, when I graduated in 1991.

4 Q. Okay. So for about how long have you just been giving
5 testimony?

6 A. Well, when I first started out it wasn't a lot. As time
7 goes by I've provided more and more testimony.

8 Q. And when did you start out giving testimony?

9 A. Not long after I graduated.

10 Q. So 1990?

11 A. '91, '92.

12 Q. So from 1991 until 2022 had you not worked for any law
13 enforcement agency doing toxicology, you have not worked for
14 any kind of lab doing toxicology; is that correct?

15 A. I've not worked for any law enforcement agency, but I
16 have performed services as a laboratory myself for the past 30
17 years.

18 Q. I'm sorry?

19 A. For the past 30 years doing laboratory work, I have my
20 own laboratory.

21 Q. And so do you run the blood samples, things like that?

22 A. I do some analysis myself, but not all analyses. It can
23 be very expensive to run certain analyses, so I don't run
24 everything. I don't have a multi-million dollar lab, I have a
25 small lab.

1 Q. I understand. And how many times have you testified for
2 the State?

3 A. I've testified hundreds of times, but I don't recall if
4 I've ever testified for the State, it's always been for the
5 defense in these types of cases.

6 Q. So hundreds of times for different defense attorneys
7 around the country?

8 A. Correct.

9 Q. Okay. And since 1991 you've had your own lab, but
10 you've not worked with any kind of company?

11 A. I've not worked for any kind of company as an employee,
12 but I've worked with many labs around the country.

13 Q. Okay. And did you do any kind of report in this case?

14 A. I did not.

15 Q. And so nobody has peer-reviewed your opinion regarding
16 this case?

17 A. Correct.

18 Q. And would you agree, normally, in a situation where
19 somebody gives an expert opinion it's been peer-reviewed?

20 A. I disagree with that. I've been doing testimony for
21 nearly 30 years --

22 Q. And none of it has ever been peer-reviewed?

23 A. None of it has ever been peer-reviewed. They're
24 certainly welcome to that.

25 Q. Okay. Have you ever written an article regarding

1 toxicology?

2 A. Yes. I don't have a lot. It's in my C.V. I don't have
3 a lot of publications, I just simply don't have time to do so.

4 Q. Okay. And were those peer-reviewed?

5 A. Yes.

6 Q. And why were those peer-reviewed?

7 A. Generally, all articles for publication in scientific
8 journals are peer-reviewed, that's standard practice.

9 Q. But your testimony and the testimony that you give as an
10 expert is never peer-reviewed?

11 A. No, it's my own testimony. It's my opinion.

12 Q. And that opinion every time for hundreds of times has
13 always been for the defense?

14 A. No, ma'am. I have done a lot of work for plaintiffs, as
15 well.

16 Q. Plaintiffs work, but not the State of South Carolina?

17 A. Correct.

18 Q. Okay. And what courts have you been qualified in?

19 A. In criminal court, family court, civil court, military
20 courts, I think that is about it.

21 Q. Have you ever been qualified in this courthouse?

22 A. I have.

23 Q. And who qualified you?

24 A. I don't remember the judge's name, but it's in my C.V.

25 Q. And how many times have you been qualified in this

1 courthouse?

2 A. Estimated, three times.

3 Q. Three times. And when was that?

4 A. The most recent was within, right before COVID.

5 Q. And you don't remember who the attorney was that
6 qualified you as an expert?

7 MR. MARTIN: Judge, I object as to relevance to that.
8 She can go into that on cross-examination.

9 THE COURT: She's still dealing with his
10 qualifications. Go ahead.

11 A. I don't recall his name exactly, I deal with literally
12 thousands of people and hundreds of attorneys, I can't remember
13 everybody off the top of my head, but it's in my C.V.

14 Q. I don't have your C.V., I wish I had it. It would have
15 been, probably, more useful. I don't know that I would have
16 had to ask so many questions. So since 1991 you've testified
17 in this courthouse about three times as an expert?

18 A. That's my estimate, yes.

19 Q. And have you ever not been qualified?

20 A. I have not been -- I have never not been qualified in
21 the field of my study.

22 Q. And what information do you review?

23 A. I reviewed the toxicology report of Mr. Michael
24 Pennington.

25 Q. And that's it?

1 A. Yes.

2 MS. LIVESAY: Your Honor, the State objects to the
3 fact that he is an expert.

4 THE COURT: He gets to redirect on the issue.

5 MS. LIVESAY: I understand.

6 THE COURT: Do you have any redirect on the issue?

7 MR. MARTIN: No. I would offer into the Court a copy
8 of his C.V.

9 MS. LIVESAY: Your Honor, now that I'm seeing his
10 C.V., can I ask one more question?

11 THE COURT: Yes, ma'am.

12 Q. Mr. Bennett, I noticed that you've got additional
13 training listed under here?

14 A. Yes.

15 Q. Now, are these the trainings that you do or that you
16 attend?

17 A. Both.

18 Q. And so how many times have you gone and given training
19 on toxicology?

20 A. I'm not quite sure I understand your question. Do you
21 mean on-site versus online?

22 Q. How many times do you go out and give trainings to
23 people, you tell them or teach them something about toxicology?

24 A. Somewhat on a regular basis, mostly to attorneys getting
25 continuing legal education credit.

1 Q. Okay. So not other toxicologists?

2 A. No.

3 Q. And these publications, are these handful here, it looks
4 like one, two, three, four, these are yours, these six?

5 A. Those are publications that I've authored or
6 co-authored.

7 Q. Okay. So either authored or co-authored, and all of
8 those were peer-reviewed?

9 A. May I take a look at them just to answer your question?

10 Q. Sure. Sure.

11 A. The most recent one is compendium, which I don't believe
12 was peer-reviewed, but all of the others were.

13 Q. And when was that?

14 A. 2014.

15 Q. Okay.

16 MS. LIVESAY: I don't have any further questions,
17 Judge.

18 THE COURT: Did you have any objection to the witness
19 being qualified as an expert that you want to put on the
20 record?

21 MS. LIVESAY: The State doesn't have an objection,
22 Your Honor. I don't believe he is an expert in forensic
23 toxicology. I don't even know if there's such a thing as
24 forensic toxicology. There may be a thing as toxicology. So
25 that's going to be my first issue, is that he is an expert in

1 forensic toxicology because I don't believe such an expertise
2 exists, and it looks like he's got listed on his C.V. that he
3 is an expert in all kind of things, serology, clinical lab
4 tests, chemical analysis, and he has not worked in a lab or
5 done anything that requires peer review since 1991. His
6 testimony has never been peer-reviewed, it's not peer-reviewed.
7 An expert normally always has somebody, that's what gives it
8 expertise is that they have an opinion and that opinion is
9 then --

10 THE COURT: Let me ask you about that. You're saying
11 that an expert witnesses testimony in a court of law has to be
12 peer-reviewed?

13 MS. LIVESAY: I'm saying traditionally experts have
14 their work --

15 THE COURT: Traditionally --

16 MS. LIVESAY: I'm saying traditionally experts have
17 their work peer-reviewed. When we come in here --

18 THE COURT: You asked him, though, about his
19 testimony, that's what you just argued to me, now you're
20 arguing something else. Now you're arguing his work
21 peer-reviewed.

22 MS. LIVESAY: I understand. I understand.

23 THE COURT: Well, is there a difference? Because
24 this is your argument, not mine.

25 MS. LIVESAY: I understand. And my argument is I

1 don't think his is an expert because he has not worked for any
2 kind of company since 1991, he has only given testimony as a
3 defense witness, and as far as training, he gives no training
4 to other toxicologists which would reveal to us that he was an
5 expert in his field, so I have to object to the fact that he is
6 an expert in forensic toxicology, and again, I don't know what
7 forensic toxicology even is, it's --

8 THE COURT: Do you want to ask him?

9 MS. LIVESAY: I can ask him.

10 THE COURT: I mean, my point is, you have now
11 examined this witness on his expertise. You now have his C.V.,
12 you've heard his testimony. Let me know your arguments. Okay?

13 MS. LIVESAY: Okay. My argument is that I don't
14 believe he's an expert. I don't believe there's such an
15 expertise as forensic toxicology, so that would be the State's
16 objection.

17 THE COURT: Thank you. She says there's such thing
18 as this field of expertise that you are offering your witness
19 for.

20 MR. MARTIN: I think she's wrong. I mean, I think
21 the fact that she don't know about it or that she don't, quote,
22 think he's qualified, is not the basis to object to his
23 qualification. I mean, I can go back over it all again, but it
24 seems featous to me, Judge.

25 THE COURT: I have not seen the C.V. Anything else?

1 MR. MARTIN: No, Judge, unless you have some
2 questions about it, I could ask more questions.

3 THE COURT: I don't have any questions. Would
4 counsel listen when I'm making a ruling?

5 MR. HELMS: Yes, Your Honor.

6 MS. LIVESAY: I'm sorry, Judge.

7 THE COURT: I was trying to make a ruling.

8 MS. LIVESAY: No further questions.

9 THE COURT: Thank you for that. I'm going to allow
10 the witness to be qualified as an expert in the forensic
11 toxicology. I have listened to the testimony as to his
12 qualifications. I have reviewed his, how many pages --
13 twenty -- 18 pages, I've also gotten a history of his
14 qualifications in this Court. I'm going to allow it. If you
15 need to cross-examine him as to the credibility of his opinion,
16 then you may do that, but as far as his qualifications as an
17 expert, he meets those qualifications in this Court's opinion
18 to be qualified as an expert witness and to receive his
19 testimony as such. Go ahead.

20 **DIRECT EXAMINATION**

21 BY MR. MARTIN:

22 Q. With that in mind, let me ask you, Dr. Bennett, again,
23 to go back to where were. Have you had an opportunity to
24 examine the toxicology report?

25 A. I didn't look.

1 THE COURT: And as far as the topic of forensic
2 toxicology, you may cross-examine the witness on that issue --
3 don't text while I'm making rulings. Okay? Try not to do
4 that. I'm not one of these judges that say don't bring phones
5 in the courtroom. I think phones and internet are very
6 important, but during the course of a proceeding try not to do
7 it in front of me. Okay?

8 MS. LIVESAY: Yes, sir, Your Honor.

9 THE COURT: Thank you.

10 MS. LIVESAY: And just to set your mind at ease, this
11 is the first time that we've been made aware of this expert, so
12 I was trying to send the information to our investigator to get
13 some of sort of information.

14 MR. MARTIN: Judge, first of all, we told last week
15 we intended to call an expert in toxicology, which I'm not sure
16 if he was named Bennett or not, but his C.V. was sent.

17 THE COURT: Alright, that's fine. You all can argue
18 about that outside of my presence. My point was to try not to
19 text while I'm making rulings. Okay?

20 MS. LIVESAY: I won't, Judge.

21 THE COURT: Your purpose of texting, fine. Take that
22 up with opposing counsel, you didn't have a C.V. beforehand,
23 and you want it, take it up with opposing counsel. Okay? We
24 do not have a jury here.

25 MS. LIVESAY: I understand.

1 THE COURT: Alright. So as far as the issue of the
2 topic of his expert, I've been in other cases where I think
3 I've qualified forensic toxicology. It's not an unknown area
4 of expertise, so I am comfortable in qualifying him in that
5 area. Plus, if you take a look at his resume it is filled with
6 subsections of forensic toxicology and everything, so I'm
7 comfortable with the topic, for purposes of this hearing. If
8 you have something else you want to bring up during the trial,
9 that's perfectly fine.

10 MR. MARTIN: Thank you, Your Honor.

11 Q. Mr. Bennett, you've been qualified as an expert in the
12 field of forensic toxicology, do you accept that mantle?

13 A. Yes.

14 Q. And forensic toxicology, again, is what, Dr. Bennett?

15 A. It's the study of the effect of drugs and other
16 chemicals on the human body and using that information in legal
17 cases.

18 Q. Now, you reviewed the toxicology report of Mr. Michael
19 Pennington in this particular case for me?

20 A. Correct.

21 Q. And what did you find was the results of the toxicology
22 report, first of all, Dr. Bennett?

23 A. The toxicology report was of the analysis of a blood
24 specimen taken from Mr. Michael Pennington at or near the time
25 of the incident at autopsy shortly after the incident, and

1 results of that analysis revealed the presence of a number of
2 compounds, mainly, ethanal, caffeine, Alprazolam,
3 Benzoylecgonine, a major metabolite of cocaine, and the active
4 ingredient in metabolites of marijuana.

5 Q. Let's go back, first of all, Alprazolam is commonly
6 known as what?

7 A. It's sold mostly under the trade name Xanax.

8 Q. Okay, Xanax. And then let's talk about Benzoylecgonine,
9 the metabolite of cocaine, and the interplay with cocaine. If
10 you would, explain to the judge what a toxicology report such
11 as this one which finds Benzoylecgonine tells us about the
12 presence of cocaine in the person at the time the blood was
13 taken?

14 A. Benzoylecgonine is the major metabolic product of
15 cocaine. It is routinely analyzed by laboratories around the
16 country, and around the world for that matter, as evidence that
17 cocaine was used. Benzoylecgonine is a compound that's easier
18 to analyze and is more readily detectable in blood, urine,
19 hair, and other biological matrices as direct evidence that
20 cocaine was used. Cocaine in the blood has a relatively short
21 half-life, therefore, Benzoylecgonine is the metabolite that's
22 analyzed because it does have a longer window of detention. So
23 the fact that Benzoylecgonine is present is used as evidence
24 that cocaine was used and is standard practice for every
25 laboratory I've ever known, worked with or have knowledge of

1 around the country and around the world.

2 Q. And the half life of cocaine is what, by the way?

3 A. It's very short. It can be anywhere of 45 minutes to an
4 hour, whereas the half life of Benzoylecgonine is much longer.
5 Some reports show three to five times longer.

6 Q. And what does this toxicology report tell us as to
7 whether or not this individual was under the influence of
8 cocaine at the time of his death?

9 A. The fact that Benzoylecgonine was present in the blood
10 is a direct indication that cocaine was also in the blood at
11 the time of death. Even though cocaine is not listed on the
12 report it's only because that particular substance was not
13 analyzed for. It could have been cocaine. It could have been
14 various amounts of cocaine. The laboratory only analyzed for
15 Benzoylecgonine.

16 Q. And so the fact that there's Benzoylecgonine listed and
17 not cocaine itself does not mean that he was not under the
18 influence of cocaine because cocaine proper was not tested for?

19 A. Correct. The laboratories rely both forensically and
20 clinically that the fact that Benzoylecgonine is present
21 indicates the consumption of cocaine, recently.

22 Q. Recent consumption of cocaine?

23 A. Correct.

24 Q. Alright. Now, of course, a blood alcohol level in this
25 case was not high or extremely high, one might say. Is that,

1 reading there, is that consistent with what you would call a
2 five on a breathalyzer or not?

3 A. Consistent with a .05.

4 Q. .05. Alright. So in this case the presence of the
5 alcohol, the Alprazolam, the Benzoyllecgonine, and the
6 marijuana, as a combination, does that tell you anything as a
7 forensic toxicologist about the effects that it may have on the
8 body of an individual?

9 A. Yes, quite a bit.

10 Q. And if you might tell that to the Court.

11 THE WITNESS: Your Honor, this might be a lengthy
12 description of the individual drugs and I want to make sure I
13 cover everything, so would it be alright if I refer to my notes
14 to make sure that everything that I discuss --

15 THE COURT: You have to ask that to the lawyers.

16 MR. MARTIN: Yes. You be thorough, but don't waste
17 the Court's time, I guess is the best way to say it.

18 THE WITNESS: Correct, yes.

19 A. Well, my role here is to determine if any of the drugs
20 present in the blood specimen of the decedent would have any
21 type of effect on the behavior of that person, mainly the
22 effect of aggression, and aggression is a condition that is
23 exhibited by changes in the brain, and that change is caused by
24 changes in the part of the brain known in the prefrontal
25 cortex, and that's the area of the brain that is controlled by

1 certain neurochemicals that if disrupted can cause behavioral
2 changes. Now, the prefrontal cortex is controlled by
3 neurochemicals, chemicals in the brain that control the
4 functioning of aggression, or lack thereof, and some people are
5 born with a poorly functioning prefrontal cortex, some are
6 disposed to it, some are environmentally conditioned to have
7 aggression through a lack of prefrontal cortex operation, and
8 some drugs can effect the functioning of the prefrontal cortex
9 which can cause certain behavioral changes.

10 Now, the toxicology report of the autopsy report of the
11 decedent showed that he had in his blood at the time of the
12 incident a minimum of alcohol, cocaine Alprazolam, marijuana
13 and caffeine. Now, I'm going to briefly take a look at each of
14 these drugs to see if any of these drugs could cause or
15 contribute to aggression. Now, with alcohol many studies have
16 performed and published in the scientific literature showing
17 that alcohol disrupts what's called executive cognitive
18 function. Now, that's a fancy way of saying prefrontal cortex
19 functioning. Now, executive cognitive function is what
20 controls the higher level of brain functioning, the functioning
21 of the brain that causes one to exhibit self control and
22 controlling their aggression and their ability to function, and
23 many studies have looked at alcohol, and even the tox report
24 states that alcohol causes impaired judgment and that alcohol
25 disrupts the chemistry, the biochemistry, the neurochemistry in

1 the prefrontal cortex causing loss of self control,
2 disinhibition and aggression. Now, the next drug, cocaine,
3 many studies have also been published in controlled laboratory
4 settings and when subjects were given cocaine compared to
5 subjects given a placebo and the studies showed significant
6 higher levels of aggression with people taking the cocaine even
7 without provocation, so provoking the aggression was not
8 necessary to show that just being under the influence of
9 cocaine increased levels of aggression. Another study
10 published in 2020 showed that people with alcohol dependence
11 exhibited elevated levels of aggression and anger and people
12 with cocaine dependence showed the same, and interesting about
13 the study showed that people with concurrent use of cocaine and
14 alcohol had the highest level of aggression. This combination
15 of cocaine and alcohol was shown to be synergistic, not just
16 additive. So what I mean by that is if cocaine increases
17 aggression from a level one to level five and alcohol increases
18 aggression from level one to level five that the two together
19 aren't five plus five or ten, that's added, they are actually
20 synergistic, meaning that five plus five could be 15 or 20, or
21 even higher. Now, there's a reason for this with cocaine and
22 alcohol. I want to introduce to the Court the compound
23 cocaethylene. By the way, the tox report also states that
24 cocaine causes excitement, risk-taking and aggression.

25 Q. And that's in the toxicology report?

1 A. Yes, sir.

2 Q. Go ahead.

3 A. Now, cocaethylene is a compound that's formed when
4 alcohol and cocaine is in the body at the same time.
5 Cocaethylene is stronger than cocaine, it stays in the body
6 longer and has a more pronounced effect. Because cocaethylene
7 always forms when alcohol and cocaine are together cocaethylene
8 was in the decedent at the time of the incident. Now, again,
9 one may say, well, why isn't cocaethylene listed on the tox
10 report? That's because it's another one of those drugs that
11 simply wasn't tested for, just like cocaine wasn't tested for,
12 only the Benzoyllecgonine metabolite. In fact, there are many
13 drugs that the toxicology report that were not tested for that
14 could have been present. And moving on to Alprazolam. That's
15 a prescription drug that's used as tranquilizer, it's very
16 potent. The dose can be one milligram. Compare to that to
17 Aspirin at 325 milligram or Ibuprofen at 800 milligrams.
18 Alprazolam dose is one milligram. This is a very potent drug.
19 There's not a lot of leeway with this drug when taking it. It
20 has to be taken cautiously and precisely as prescribed. There
21 are significant adverse reactions, side effects, if you will,
22 with this drug. One adverse reaction that the drug
23 manufacturer and the pharmaceutical company, physicians,
24 pharmacists clearly and emphatically warn, I know I did as a
25 pharmacist, warned the person taking Alprazolam that if you're

1 taking it then no alcohol is to be consumed. In fact, as a
2 study published on the influence of alcohol on Alprazolam, in
3 fact, that's the title of the article, influence of alcohol on
4 metabolism of Alprazolam, and it reported that even though
5 Alprazolam is a tranquilizer, that coingested with alcohol
6 Alprazolam can increase behavioral irritability and aggression,
7 and actually quantitated that that, we can go over it need be,
8 I'm moving onto marijuana. Most people think of marijuana as a
9 drug that calms you down and makes you relax, and it does have
10 that effect, but the tox report itself says that marijuana is a
11 hallucinogenic, it causes hallucinations. It also states that
12 marijuana has reality distorting effects, which could impact
13 this case. A 2021 study reports that cannabis use disorder is
14 associated with an increased risk of aggression, we're talking
15 marijuana, and more importantly a recent study just published
16 this year in 2022 where they looked at cannabis related harm to
17 others, cannabis violence, that's part of the title of the
18 article, and it did show that cannabis resulted in an increased
19 level of physical violence, mainly assault, aggression and
20 fighting. And lastly, I'll need to discuss the ubiquitous
21 caffeine which most people tend to ignore. There is even a
22 recent study where they looked at people that are drinking
23 alcohol and also consuming energy drinks, energy drinks have a
24 high level of caffeine in them, and the study concluded that
25 persons who are consuming alcohol and these energy drinks had a

1 higher level of aggression than just with the alcohol alone,
2 indicating that caffeine, the ubiquitous caffeine, can also
3 contribute to aggression.

4 So in conclusion, in looking at all of the drugs that
5 were detected, and even some that weren't such as cocaethylene
6 which I'm saying is present, that all of these drugs, each in
7 of in and of themselves can cause aggression, and so when you
8 collectively look at the totality of all of these drugs
9 together at the same time in this one person then it would be
10 my opinion that it is more likely than not that this person was
11 exhibiting signs of aggression at the time of the incident.

12 Q. And that is your opinion to the standard of more likely
13 than not?

14 A. Correct.

15 Q. Now, a couple questions I want to ask you. A lot of
16 times it says that one or more of these drugs, and I'm not sure
17 which one, but done alcohol, is a depressant. That term
18 "depressant" is used with some of it. What does that mean in
19 the real world. Does that mean if we drink alcohol that we're
20 going to get depressed, or what does that mean?

21 A. No. You're referring to clinical depression where one
22 feels sad or hopeless or worthless. With alcohol and these
23 other drugs we're talking about depression of the central
24 nervous system, meaning that the person has a disruption in the
25 functioning of their prefrontal cortex. Now, that's the area

1 we've discussed allows someone to have good critical judgment
2 thinking and thinking of reasonableness and calmness and
3 rationality and evaluation of events and circumstances in your
4 environment in order to make good decisions, whereas if that's
5 interrupted by these depressants or even stimulants, if that
6 prefrontal cortex is disrupted by these drugs then there is a
7 loss of critical judgment, there is reactivity, reactionary to
8 incidents without much thought, impulsiveness and aggression.
9 So it's someone who flies off the handle or someone who has a
10 knee-jerk reaction, without putting a lot of thought into what
11 they're doing before they do it, and that is the hallmark of
12 these compounds that were in the decedent's blood at the time
13 of the incident.

14 Q. And I don't know if you can opine to this or not, but in
15 a case like the one we've got here where there is some
16 incident, altercation, disagreement between two parties, the
17 toxicology report that you have before you would allow you to
18 testify to what, regarding the aggressor in that situation,
19 based on the toxicology itself?

20 A. Based purely on the toxicology report of the number of
21 compounds in the decedent's blood, it would be my opinion that
22 the person most likely would be exhibiting behavioral changes,
23 impulsivity, reactionary actions and aggression.

24 Q. And the toxicology report, if I understood what you
25 testified to, the Benzoylecgonine tells us that there was

1 cocaine in the body either at the time of death or in a short
2 period of time before?

3 A. Correct.

4 Q. But it did not test for cocaine itself?

5 A. Correct.

6 Q. So does the Benzoylecgonine give you any clue as to the
7 amount of cocaine that could have been in the decedent at the
8 time of his death or not?

9 A. It gives you an indication of whether the person was
10 impaired by cocaine at the time of death, yes. I can give you
11 some specifics of that based on what's in the toxicology
12 report.

13 Q. Share that with the Court if, you would.

14 A. The quantity of Benzoylecgonine detected was
15 450 nanograms per millimeter, and the toxicology report in the
16 reference comments sections states that number three,
17 Benzolecgonine, cocaine degradation product, states that the
18 average blood Benzolecgonine concentration and 906 impaired
19 drivers was 1260 nanograms to millimeter with a range of five
20 to 17,600 nanograms to millimeters. Meaning that, even a level
21 of Benzolecgonine as low as five nanograms per mil as low as
22 five nanogram per mil results in impaired drivers in the
23 particular study they referred to. So the fact that there's
24 450 nanograms per millimeters of Benzolecgonine in the
25 decedent's blood tells me that he was impaired by cocaine.

1 Now, the level of 450, I believe is artificially low because
2 the fact that he was taking alcohol at the same time, a
3 significant portion of that cocaine was metabolized to
4 cocaethylene and not Benzoylecgonine. So if we were able to
5 subtract out that portion of cocaine that was metabolized to
6 cocaethylene the Benzoylecgonine would be significantly higher
7 indicating a greater likelihood that the decedent was impaired
8 by cocaine at the time of the incident.

9 (Defendant's Exhibit No. 35, 36, 37, 38 was marked
10 for identification.)

11 Q. Let me hand it to you, Dr. Bennett, what's marked as
12 Defendant's number 38 and ask you if you can identify that.

13 A. This is a compendium of abstracts of some references
14 that I did research on prior to this case.

15 Q. And were they mentioned or used as a basis for some of
16 the testimony you gave today?

17 A. Yes.

18 MR. MARTIN: And Judge, I'd move to enter into
19 evidence the autopsy and toxicology, the C.V. and these
20 peer-review scientific documents that Dr. Bennett used as part
21 of his testimony.

22 THE COURT: Any objection? While she's looking at
23 that, the toxicology report, what was that number?

24 MR. MARTIN: What, Judge?

25 THE COURT: What was the number?

1 MR. MARTIN: I said the autopsy and the toxicology
2 report, C.V. and the peer-review studies.

3 THE COURT: Do you want to give it to the court
4 reporter. He's got the other two, which I'll hand up.

5 MS. LIVESAY: The State, of course, objects to
6 Defense Exhibit 38.

7 THE COURT: 38 is which one, because I don't have the
8 numbers.

9 MR. MARTIN: That's the last thing he testified to,
10 Judge, is which are the peer-reviewed articles that he said he
11 used as part of his expert testimony.

12 THE COURT: And the basis of the objection?

13 MS. LIVESAY: I'm not sure who prepared this. Did
14 this expert prepare it?

15 THE WITNESS: Yes.

16 MS. LIVESAY: And two, the articles are cocaine and
17 alcohol. I think he's already testified that our particular
18 victim had cocaine metabolite which is very different because
19 that would indicate that cocaine in the victim's system had
20 already been metabolized, so this would be taking the results
21 of our case, certainly, and misconstruing them, because it
22 doesn't say cocaine metabolite. This if somebody took a drink
23 and currently was under the influence of cocaine, and that's
24 not what we have in our case.

25 THE COURT: Okay. You may cross-examine him. I

1 think it goes to the credibility or weight of the testimony.
2 I'm going to allow it in. What about the other two documents?

3 MS. LIVESAY: Nothing further.

4 THE COURT: Nothing as to the other two documents?

5 MS. LIVESAY: What are the other two documents?

6 MR. MARTIN: The C.V. and the autopsy/toxicology
7 report.

8 MS. LIVESAY: Just the same as our prior objection,
9 Your Honor, under Washington, we don't believe the toxicology
10 report is relevant, and as to my prior objection as to his
11 qualifications as an expert.

12 THE COURT: Alright. Yes, sir, we'll allow both in.
13 Anything else?

14 (Defendant's Exhibits 35, 36, 37 & 38 were admitted
15 into evidence.)

16 MR. MARTIN: Nothing else at this time, no, sir.
17 Yes, sir?

18 **CROSS-EXAMINATION**

19 BY MR. HELMS:

20 Q. Doctor, tell me your name one more time so I don't get
21 it wrong.

22 A. Robert Bennett.

23 Q. Dr. Bennett. Doctor, there is no question you were
24 hired by the defense, right?

25 A. Correct.

1 Q. And you were compensated for your time here today?

2 A. Correct.

3 Q. Doc, the last thing, and I want to try and address this
4 in reverse order, if I may, so I don't miss or I miss fewer
5 things than I would otherwise. The last thing that was entered
6 into evidence was Defendant's Exhibit 38. Tell me what this is
7 again, please, sir.

8 A. This is a compendium of abstracts taken directly from
9 publications in the library of congress that I used to
10 partially perform my opinion.

11 Q. And when did you prepare this?

12 A. Two days ago.

13 Q. So you prepared it in anticipation of coming to court
14 today?

15 A. Correct.

16 Q. And it's an compendium of abstracts from others, so it's
17 basically an amalgamation of other sources?

18 A. As I stated, I went online to the library of congress
19 and reviewed, peer-reviewed scientific publications and copied
20 the abstracts of those publications into this collection.

21 Q. So the abstracts that you used were actually the
22 peer-reviewed documents?

23 A. Correct.

24 Q. This document, Defendant's Exhibit 38, has not been
25 peer-reviewed?

1 A. I'm confused as to why it would be.

2 Q. You don't have to understand why it would be. My
3 question is this: Has this document, the document that was
4 entered into evidence by Mr. Martin just now, has this document
5 been peer-viewed?

6 A. Of course not.

7 Q. Okay. Was it provided -- when did you provide that
8 document to the defense?

9 A. Two days ago.

10 Q. Two days ago. Okay. Did they ask you to author that
11 document?

12 A. No.

13 Q. But again, you're the only one that's seen it thus far
14 until today?

15 A. I don't know who else has seen it.

16 Q. Okay. That's fair. I want to talk to you about this.
17 You saw the toxicology report from Mr. Pennington?

18 A. Correct.

19 Q. And we can agree that the toxicology report says there
20 was ethanol?

21 A. Correct.

22 Q. With a blood alcohol concentration or a B.A.C. of .05?

23 A. Correct.

24 Q. Let's talk about .05, is that a lot of alcohol?

25 A. That's a relative question. It could be a lot of

1 alcohol, depending on the circumstances. I think I can best
2 answer your question by stating that at a level of .02
3 impairment starts to occur, so at .05, he was impaired.

4 Q. He was impaired?

5 A. Correct.

6 Q. And you can say that definitively with no other
7 information?

8 A. Yes, I can.

9 Q. Let me ask you this, sir. Impairment, what does that
10 mean?

11 A. That's a very broad definition where a person,
12 specifically to alcohol is what we're discussing, impairment
13 related to alcohol, that the person has some degree of loss of
14 critical judgment, delayed reaction time, disinhibition,
15 impulsivity, aggression, there's quite a number of effects of
16 impairment due to alcohol that's been well studied and well
17 documented.

18 Q. Let me ask you this: As to the symptoms of impairment
19 that you just listed to Court, does every person that's
20 impaired suffer those consequences?

21 A. Absolutely not.

22 Q. Okay. Does what the person who is impaired, does the
23 way they behave depend on specific circumstances to that
24 person?

25 A. Absolutely.

1 Q. Okay. Does it depend on things such as weight?

2 A. Yes.

3 Q. Does it depend on things such as tolerance?

4 A. Yes.

5 Q. What is tolerance, Doc?

6 A. The ability for the body to become accustomed to the
7 effect of the substance.

8 Q. When someone is accustomed to the effect of a substance
9 what effect does that have when they continue to -- or let me
10 ask you this: When someone is accustomed to the effects of a
11 substance isn't it true that it requires more of that substance
12 for them to be intoxicated or under the influence of that
13 substance?

14 A. You're almost correct. What accustom means is that
15 person can consume more of the substance and be less exhibiting
16 of symptoms of that substance.

17 Q. That's fair, Doc, that's a better way. I like what you
18 said better. Let me ask you this, Doc, how much did Michael
19 drink a day?

20 A. I do not know.

21 Q. How much did he drink a week?

22 A. I do not know.

23 Q. How much did he have that day?

24 A. I do not know.

25 Q. So you have no idea as to the tolerance of Michael

1 Pennington, do you?

2 A. That's correct.

3 Q. Okay. But that is a factor into whether or not he was
4 under the influence of this substance, correct?

5 A. That is a factor as to the degree of where the influence
6 of the alcohol was.

7 Q. But you didn't factor that in?

8 A. Yes, I did factor that in.

9 Q. You factored in his alcohol tolerance?

10 A. No, no, no. I factored in the fact that based on the
11 parameters that you brought up, that could influence his degree
12 of impairment.

13 Q. Did Michael Pennington have a high or low tolerance for
14 alcohol?

15 A. Do not know.

16 Q. Do not. Doc, let's talk about what else was in him.
17 What did Michael have in his digestive system?

18 A. I do not know.

19 Q. What did he eat last?

20 A. I do not know.

21 Q. What did he eat last?

22 A. I do not know.

23 Q. Wouldn't that affect alcohol intoxication?

24 A. No. That would affect the degree alcohol absorption.

25 Q. Okay. So tell me about absorption. What is alcohol

1 absorption?

2 A. Alcohol is absorbed initially by the stomach and then
3 later by the rest of the digestive tract and food can influence
4 the rate and absorption, and therefore, the rate of impairment.

5 Q. Does food increase or decrease the rate of absorption?

6 A. Food decreases the rate of absorption.

7 Q. Let me ask you this: If he absorbed it quicker versus
8 slower what does that mean in terms of how his would behave?

9 A. If the alcohol absorbed quicker then the impairment is
10 going to occur quicker and higher degree of impairment.

11 Q. That's fair. And that would all be affected by what's
12 in his stomach?

13 A. Correct.

14 Q. But you don't know what was in his stomach?

15 A. That's correct.

16 Q. So there's some unknown variables there, correct?

17 A. Yes.

18 Q. Okay.

19 A. All I know is he had a blood alcohol concentration of
20 .05.

21 Q. Doc, do you know what the per say amount for driving a
22 car in South Carolina is?

23 A. Yes.

24 Q. What is it?

25 A. .08.

1 Q. So he could still legally drive a car?

2 A. He could.

3 Q. Alright. Let's move on to Xanax, Doc. Is Xanax
4 illegal?

5 A. No. It's a legal prescription drug.

6 Q. Did you know that Michael Pennington had a prescription
7 for Xanax?

8 A. I did not know whether he did or not.

9 Q. Okay. Now, let me ask you this. You said, there's not
10 a lot of leeway. Now, those were your words when you were
11 talking about Xanax --

12 A. Correct.

13 Q. -- in terms of how much you take and how you take it.
14 Did you mean that to mean that to mean that you basically got
15 to take it how it's prescribed?

16 A. Correct.

17 Q. How was it prescribed to Michael?

18 A. I do not know.

19 Q. So was he taking it as he was prescribed?

20 A. No.

21 Q. How do you know that?

22 A. Because he had Alprazolam in his blood along with
23 alcohol in his blood, and that is not as it's prescribed.

24 Q. That's fair. That's fair. We talked about the alcohol,
25 but what about just the Xanax? Did he take too much of it that

1 day?

2 A. Do not know.

3 Q. Did he take too little of it that day?

4 A. Do not know.

5 Q. So you don't know if he was under the influence of that
6 at that time?

7 A. My opinion is that he was under the influence of Xanax
8 at the time because it was present in his blood at the time of
9 the incident.

10 Q. It was present in his blood at the time of the incident?
11 As it concerns the B.A.C., what was his B.A.C. at the time of
12 the incident? And we're back on alcohol, of course, because
13 we're talking about blood alcohol content. I'm asking you,
14 what was the B.A.C.? I'll ask it like this, Doc. I'll
15 rephrase the question. I see the wheels turning. Does B.A.C.
16 go up or down?

17 A. Over time?

18 Q. Yeah.

19 A. Well, if metabolism is still occurring it goes down,
20 however, if we're talking postmortem, that's a whole different
21 story.

22 Q. What was his B.A.C., do you know, when he was shot?

23 A. In the neighborhood of .05.

24 Q. And how do you know that?

25 A. Because that's what it was at the time of the autopsy.

1 Q. So it didn't go down after he died?

2 A. Postmortem redistribution can cause the alcohol to go up
3 or down, so I don't know how much it went up or down or if any.
4 The only thing I know is that his blood alcohol concentration
5 was .05.

6 Q. When?

7 A. At the time it was drawn at the autopsy.

8 Q. So you don't know what his B.A.C. was when he was shot?

9 A. All I know is that it was in the neighborhood of .05, I
10 don't know the exact amount.

11 Q. I got you. Caffeine, Doc. You said he tested positive
12 for caffeine?

13 A. Correct.

14 Q. How positive? Was he very positive, kind of positive?

15 A. His report doesn't say, it just says positive.

16 Q. How did he get the caffeine in his system?

17 A. I don't know.

18 Q. What has caffeine in it?

19 A. Energy drinks, coffee, coke.

20 Q. Coca Cola?

21 A. Yeah.

22 Q. So that positive right there on his tox report could be
23 because he drank a Coca-Cola before he was shot?

24 A. It could have been.

25 Q. We talked about the alcohol and the Alprazolam. Let's

1 talk about the cocaine metabolite, Benzoylec -- say it for me,
2 Doc.

3 A. Benzoylecgonine.

4 Q. That. What is that, Doc?

5 A. That is the major metabolite of cocaine.

6 Q. Now, let me ask you this, Doc, now, as we go, now you
7 said that the .053 as far as his B.A.C. is about right?

8 A. Correct.

9 Q. And so as it concerns the alcohol, this tox report is
10 correct?

11 A. I'm making the assumption that it is correct.

12 Q. Fair enough. As it concerns the caffeine, you assume
13 that's correct, he was positive for caffeine?

14 A. Correct.

15 Q. So you don't take any issue with that, right?

16 A. Correct.

17 Q. Okay. So that's not wrong?

18 A. Correct.

19 Q. You don't want to correct me in there. The cocaine
20 metabolite. How long does it take for cocaine to turn into a
21 cocaine metabolite?

22 A. It's quick. It's a hydraulic reaction. The cocaine
23 hydrolyzes the cocaine quickly. It starts within minutes.

24 Q. It starts within minutes. How long? The short end to
25 the high end?

1 A. It varies from individual to individual, several hours.

2 Q. I'm sorry, I didn't mean to interrupt, go ahead.

3 A. Several hours.

4 Q. Several hours?

5 A. Correct.

6 Q. How long did it take Michael to metabolize cocaine?

7 A. I don't know.

8 Q. You don't know. So you don't know if Michael took
9 cocaine five minutes before he was shot or hours before he was
10 shot?

11 A. Correct.

12 Q. You talked about the amount. The result was 450; is
13 that right?

14 A. Correct.

15 Q. But you said that isn't right.

16 A. I give reasons to why I think it most likely was higher.

17 Q. You think that was higher?

18 A. Correct.

19 Q. So the other stuff on the toxicology report is correct,
20 but that one is not?

21 A. I'm saying that if he wasn't under the influence of
22 alcohol the amount of Benzoyllecgonine would most likely have
23 been higher indicating a higher level of cocaine consumption.

24 Q. Okay. But Benzo, that word, that is the result of, you
25 said cocaine degradation, right?

1 A. Correct.

2 Q. And that says to me says degradation takes place after
3 that consumption.

4 A. The degradation starts and is a process that occurs
5 during the whole metabolic process.

6 Q. Okay.

7 A. So it can take time for a drug to degrade but the
8 initial drug, sometimes referred to as the pan drug, is still
9 present.

10 Q. Does the cocaine metabolite have a different effect than
11 the cocaine itself?

12 A. The cocaine metabolite benzoylecgonine has no effect on
13 the body.

14 Q. It has no effect?

15 A. No psycho effect, no effect on the brain. It's not a
16 psycho stimulant like cocaine is.

17 Q. So the Benzoylecgonine, whatever that word is, you're
18 saying had no effect on him?

19 A. It's inactive biologically.

20 Q. What would have been accurate? What number should you
21 put there?

22 A. I would have to spend a couple hours doing the
23 calculation to get an approximation.

24 Q. Did you do that in preparation for this whenever you
25 were authoring that document?

1 A. No. Because the fact that Benzoylecgonine is present is
2 relied upon by hundreds of thousands of drug tests throughout
3 this country on a daily basis as an indicator of the presence
4 of cocaine, regardless of the amount.

5 Q. So you're saying that the industry standard as it
6 concerns that metabolite is probably pretty accurate?

7 A. Correct.

8 Q. Doctor, I want you to read this, and this is the tox
9 report that you testified to a minute ago for Mr. Martin.
10 Under that metabolite name that I still can not pronounce,
11 please read that to the Court, if don't mind?

12 A. The part you have underlined?

13 Q. Yeah. Under that metabolite name would you read to the
14 Court what it says that that metabolite does to the body?

15 A. The whole paragraph?

16 Q. Sure.

17 A. Benzoylecgonine is an inactive metabolite and chemical
18 breakdown product of cocaine. Cocaine is a DEA Schedule II
19 controlled central nervous stimulant drug. Effects following
20 cocaine use include euphoria, excitement, restlessness, risk
21 taking, sleep disturbance and aggression. A period of mental
22 and physical fatigue and somnolence follow the use of cocaine
23 after the excitant-stimulant effects wear off.

24 Q. Say that again.

25 A. A period of mental and physical fatigue and somnolence

1 follow the use of cocaine after the excitant-stimulant effects
2 wear off.

3 Q. That sounds to me, Doc, like the exact opposite of
4 aggression. What do you think: Fatigue, somnolence follow the
5 use of cocaine after the excitant-stimulant wears off.

6 A. But we don't know if the excitant-stimulant effect had
7 worn off yet.

8 Q. We don't, do we, Doc?

9 A. Correct.

10 Q. Alright. Doc, you also told this Court about some other
11 things that you said were present in Michael Pennington's
12 system that are not on this tox report, something to the effect
13 of cocaethylene?

14 A. Correct.

15 Q. Doc, this is the tox report. Point out to the Court
16 where cocaethylene is on that tox report.

17 A. It's not there because it wasn't tested for.

18 Q. Did you test for it?

19 A. No.

20 Q. Nobody tested for it?

21 A. Correct.

22 Q. But it was there?

23 A. Yes.

24 Q. Unequivocally, you can say that?

25 A. Yes. Because every time cocaine and alcohol is in the

1 body at the same time cocaethylene forms.

2 Q. But Doc, was cocaine in his system? I mean, we know the
3 metabolite was, but is the cocaine still there when the
4 metabolite's there?

5 A. Most likely is, yes.

6 Q. Most likely?

7 A. Correct.

8 Q. But you can't say for sure?

9 A. Correct.

10 Q. Okay. So only if the cocaine was still there did
11 alcohol aggravate the cocaine, but we don't know if the cocaine
12 was still there?

13 A. Correct.

14 Q. Moving on, Doc. I want to talk to you, not about
15 something that wasn't there, alcohol and cocaine dependence.
16 You read something or alluded to something with Mr. Martin
17 about alcohol and cocaine dependence. Why did you address that
18 with the Court?

19 A. Because the publication showed that alcohol dependence
20 can cause the effect of aggression.

21 Q. What is alcohol dependence?

22 A. That's someone who uses alcohol regularly and is
23 dependent on it, they have a craving for it.

24 Q. That's fair. How dependent was Michael?

25 A. I do not know.

1 Q. So then you have no idea as to whether or not that thing
2 you addressed or read to the Court even applies to Michael, do
3 you?

4 A. Correct.

5 Q. So what was the point of reading it?

6 A. That it could occur.

7 Q. That it could occur?

8 A. Yes.

9 Q. So you think that's the standard you come in here and
10 testify to, if it could occur?

11 A. That's just one isolated statement. It doesn't apply to
12 everything I said.

13 Q. Doc, you said higher levels, and when you were alluding
14 to the that article, higher levels actually equal more
15 aggression, I have that in quotes because you said that.

16 A. Correct.

17 Q. What were you referring to?

18 A. I don't understand the question.

19 Q. When you higher levels equals more aggression, higher
20 levels of what exactly, higher levels of cocaine, higher levels
21 of alcohol or both?

22 A. Both.

23 Q. Both.

24 A. In other words, cocaine has been shown in studies to
25 produce higher levels of aggression.

1 Q. Sure.

2 A. Alcohol has been shown in studies to produce higher
3 levels of aggression.

4 Q. Sure.

5 A. Cocaine with alcohol has the highest level of
6 aggression.

7 Q. And like you said before, that's just one option that
8 could have taken place. We don't know if those were present
9 simultaneously? Well, let me ask you this. Didn't you just
10 testify you don't know if the cocaine was in his system?

11 A. I'm saying the cocaine was in his system because
12 Benzoylecgonine was present.

13 Q. But you said there's nowhere on that tox report that
14 Benzoylecgonine -- I mean, say that one more time. Cocaine is
15 present because Benzoylecgonine is present?

16 A. Correct.

17 Q. But Benzoylecgonine is the metabolite of cocaine?

18 A. Correct.

19 Q. And you're saying they are present simultaneously?

20 A. You're now confusing me by making your statements by
21 stating that cocaine -- it sounds like you're saying cocaine is
22 not present.

23 Q. I'm asking you, I don't know. I'm asking you.

24 A. I'm saying cocaine was most likely present because
25 Benzoylecgonine was present and that's the forensic toxicology

1 standard of operation, that if Benzoylecgonine is present it's
2 due to cocaine use and cocaine is most likely present as well.

3 Q. Most likely present?

4 A. Well, nothing is absolute.

5 Q. Fair enough, Doctor. Doc, at some point you said the
6 alcohol and Alprazolam is commonly known as a tranquilizer.
7 You said "tranquilizer," is that right?

8 A. Alprazolam is a tranquilizer.

9 Q. What does a tranquilizer do?

10 A. It calms someone down, makes them relaxed, sleepy,
11 drowsy.

12 Q. And again, how much Alprazolam was in Michael
13 Pennington?

14 A. 16 nanograms to milligrams.

15 Q. Doc, you said it was more than likely or not because of
16 all these things taken into consideration, both what's on the
17 tox report, not on the report, more likely than not that
18 Michael Pennington was acting aggressively, is that what you
19 said?

20 A. That is.

21 Q. Doc, can you say, though, to this Court the way you're
22 supposed to to a reasonable degree of medical certainty that
23 Michael Pennington was aggressive?

24 A. To a reasonable degree of toxicological certainty that
25 Michael Pennington was displaying some signs of aggression

1 based on the drugs and the number of drugs that was in his
2 system at the time.

3 Q. And you're just basing that on what you see in front of
4 you, not what you know about what was going on at the time?

5 A. Correct.

6 Q. How long Doc, and I'm winding up, how long before he was
7 shot was he exhibiting these signs of aggression? Doc, you're
8 able to tell us to a reasonable degree of toxicological
9 certainly that he was aggressive, right?

10 A. To some degree, yes.

11 Q. Reasonable degree, that's the standard?

12 A. Correct.

13 Q. And you're able to say that in this Court. How long
14 prior to his death was he exhibiting these signs?

15 A. Up until the time of his death.

16 Q. And prior to that, you don't know when it started?

17 A. I do not.

18 Q. Do you know if Michael Pennington was scared when he was
19 shot?

20 A. I do not know that.

21 Q. Please answer any questions the defense has.

22 THE COURT: Any redirect into what he went into?

23 MR. MARTIN: No, sir.

24 THE COURT: Thank you, sir, you may step down. Any
25 reason why the witness cannot be excused?

1 MR. MARTIN: Well, Judge, yes.

2 THE COURT: Okay. Don't be excused, I just asked for
3 objection. Lawyers, approach.

4 (Off the record discussion was held at the bench by
5 Court and counsel.)

6 THE COURT: We'll reconvene at 9:30 in the morning.

7 MR. MARTIN: Thank you, Judge.

8 (Concluded for the day Monday, November 14, 2022 at 4:50 p.m.)

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24 **(Whereupon, proceedings reconvened Tuesday, November 15, 2022)**

25 THE COURT: I'm told the microphone up here is not

1 working as it should, so if ever you can't hear me just raise
2 your hand and let me know and I will definitely speak up and I
3 will try to remember and try to speak up as we go through, but
4 again, if you can't hear me let me know and I'll try to be more
5 conscious about it. Okay. Is everybody ready to proceed?

6 MR. MARTIN: Judge, we're ready. I'm actually
7 waiting on the two witnesses I was going to start with and one
8 of them was here and now one of them is not in the room so let
9 me make a quick surveil.

10 THE COURT: Okay. Is the State ready to proceed?

11 MS. LIVESAY: Judge, if I can, before Mr. Martin
12 walks out, I did want to clarify a point that came up
13 yesterday. As to the expert that Mr. Martin called for
14 toxicology, he did send us that C.V. It was sent Sunday
15 morning, so I didn't realize we had it until last night. We
16 did receive that. We did not receive the Google search that
17 was placed into evidence yesterday, but I did want to make that
18 clear on the record since I had originally said we did not
19 receive it.

20 THE COURT: Thank you.

21 MR. MARTIN: And Judge, if I could, we've got to use
22 the State's equipment here, but we've got the video deposition
23 of Dr. Proctor, and I need to get that set up so that you
24 can -- can Tanya or Lacey help with that?

25 MS. LIVESAY: What do you want to do, just set it to

1 TV?

2 MR. MARTIN: Yes.

3 MS. LIVESAY: We'll have to move it over here,
4 because I'm going to have to hook it in here.

5 MR. MARTIN: Let's do that so we can get it ready to
6 go.

7 THE COURT: I guess this is what we're going to do
8 first?

9 MR. HELMS: Your Honor, it's Mr. Martin's ballgame.
10 I'm just trying to be cooperative. This is our equipment, he's
11 asking to use it, so I don't really know how he wants to go
12 forward, we're at his mercy, Judge.

13 THE COURT: That makes two of us.

14 MR. MARTIN: Judge, I'd like to start with playing
15 this video of Dr. Proctor's deposition.

16 MR. HELMS: Is that TV on, is it on?

17 MR. MARTIN: Judge, what I'm going to do, I think --
18 do we got this about ready to go? I got one witness we can
19 call while they're getting this set up.

20 THE COURT: Who is your witness?

21 MR. MARTIN: This is Officer Detective Kelly with the
22 Horry County Police Department.

23 THE COURT: Thank you.

24 **Detective Jonathan Kelly being first duly sworn,**
25 **testified as follows:**

1 THE CLERK: Please state your full name and spell it
2 for the record.

3 Detective Jonathan, J-o-n-a-t-h-a-n, last name Kelly,
4 K-e-l-l-y.

5 **DIRECT EXAMINATION**

6 BY MR. MARTIN:

7 Q. And Detective, you're with the Horry County Police
8 Department?

9 A. Yes, sir.

10 Q. And a Detective, obviously, how long have you
11 worked with them?

12 A. As a detective, I've been employed approximately three,
13 three and a half years, as a whole with the department,
14 approximately 13 years.

15 Q. Did you have an occasion to become involved in the
16 investigation of the case against Anijah Yarnell on May 14th?

17 A. I did.

18 Q. And where did you go in connection with your part of the
19 investigation?

20 A. I went to his residence off of Winchester Court in
21 Myrtle Beach section of Horry County.

22 (Defendant's Exhibits 39 & 40 were marked for identification.)

23 Q. And let me show you what's marked for identification as
24 Defense Exhibits 39 and 40 and ask you if you can identify
25 those?

1 A. Yes, sir. These are photos that I took, I believe I
2 took at the scene to send to other officers for search warrant
3 purposes.

4 Q. And they're photographs of what?

5 A. These are photographs of Anijah -- the vehicle that
6 Anijah was operating that night and that and the officers were
7 looking for based on witness statements on the scene.

8 Q. Do you know off the top of your head what time you got
9 there?

10 A. Not off the top of my head, I want to say around
11 11:00 at night.

12 Q. 11:00. Alright. Exhibit number 39 & number 40, do
13 these photographs accurately depict what you saw and took a
14 picture of that night?

15 A. They do.

16 MR. MARTIN: We would move to enter into evidence 39
17 and 40, Your Honor.

18 MS. LIVESAY: No objection.

19 THE COURT: Without objection.

20 (Defendant's Exhibits 39 & 40 were admitted into evidence.)

21 Q. And if you would, this is number 39. I'm going to hand
22 it up to the judge. What is that?

23 A. Exhibit Number 39 is a picture from the driver's side
24 rear corner of the vehicle. It's an overall so that I could
25 capture the tag and the state of the vehicle.

1 Q. And Exhibit Number 40, which I'm going to show to the
2 Court. If you would tell him what that is and what the
3 significance of it was during your investigation?

4 A. This is a photograph of a driver window on that same
5 vehicle and the significance is that it appears to have a hole
6 in the driver window.

7 MR. MARTIN: Answer any questions they have for you.

8 MS. LIVESAY: Thank you, Judge.

9 (State's Exhibit Number's 21, 22, 23, 24, 25, 26, 27 &
10 28 were marked for identification.)

11 **CROSS-EXAMINATION**

12 BY MS. LIVESAY:

13 Q. Detective Kelly, I'm going to show you State's Exhibits
14 21 through 28. If don't mind, take a look at those pictures
15 and tell me if you recognize that vehicle and where it's
16 located?

17 A. This is the can in the vehicle that Anijah Yarnell was
18 said to have been driving the evening of the shooting and these
19 are more of the same photos that I took to send for the search
20 warrant.

21 Q. If you don't mind, just take a look at all of them and
22 tell me if those accurately depict the defendant's car when you
23 were out there that night at this apartment at Winchester
24 Circle?

25 A. Number 23, is this a cropped version of one of my

1 photos?

2 Q. I'm not sure if that's your or Greg Lent's, but is that
3 the way it appeared that night?

4 A. Yes. It's an accurate, but I don't believe I took one
5 from that angle, specifically, on 23, but the rest of them
6 appear to be my photos.

7 Q. Let me ask you this: Do they all accurately reflect how
8 the defendant's car appeared when you arrived out there that
9 night?

10 A. They do.

11 MS. LIVESAY: At this time the State wishes to place
12 21 through 28.

13 MR. MARTIN: The only objection would be to the one
14 that, if I understood him right, that he didn't take.

15 THE WITNESS: Unless it's a cropped photo of mine,
16 it's not a photo that I specifically took, but it does
17 accurately reflect the way the window appeared at the time.

18 MR. MARTIN: Who took that photograph, do you know?

19 THE WITNESS: I'm not personally aware, I believe it
20 was Greg Lent.

21 MR. MARTIN: Do you got Mr. Lent coming, Ms. Livesay?
22 Is he going to be here to testify?

23 MS. LIVESAY: No, and I don't need to. I think the
24 rule of authentication says that he's only got to be able to
25 say that is what it appears to be.

1 MR. MARTIN: If he can say that, I have no objection
2 to it.

3 THE COURT: And I think that's what he said. I'm
4 going to allow it.

5 MS. LIVESAY: Thank you, Judge.

6 (State's Exhibits Nos. 21, 22, 23, 24, 25, 26, 27 & 28
7 were admitted into evidence.)

8 Q. Now, in looking at these photographs, if you don't mind
9 tell this Court what is the only damage that is on the
10 defendant's vehicle?

11 A. The only damage that I observed was to the driver window
12 with a hole about midway up.

13 Q. Okay. And the window in the driver's door, can you tell
14 if it's bowed out or if it is a bowed in?

15 A. It appears to be going outward because the way the
16 window is bent out of the track as opposed to inward. It
17 didn't appear it was pushed in, it appeared it was pushed out.

18 Q. And there is no other damage on the vehicle at all? No
19 other window was cracked, the door doesn't appear to be dented
20 in? The windshield doesn't appear to be cracked; is that
21 correct?

22 A. That's correct.

23 Q. And the window that was damaged was bowed out?

24 A. Correct.

25 Q. And you think from the gunshot hole?

1 A. That's what it appears to me.

2 Q. And let me ask you something, how far down is the
3 window? Like, how much space is left, do you understand my
4 question?

5 MR. MARTIN: I object. The window is the best
6 evidence of how far it's down, and it's in evidence.

7 THE COURT: Okay. I'm not going to disagree, but I
8 think he can be asked that question.

9 MS. LIVESAY: Thank you, Judge.

10 A. From the top of the window frame to where the top of the
11 window currently sits after it's pushed out partially is
12 probably two and a half to three inches.

13 Q. And if you don't mind, how far is two and a half to
14 three inches to you, show me, about this far?

15 A. (Indicating.)

16 Q. Thank you. And about how far down is the bullet hole in
17 the window? It clearly goes through the window, correct?

18 A. Correct.

19 Q. And how far down is it?

20 A. From the top of the window?

21 Q. Yes, sir.

22 A. I would guess about six inches, roughly.

23 Q. Okay. Now, did you see Mr. Yarnell that night?

24 A. I did.

25 Q. And did you collect any evidence off of him?

1 A. I did.

2 Q. And what did you collect?

3 A. I completed a GSR kit, gunshot residue kit.

4 Q. And when you saw him did he have any blood on him?

5 A. Not that I could tell.

6 Q. And did he have any blood on his hands when you did the
7 GSR kit?

8 A. No.

9 Q. And when you got out there who all was already out there
10 with the defendant?

11 A. Sergeant Buckingham, Corporal Raven and a constable.

12 Q. So several officers?

13 A. Correct.

14 Q. And did you see EMS out there, did you see EMS?

15 A. No.

16 Q. Did you see anybody having to render any medical care to
17 the defendant?

18 A. No.

19 Q. And again, do you recall seeing any blood on the
20 defendant at all?

21 A. No.

22 Q. When you were out there and you did the GSR kit, was he
23 sitting up, standing up, did you see him stand up?

24 A. He was seated initially and then I assisted him in
25 standing up so I didn't bend his wrist too far to get the GSR

1 kit.

2 Q. Okay. So you could do the kit more effectively?

3 A. Correct.

4 Q. And did he stand up?

5 A. Yes.

6 Q. Did he have any problems standing up?

7 A. No.

8 Q. When you were out there did he appear to be in any pain
9 or discomfort?

10 A. He was shaking and uttered that he was in shock and
11 nervous.

12 Q. Okay. Was he moaning?

13 A. No.

14 Q. Was he crying?

15 A. No.

16 Q. Was he grunting in discomfort?

17 A. No.

18 Q. So did he show any signs that he was in any kind of pain
19 at all?

20 A. No.

21 Q. And no blood?

22 A. No.

23 Q. Detective Kelly, if you thought that defendant needed
24 medical services would you have contacted EMS?

25 A. Yes. We would have either contacted EMS or we would

1 have taken him to the hospital on the way to transport him to
2 either to the police station or the jail.

3 Q. And was he ever transported to the hospital?

4 A. Not to my knowledge.

5 Q. But you would have called EMS if he required medical
6 care?

7 A. Correct.

8 Q. And you never contacted EMS?

9 A. Correct.

10 MS. LIVESAY: No further questions for this witness,
11 Judge.

12 THE COURT: Any Redirect?

13 MR. MARTIN: Just a couple.

14 **REDIRECT EXAMINATION**

15 BY MR. MARTIN:

16 Q. Depict the exhibit that shows the bullet hole in the
17 window, just to reaffirm, that was taken by you at Mr.
18 Yarnell's residence, correct?

19 A. Correct.

20 Q. Not at the crime scene?

21 A. Correct.

22 Q. But after he had driven the car to the residence?

23 A. I assume he drove the car to the residence, yes, what
24 happened to the car, it was transported to the residence,
25 correct.

1 Q. Somebody drove it to the residence?

2 A. Correct.

3 Q. And you know if that was the same or different position
4 that the window was in as far as up and down was concerned at
5 the time the shot was fired through it?

6 A. I could say with confidence that it was at least up to
7 the point of where the bullet hole went through the window.

8 Q. Right. Which could have been six inches, or how many
9 inches lower that is, I think you thought maybe six.

10 A. Roughly.

11 Q. Roughly that. And again, there is what looks like a bit
12 of a buckle to the top left-hand corner of the glass?

13 A. Correct, and it's spidered.

14 Q. And if someone were trying to roll that window up it
15 could be that, could it not?

16 MS. LIVESAY: Your Honor, objection. Speculation.

17 A. I wouldn't know.

18 Q. You wouldn't know.

19 THE COURT: I'm going to allow the question. Ask the
20 question. Now we're talking at the same time.

21 A. I'm sorry, I didn't hear it.

22 Q. Okay. The question is the buckle that you see there,
23 that's not where the bullet went through the glass, is it?

24 A. I wouldn't know.

25 Q. Well, you see the bullet hole there?

1 A. I see the bullet hole and it is bowed out in that
2 portion, as well. I couldn't tell you. I've never tried to
3 roll up a window that has been shattered.

4 Q. That's been shattered. Okay.

5 A. So I don't know if it would do that or not.

6 MR. MARTIN: I got you. That's all the questions I
7 have. Thank you, sir.

8 THE COURT: Thank you, sir. You may step down.
9 Watch your step.

10 THE WITNESS: Thank you.

11 MR. MARTIN: Let's play the video.

12 MR. HELMS: Your Honor, if it pleases the Court, can
13 I sit back here?

14 THE COURT: Yes, sir.

15 MR. HELMS: Thank you.

16 THE COURT: Tell me again, who is this?

17 MR. MARTIN: Judge, this is pathologist, Lee Proctor.
18 Lee was doing autopsies for Horry County back in 2020 when this
19 one was conducted on Mr. Pennington, and he had a medical
20 appointment in New York, and we agreed to do him by video so
21 that we could present this to you and allow him to meet what
22 was an important appointment. He got really sick with COVID
23 after he was doing this work. This is a video deposition of
24 Dr. Lee Proctor who did the autopsy on Mr. Pennington on May
25 15, 2020.

1 MR. HELMS: And Your Honor, if I may?

2 THE COURT: Yes.

3 MR. HELMS: Just for the record, our objection is not
4 a general objection to Dr. Proctor's testimony. Obviously, he
5 is the pathologist who conducted the autopsy on the victim.
6 His testimony is not only relevant, it's admissible, Judge, as
7 it concerns that autopsy, however, Judge, I think implicitly
8 the defense has agreed that a toxicologist is a specialized
9 medicine by calling a toxicologist to the stand. In this
10 testimony they are going to try to introduce Dr. Proctor's
11 testimony as a hybrid testimony of both professionalism and
12 toxicology, which they've already called to the stand, Judge,
13 as well as touch on the subject matter of the autopsy that he
14 conducted on Mr. Pennington. Our objection is noted in the
15 video, we object prior to the testimony. Judge, I don't want
16 to interrupt the video to object, if I can help it, I guess,
17 Judge, if we need to we will to preserve our objection, but
18 that is our general objection, and the testimony ventures into
19 that later in his testimony, into that forbidden, for lack of a
20 better term, area that we would say is outside the scope of his
21 expertise, Your Honor. I think you'll see that in the
22 substance of the testimony itself.

23 THE COURT: I'm not clear as to what your objection
24 is going to be, but thank you for that information. I will
25 listen.

1 MR. HELMS: Fair enough. Thank you, Judge.

2 (Video playing.)

3 MS. LIVESAY: There's a chair right there if you want
4 to wheel it over.

5 MR. MARTIN: Okay. Your Honor, if I may ask, is
6 there any way that the defendant can be seated right here with
7 the deputies so that he can view the tape?

8 THE COURT: Yes. I'm not hearing it.

9 (Video Deposition of Dr. Proctor playing)

10 MR. HELMS: Your Honor, at this time she's going to
11 go to a different location. This same interview is saved on
12 the actual computer. We think it may play a little better if
13 there's no objection from the defense.

14 MR. MARTIN: No objection to that.

15 MR. HELMS: Thank you, sir.

16 MS. LIVESAY: Do you want to just pick up where we
17 left off?

18 MR. MARTIN: Yes.

19 MS. LIVESAY: Okay. Seven minutes and eighteen
20 seconds.

21 MR. MARTIN: As far as I'm concerned, just pick up
22 where we left off.

23 (Video Deposition of Dr. Proctor continued playing)

24 MR. MARTIN: Can we stop just a second? Judge, if
25 you would like, those photographs have got to be here

1 somewhere. They were taken into evidence by that court
2 reporter, you can get them later, but I was thinking if you
3 wanted to see what was handed to him as it was going along we
4 can get them to you. Do you know where the photographs are
5 that the court reporter --

6 MS. LIVESAY: They brought them, I'm sure.

7 MR. MARTIN JR.: These are all the photos and
8 exhibits admitted in this testimony. That one on top,
9 particularly, is the one he's talking about at the moment.

10 THE COURT: So the numbers that I see are the numbers
11 that he's going to reference in the video?

12 MR. MARTIN JR.: That's correct, Your Honor.

13 THE COURT: Okay. Thank you.

14 MR. MARTIN: Judge, we're going to reference some
15 more exhibits that are down here, but I think you're going to
16 be able to see them on the video, but if you can't let me know.
17 Thank you.

18 (Video playing.)

19 MR. HELMS: Please stop it. It's from here on that
20 the State objects to the further testimony.

21 THE COURT: Tell me again the basis of the objection.

22 MR. HELMS: Your Honor, the basis of the objection is
23 he's testifying at this point not to the findings of the
24 autopsy, Your Honor, but as to his opinion as to the
25 compounding effects of the tox screen that was conducted on the

1 victim, it exceeds his expertise, Judge. I think that's
2 implicitly agreed to by the defense by the fact that they
3 called a toxicologist yesterday for the reason to testify as to
4 those specific findings, and for that reason this is not only
5 outside the scope of Dr. Proctor's expertise, but Judge, it's
6 unduly cumulative.

7 MR. MARTIN: I do not implicitly agree by calling the
8 toxicologist that he's not qualified to testify as he does in
9 this video. In my 35 years of practicing law, a forensic
10 pathologist had been qualified to comment on the general
11 effects of alcohol and the drugs in the body. Now, they raise
12 this objection and then we took the testimony and we raise the
13 objection so I decided to the extent that there was any
14 question, ultimately, in your mind or a jury's mind about the
15 relevance of this testimony, I did get a toxicologist to add to
16 what Dr. Proctor said, but again, I don't implicitly agree that
17 Proctor can't testify, I just got additional testimony for the
18 Court.

19 THE COURT: Anything else?

20 MR. HELMS: No.

21 THE COURT: I'm going to allow it for purposes of
22 this hearing, so we're going to proceed on, and the rulings for
23 this hearing are not rulings that will be made at the trial of
24 the case.

25 MR. HELMS: Understood. Thank you, Your Honor.

1 (Video playing.)

2 THE COURT: Alright, now, she's still making the same
3 objections that I just ruled on, so I don't need to address
4 those? Okay. Let's take a short recess.

5 MR. HELMS: Yes, sir.

6 MS. LIVESAY: And Judge, we did that just to preserve
7 it for today in the video.

8 THE COURT: Okay. We're going to step down and come
9 back.

10 (Recess taken.)

11 (Video playing.)

12 THE COURT: Do I need to rule on that one?

13 MR. MARTIN: Judge, I think so, and I hadn't said
14 anything to this point because you got to see what it is to do,
15 but I do object to the introduction of that diagram because
16 number one, it hasn't been authenticated, and number two, it's
17 not to scale and the relevance of it would be related to
18 distance.

19 MS. LIVESAY: Your Honor, as we've seen from Dr.
20 Proctor's testimony, Dr. Proctor authenticated it when he
21 testified as to stippling and said this is exactly what he's
22 looking for when it comes to stippling. This is what the
23 wound's going to look like closer and the further you get away,
24 these are the changes because this is how the gun works. So
25 it's relevant because Dr. Proctor said that this was accurate

1 as to what you would expect to see from the wound as to the
2 distance, even to the spreading of the stippling the further
3 you get away. In fact, he said, this is --

4 THE COURT: I understand that. I'm telling you
5 address to the issues that he raised.

6 MS. LIVESAY: He raised the issue that it's not
7 relevant. Of course it's relevant. His entire testimony to
8 Morgan Martin was as to the stippling and to the distance of
9 the wound.

10 THE COURT: She says it is relevant.

11 MR. MARTIN: And first of all, my objection was not
12 as to relevance, but I can certainly throw that in there, but
13 that, I would say, first of all, that diagram, that exhibit is
14 not relevant to this case because as Dr. Proctor pointed out at
15 the end of his testimony, it does not take into account that
16 this bullet went through glass which would have some effect on
17 the stippling. I'll go back again. That diagram has not been
18 authenticated, and I don't think Dr. Proctor did that other
19 than in a general context. Here we're in a specific context of
20 this case and we're talking about distances. He said ten to 12
21 inches. That diagram is not to scale, has no measurements on
22 it, and in general I would object and certainly accept your
23 ruling.

24 THE COURT: Anything else from the State?

25 MS. LIVESAY: Yes, sir, Your Honor. If I may? Dr.

1 Proctor says --

2 THE COURT: Are you go back to his testimony?

3 MS. LIVESAY: -- the diagram was accurate. He did
4 say this is what he's looking for on the wounds to determine
5 how close the shot was, so clearly it's relevant and it's
6 accurate. No diagram can take into account every circumstance,
7 just like no map can. Not every map is going to show every car
8 that was up there that day, that time, but it's still accurate
9 as to what it's being used for. So Dr. Proctor authenticated
10 it when he said this is how the gun works, this is how the
11 wounds appear according to closeness. He also said this was
12 accurate as to the further you are away from the barrel the
13 further the spread of the stippling is.

14 THE COURT: I'm going to allow it in for what it's
15 worth and what I use with the phrase, what it's worth, is I
16 will take that the doctor did not prepare it and he did qualify
17 his answers at the end by saying he doesn't take into account
18 that it went through the glass, but it is a demonstrative tool
19 that is beneficial to the trier of facts and part of this
20 hearing as to the understanding of what took place when a
21 gunshot of that nature happened, so I'll accept it into
22 evidence. Alright? Go ahead.

23 (Video playing)

24 THE COURT: Did I need to rule on that?

25 MR. HELMS: Your Honor, my position is, however

1 you've been handling objections up to this point, there have
2 been many of them, I would ask you to continue handling them in
3 that same fashion. I don't know if you've been ruling on them
4 to yourself or if you've been --

5 THE COURT: Well, some of the objections I have not
6 voiced because the response is just an obvious decision on my
7 part and since there is no jury here I've taken those
8 objections and I've digested them to be more of attack on
9 credibility or lack of credibility or the weight of the
10 evidence or the lack of the weight of the evidence and so I
11 have not felt the need to make a verbal ruling, but whenever
12 they start going back and forth and back and forth on the video
13 then I feel like I need to say something.

14 MR. HELMS: I understand.

15 THE COURT: So I depended upon, also, the lawyers to
16 let me know when there was an objection substantial enough or
17 material enough to the information I'm receiving that I needed
18 to make an objection, as well, so do not take that I stayed
19 silent as being an indication that I've had some plan on the
20 ruling. Okay?

21 MR. HELMS: Yes, sir.

22 THE COURT: Now, that being said, do I need to rule
23 on this one?

24 MR. MARTIN: And I'm not clear exactly what this one
25 is, so I will go back and say I objected, Judge, to the line of

1 questioning about Dunes Club membership and his line of
2 relationship with me, and you know, I didn't raise that at the
3 time it came up on the video because you have to hear it to see
4 what you can rule on. If that were before a jury I would
5 object to it and, technically, I object to it now because I
6 think it's not relevant and is in some ways an attack on the
7 character of Dr. Proctor or maybe myself of having the audacity
8 to call him as a witness.

9 MS. LIVESAY: It goes towards bias, Your Honor, it's
10 certainly not an attack on anybody's character. It just goes
11 towards, look, these people are friends. Clearly, throughout
12 the testimony there were things testified --

13 THE COURT: I understand. I don't need a long
14 explanation, just tell me what your position is.

15 MS. LIVESAY: That it goes towards bias, and I do
16 think, as you know, that several things were answered by Dr.
17 Proctor that were not in the report.

18 THE COURT: I think her line of questioning is proper
19 cross-examination, especially at a hearing like this. If it
20 goes in front of a jury then maybe the decision is different
21 because it is an attack that requires you to go after the
22 lawyer. Okay? And I am concerned of the constitutional
23 ramifications any time that that happens when you bring the
24 lawyer into play, as opposed to that question about has he been
25 paid, the amount of money that's been paid and did the lawyer

1 pay me, that's different, I think that is definitely proper,
2 but I think for a hearing like this your questioning is in
3 line. So your objection is noted. If you all need to preserve
4 it for the record you preserve for whatever value it is for the
5 record. Okay?

6 MR. HELMS: Yes.

7 THE COURT: Anything else?

8 MR. HELMS: No, sir, Your Honor, the only other thing
9 I'll bring to the Court's attention is you said something in
10 regards to the substantiality of the objection. I would draw
11 the attention of the Court to our objection for Dr. Proctor
12 testifying outside the scope of his expertise in terms of
13 ballistics and toxicology.

14 THE COURT: Okay. And I think I've already ruled on
15 that, as well as I've heard additional testimony from this
16 witness that the issue of him testifying as to toxicology is in
17 his opinion is encompassed within that forensic pathology area
18 that he is qualified to testify to, to his testimony as far as
19 it relates to forensic toxicology that applies to his work, I
20 think is appropriate. I think the record has shown that he is
21 qualified in that manner and that I feel confident to allow his
22 testimony in for purposes of this hearing.

23 MR. HELMS: I understand.

24 THE COURT: As well as his testimony as to his work
25 with the ballistics, his history, his expertise, working for

1 the county, and in fact that he's come to court to testify to
2 and I think the Court can take judicial notice of the numerous
3 times this Court has sat in a Court of law, heard a pathologist
4 who performed the actual autopsy report of a deceased to come
5 into court to testify as what his showings were as to bullets,
6 the cause of the death, the toxicology results, and so I think
7 his testimony has been all in line on that issue. Do you have
8 anything else you wish me to rule on that relates to this
9 witnesses area of testimony in the area of toxicology?

10 MR. HELMS: I do not.

11 THE COURT: Do you have anything else for this Court
12 to opine on this witnesses testimony area of toxicology?

13 MR. HELMS: No, sir.

14 THE COURT: Thank you very much. Let's move on.

15 (Video playing.)

16 (Dr. Proctor video deposition concluded)

17 THE COURT: Do you all need a break?

18 MR. MARTIN: I'm good, Judge.

19 THE COURT: Do you want to call your next witness?

20 MR. MARTIN: We would move into evidence Dr.

21 Proctor's video deposition and the exhibits that he testified
22 to at the trial with the exception of the State's Exhibit
23 number 8.

24 THE COURT: Okay. But I thought I ruled that State's
25 eight would come in.

1 MR. MARTIN: And I'm not sure, Judge, and if it is
2 then certainly I accept that, I just wanted to make that note
3 for the record.

4 THE COURT: For purposes of this hearing it was in.

5 MR. MARTIN: We do need to mark the video itself.

6 **Dennis McLain Lewis being first duly sworn, testified**
7 **as follows:**

8 **DIRECT EXAMINATION**

9 BY MR. MARTIN:

10 Q. Mr. Lewis, are you retired?

11 A. Yes, sir.

12 Q. Glad to be?

13 A. Amen.

14 Q. And you were formerly with the Horry County Police
15 Department?

16 A. I was.

17 Q. When did you retire?

18 A. This year.

19 Q. This year, in 2022?

20 A. Yes, sir.

21 Q. And what was your job with the Horry County Police
22 Department?

23 A. Crime Scene Investigator.

24 Q. And as a crime scene investigator did you sometimes
25 transport evidence from the Horry County evidence locker to

1 SLED?

2 A. Yes, sir.

3 Q. And did you do that in to Anijah Michael Pennington
4 case?

5 A. Yes, sir.

6 Q. Let me show you what is marked as --

7 MR. MARTIN: Judge, let me say for the record, I'm
8 calling Mr. Lewis a bit out of order because of his time
9 schedule. The State wanted him to testify to these matters and
10 I'm going to hand him some evidence that was taken by
11 investigative officers and then analyzed by SLED. He is solely
12 for the purposes of a chain.

13 (Defendant's Exhibit No. 5 was marked for
14 identification.)

15 Q. Let me show you what's marked as Defendant's number five
16 and ask you if you can identify that.

17 A. Yes, sir, it's latent prints lifted from a door, front
18 door.

19 Q. Latent prints lifted from a front door?

20 A. Yes, sir.

21 Q. And did you transport that latent print from the Horry
22 County evidence locker to SLED?

23 A. Yes, sir.

24 Q. And when you got it to take it to SLED who do you leave
25 it with there?

1 A. With the check-in receptionist. We turn it into SLED
2 and they take it and, yes, sir.

3 Q. Did you change it or alter it in any fashion?

4 A. No, sir.

5 Q. Did you deliver it in a sealed fashion --

6 A. Yes, sir.

7 Q. -- as it was delivered to you?

8 A. Yes, sir.

9 (Defendant's Exhibit No. 7 was marked for identification.)

10 Q. Let me show you defendant's exhibit number 7 and ask you
11 the same question about that.

12 A. Yes, sir, this is major case prints, yes, sir.

13 Q. And again, that's major case prints, does it say of who?

14 A. Yes, sir, it says of Michael Pennington the third.

15 Q. And that was retrieved from you at the Horry County
16 evidence locker and taken to SLED?

17 A. Yes, sir.

18 Q. Did you alter it in if any fashion?

19 A. No, sir.

20 Q. Did you unseal it?

21 A. No, sir.

22 Q. Did you deliver it as you removed it from the Horry
23 County evidence locker?

24 A. I did.

25

1 (Defendant's Exhibit No. 3 was marked for identification.)

2 Q. Let me show you what's marked as Defendant's Exhibit No.
3 6. Strike that. Let me hand you Defendant's Exhibit Number 3
4 and ask you if you can identify that.

5 A. Yes, sir, some buccal swabs, I do believe, and DNA
6 evidence.

7 Q. And buccal swabs, does it say of who?

8 A. Michael Pennington the third.

9 Q. And did you deliver that to SLED?

10 A. Yes, sir.

11 Q. From the Horry County evidence locker?

12 A. I did.

13 Q. Did you unseal it or alter it in any fashion?

14 A. No, sir.

15 Q. Did you deliver it to SLED as you had received it?

16 A. I did.

17 Q. Let me show you what is marked as Defendant's Exhibit
18 No. 3 and ask you if you can identify that.

19 A. The touch DNA collected from exterior driver door.

20 Q. Did you retrieve from Horry County evidence locker?

21 A. Yes, sir.

22 Q. Did you take it to SLED?

23 A. I did.

24 Q. Did you open it or alter it in any fashion?

25 A. No, sir, I did not.

1 MR. MARTIN: Let me show you what is marked as
2 State's Exhibit number six. Can we double mark them, or is
3 that not the way to do things?

4 THE COURT: I have no problem with double marking as
5 long as you can all be sure, that you all can tell --

6 MR. MARTIN: I didn't realize that the State had.

7 MS. LIVESAY: I'll look at it before we --

8 MR. MARTIN: And I don't know that there's a need to
9 double mark it. I'll take back the question.

10 Q. Dennis, they say that you did not take this but let me
11 show you State's Exhibit 6 and ask you if you can identify it?

12 A. It's touch DNA from the trigger swab from the trigger of
13 the handgun Glock.

14 Q. Do you know whether you took it or not?

15 A. I'm not sure without the chain.

16 Q. Well, did you have a chain with you?

17 A. When I carried these? I'm not positive on that.

18 MR. MARTIN: Let me ask the State just in an effort
19 to save some time, who took those to buccal swabs to Columbia?

20 MS. LIVESAY: Lori Dudley.

21 MR. MARTIN: Would you stipulate to that chain of
22 custody or do you want me to call Lori Dudley?

23 MS. LIVESAY: That's fine, and, no, you don't have to
24 call her.

25 MR. MARTIN: I do not have to call her?

1 MS. LIVESAY: No.

2 THE COURT: Thank you.

3 (Defendant's Exhibit No. 2 was marked for identification.)

4 Q. And let me show you Defendant's Exhibit number two, I
5 don't think I've shown you that one, and ask you if that's
6 something you took to Columbia?

7 A. Yes, sir, it appears so. Without the actual chains I
8 wouldn't be 100 percent positive.

9 MR. MARTIN: Do you have any objections to the chain
10 of custody on the Defendant's Exhibit Number 2, which is the
11 buccal swabs of Anijah Yarnell?

12 MS. LIVESAY: No, sir.

13 THE COURT: Tell me again what that is?

14 MR. MARTIN: It is two oral buccal swabs of Anijah
15 Yarnell. And I have looked and cannot find -- it was my
16 understanding that there were two buccal swabs of Emily Cerio
17 sent to SLED for evaluation but I can't find them here. I know
18 you might not have any idea where they are, but I'm asking you.

19 MS. LIVESAY: I don't think a buccal swab was ever
20 submitted for Emily, was it?

21 MR. MARTIN: I think it was.

22 MS. LIVESAY: I'll double check.

23 MR. MARTIN: And so for the second time, maybe we can
24 find that, but as to taking it to Columbia or not, would you
25 stipulate to the chain of custody in the event Mr. Lewis is the

1 man that took it?

2 MS. LIVESAY: I don't mind stipulating to the chain.

3 MR. MARTIN: Okay.

4 THE COURT: And that is as to something that we don't
5 have?

6 MR. MARTIN: That's as to something we don't have,
7 but it would, Your Honor, be buccal swabs taken from Emily
8 Cerio, C-e-r-i-o.

9 THE COURT: Thank you.

10 MR. MARTIN: That would be my questions for Mr.
11 Lewis, Judge.

12 MS. LIVESAY: We'll find that, Judge.

13 THE COURT: Do you all have any cross-examination?

14 MS. LIVESAY: Yes, I do have cross-examination. And
15 if I'm correct, he is trying to put in the fingerprint, the DNA
16 of Anijah and Emily and Michael Pennington?

17 MR. MARTIN: Yes, and Emily Cerio and --

18 MS. LIVESAY: So everybody from the DNA report?

19 MR. MARTIN: From the DNA report, the fingerprint
20 report with the idea that I would call Jill Domogauer, Heather
21 Wilson, to establish that they took the prints from the car and
22 from the victim and then Kimberly Mears to testify about the
23 print from SLED and then would call whoever was necessary for
24 taking the buccal swabs that were later tested by Sara Zapata
25 from SLED.

1 MS. LIVESAY: Okay.

2 **CROSS-EXAMINATION**

3 BY MS. LIVESAY:

4 Q. Mr. Lewis, you were currently working at Horry County
5 Police Department in 2020, correct?

6 A. Yes, ma'am.

7 Q. And you were working in crime scene?

8 A. Yes, ma'am.

9 Q. You were a crime scene investigator?

10 A. That's correct.

11 Q. And who else was in crime scene at the time?

12 A. 2020?

13 Q. Yes, sir.

14 A. Jill Domogauer, I'm not sure about Robbie Car (Ph), I
15 don't know if he retired yet or not --

16 Q. Okay.

17 A. -- and myself.

18 Q. So it was you, Jill Domogauer and Heather Wilson?

19 A. In 2020, I'm not sure, but yes, ma'am, Heather Wilson
20 was back there. I don't know if she was there in 2020. I'm
21 not sure.

22 Q. But you're sure that you and Jill Domogauer were back
23 there?

24 A. Yes, ma'am.

25 Q. Okay. And you took fingerprints to SLED for comparison;

1 is that correct?

2 A. Yes, ma'am.

3 Q. So neither you nor Jill Domogauer made any kind of
4 fingerprint comparisons there in the lab?

5 A. No, ma'am, I did not.

6 Q. And you also took the DNA, as well, correct?

7 A. Yes, ma'am.

8 Q. Or somebody did?

9 A. Yes.

10 Q. Okay. So nobody in-house there at the county processed
11 any kind of DNA, any kind of comparisons, anything like that?

12 A. No, ma'am, not to my knowledge, no, ma'am.

13 Q. So nobody did any comparisons of the fingerprint, nobody
14 did can any comparisons of the DNA; is that correct?

15 A. That's correct.

16 Q. And it's customary that crime scene investigators
17 outsource all those type of analysis to SLED; is that correct?

18 A. Yes, ma'am.

19 Q. So it's the normal course of business, and at the time
20 you collected evidence, as well, correct?

21 A. I'm not sure. On this scene I don't think I collected
22 any, no.

23 Q. No, not on this case, but as a crime scene
24 investigator --

25 A. Yes, ma'am.

1 Q. -- you would collect evidence, take pictures, correct?

2 A. That's correct.

3 Q. And then when things needed further analysis, they were
4 sent to SLED?

5 A. That is correct, yes, ma'am.

6 Q. And none of that stuff was done in-house?

7 A. It was not.

8 MS. LIVESAY: No further questions, Judge.

9 THE COURT: Any redirect on what she went into?

10 MR. MARTIN: No, no further questions, Judge.

11 THE COURT: Thank you, sir. You may step down. Be
12 careful stepping down.

13 THE WITNESS: Can I be relieved from my subpoena?

14 MS. LIVESAY: Yes, I'm assuming so. Can he be
15 relieved?

16 THE COURT: Any objection to him being released?

17 MR. MARTIN: Yes, yes, unless and until he were
18 needed for trial, he's under subpoena, in the event we go
19 forward with the trial this week.

20 THE COURT: So that's a yes and no answer. I think
21 you can leave the building for today, but you can't go anywhere
22 to talk to the lawyers, they'll inform you.

23 MR. HELMS: And Judge, we have Mr. Lewis' cell phone
24 number, we can get ahold of him pretty easy.

25 THE COURT: Thank you.

1 MR. MARTIN: Heather Wilson.

2 THE COURT: Will the lawyers approach a second?

3 (Off the record discussion was held at bench by Court
4 and counsel.)

5 MR. MARTIN: Judge, we would call Heather Wilson for
6 the purpose of establishing in this case that she took known
7 case prints of the deceased, Mr. Michael Pennington, which Mr.
8 Lewis just testified that he took to SLED where they were
9 examined to establish a complete chain of custody. It's my
10 understanding that the State has now decided they will
11 stipulate to that, and we do not need to call Ms. Wilson.

12 MS. LIVESAY: That's correct. For the purposes of
13 this hearing we stipulate that Heather Lewis collected the
14 prints from the victim, Michael Pennington, and of course that
15 was postmortem.

16 MR. MARTIN: Is that Heather Lewis or Wilson?

17 MS. LIVESAY: Wilson.

18 THE COURT: Okay, then ma'am, talk to the lawyers,
19 but I think you can leave, but be sure that you get the
20 permission from them. Thank you for coming.

21 MS. WILSON: Thank you, Your Honor.

22 MR. HELMS: We have no objection.

23 THE COURT: With that, let's take a lunch break. Why
24 don't we try to come back about 1:30, 1:35?

25 MR. HELMS: Yes, sir, Your Honor.

1 THE COURT: Thank you.

2 (Recess taken.)

3 MR. MARTIN JR.: Your Honor, our next witness, the
4 crime scene analyst, Ms. Domogauer, has just texted the State
5 and let her know she is in traffic, she is trying to get back
6 here.

7 MR. MARTIN: Well, what we can do, Judge, it's a
8 little out of order, but I've got the SLED people here. I can
9 get the fingerprint lady from SLED to testify and then we can
10 put Jill up to hook it up later on since we are dealing with a
11 judge and not a jury.

12 MS. LIVESAY: Judge, before we even get into that,
13 the State's got some questions regarding scheduling. The State
14 has five people here from New York and we've got word from our
15 office that the Court does not intend to go forward for the
16 trial of this case this week, so we're just trying to figure
17 out scheduling --

18 THE COURT: Where did you get that information?

19 MS. LIVESAY: Mary-Ellen Walter is the attorney in
20 our office that corresponds with Tammie Butler and she just
21 told us that Tammie indicated that you wanted a two-day trial
22 for the end of this week.

23 THE COURT: Well, I never said that so your
24 information is wrong. Ask me your question. What is your
25 question?

1 MS. LIVESAY: If this makes it past Stand Your
2 Ground, does the Court intend to move forward with the trial
3 this week?

4 THE COURT: I don't know. We can address that when
5 we get to that point. Let me tell you why, but I'm not going
6 to answer your question at this time, because I'm in control of
7 this case right now.

8 MS. LIVESAY: Yes, sir.

9 THE COURT: And I am going to want to meet with the
10 lawyers after we have this evidence that's presented to me and
11 see where this case stands because as this case is being
12 presented now, neither side has the perfect case, and this case
13 might be something that probably we need to talk about maybe
14 resolving.

15 MS. LIVESAY: I understand, and again, the only
16 reason we were checking is because at this time the State is
17 accommodating probably seven out of town witnesses so we're
18 just trying to forecast kind of what we need to go --

19 THE COURT: I'll step down and we'll come back.

20 (Recess taken.)

21 THE COURT: Is your witness here yet?

22 MS. LIVESAY: Yes, sir.

23 THE COURT: Let's bring them in.

24 MR. MARTIN: Judge, we can proceed with Ms. Mears and
25 we'll call the crime scene analyst when she gets here.

1 THE COURT: Okay.

2 **Kimberly Mears being first duly sworn, testified as**
3 **follows:**

4 THE WITNESS: My name is Kimberly Mears, first name
5 spelled K-i-m-b-e-r-l-y, last name is M-e-a-r-s.

6 **VOIR DIRE**

7 BY MR. MARTIN:

8 Q. Ms. Mears, you're employed with SLED?

9 A. That's correct.

10 Q. In what capacity?

11 A. I'm a forensic scientist in the latent print department.

12 Q. And what are your qualifications that make you qualified
13 to compare and testify as to print identification?

14 A. I have a Bachelor of Science Degree in Biology from
15 Winthrop University. Once hired by SLED's latent print
16 department I completed their in-house training program which
17 lasted about a year. I was also accepted into the latent print
18 examiner training program sponsored by the National Institute
19 of Justice, and that was a ten-week program with courses
20 covering all aspects of fingerprint work.

21 Q. Have you been qualified as an expert -- well, what is
22 your field, specifically, so I ask the question correctly?

23 A. It can be latent print analysis, latent print
24 comparison.

25 Q. Have you been qualified as an expert in the field of

1 latent print analysis in the courts of South Carolina?

2 A. Yes, I have.

3 Q. On, roughly, how many occasions?

4 A. About 27.

5 MR. MARTIN: We'd offer Ms. Mears as an expert in the
6 field of latent print --

7 MS. LIVESAY: We don't contest that she's an expert.

8 THE COURT: In what area?

9 MS. LIVESAY: We have no objection that she's an
10 expert in fingerprints.

11 THE COURT: What is the area?

12 MR. MARTIN: Latent print identification; is that
13 correct?

14 THE WITNESS: That's right.

15 THE COURT: Thank you very much.

16 **DIRECT EXAMINATION**

17 BY MR. MARTIN:

18 Q. Let me show you what's been marked as Defendant's
19 Exhibit Number 5 and Number 7 and ask you if you can identify
20 those and tell the Court what you have done in connection with
21 those two items of evidence?

22 A. So Exhibit 5 is SLED's item 18, that does have my SLED
23 lab number, item number and initials, and this is the latent or
24 unknown print I received from the scene, and then Exhibit 7 is
25 SLED's lab item number 19 that has the SLED lab number item

1 number and my initials on these, and these are the postmortem
2 known fingerprints of Michael Pennington the third and I was
3 asked to compare the latent lift to the known prints.

4 Q. And does that latent lift indicate to you where it came
5 from?

6 A. Driver door front.

7 Q. Driver door front.

8 A. Yes.

9 Q. Did you make that comparison?

10 A. Yes, I did.

11 Q. Were you able to make an identification?

12 A. Yes. The latent print was identified the postmortems
13 bearing the name Michael Pennington the third.

14 Q. And so to be sure that I've got this clearly on the
15 record, the deceased, Michael Pennington's prints, and let me
16 ask you -- prints were found on or matched the latent prints
17 sent to you that were marked, driver's side door?

18 A. That is correct. The postmortems matched, or were
19 identified to the latent print from the driver door.

20 Q. And can you tell the Court whether it was fingers or
21 what portion of the hand was identified as a match?

22 A. The impression on the latent lift is of a left palm and
23 it was identified to the left palm from the post-mortem prints.

24 Q. Did you prepare an exhibit to show the Court the points
25 of match that you identified?

1 A. Yes, I did.

2 Q. Where is that?

3 A. It's right here (indicating.)

4 (Defendant's Exhibit No. 42 was marked for
5 identification and admitted into evidence.)

6 THE COURT: Without objection?

7 MS. LIVESAY: Without objection.

8 THE COURT: She can't take down raising a thumb,
9 okay?

10 MS. LIVESAY: Yes, sir.

11 THE COURT: Thank you. What number is that?

12 MR. MARTIN: Judge, this is Defendant's Exhibit 42.

13 THE COURT: Thank you.

14 Q. If you would, Ms. Mears, take Exhibit 42 and I know you
15 said it's a match, just give the judge a little more analysis
16 of how you reached that conclusion.

17 A. So the black lines we're looking at are the ridges
18 represented on the skin and you can see throughout, they're not
19 running uniformly from one side to the other. One ridge can
20 fork into two, bifurcation, a ridge can just stop, any ridge,
21 ridges can also just form dots which look like the period at
22 the end of the sentence. Those are what we call ridge
23 characteristics and when doing that comparison between unknown
24 or latent print with the known print we're looking at the
25 characteristics and the relationship to each other between the

1 unknown and the known. So just to what I have marked here,
2 line A is pointing to this ending ridge that's coming in and
3 then just stops here. You can go two ridges down to the point
4 marked "I," another ridge that comes in from the left and just
5 stops and you work your way down, the same is true in the
6 known. We have this ending ridge marked "A," work your way
7 down to another ending ridge marked "I" and the same is true
8 throughout the whole impression, A, B, C, D, correspond to A,
9 B, C & D between the known and the unknown. We work our way
10 through looking for similarities or disagreement between the
11 two, and in this case there is no disagreement between the
12 unknown and known print. There are additional points of ridge
13 characteristics in agreement between these two, they are just
14 not marked for the purposes of this chart to still be able to
15 see the prints themselves.

16 Q. Okay. And in a layman's way of asking, is there any
17 question but that Mr. Pennington's prints were matched the
18 latent print lift from the driver's side door as identified to
19 you?

20 A. No, it is identified.

21 Q. And it's Michael Pennington's handprint?

22 A. That is correct.

23 MR. MARTIN: That's all the questions I have for Ms.
24 Mears.

25

CROSS-EXAMINATION

1

2 BY MS. LIVESAY:

3 Q. That fingerprint, what part of the hand was the print?

4 A. So it's on the left palm. It's what we call the
5 hypothenar region which is the large region below the little
6 and ring fingers.

7 Q. Okay. So the left part right here?

8 A. Kind of closer towards the wrist, yes.

9 Q. So down the palm?

10 A. Yes, the meaty portion of the palm?

11 Q. And that was the left hand?

12 A. That's correct.

13 Q. Is there any way you can tell when that print was left
14 on the vehicle?

15 A. No, there is no way for me to tell.

16 Q. Is there any way for you to know whether somebody walked
17 up to the vehicle aggressively and left the print or if
18 somebody just put their hand up there?

19 A. No, there's no way for me to tell.

20 Q. So you don't know if he just walked up and put his hand
21 on the car to talk to the guy or whether he walked up
22 aggressively to the car; is that right?

23 A. There is right, I don't know.

24 Q. And there's no way for you to tell when the print was
25 left on the car?

1 A. That's correct.

2 Q. You know, sometimes there is what they call, I guess,
3 maybe an identifier on the print, like a scar. Do you know
4 what I'm talking about?

5 A. We would call that a focal point.

6 Q. Okay, good. I knew it had a name, I've been doing this
7 long enough, and that's something that kind of identifies it,
8 like a scar?

9 A. It would make it more unique, yes.

10 Q. And do we have anything like that in this case?

11 A. No, not in the form of a scar or anything like that, no.

12 Q. And you call that a focal point?

13 A. Yes.

14 Q. Do we have any kind of focal point in this particular
15 case?

16 A. A focal point can be something that stands out like a
17 scar. It can also be a specific cluster of ridge
18 characteristics, which we do have those in this.

19 Q. Okay, but do we have anything like a scar?

20 A. No.

21 Q. And a cluster is just you matching what we just looked
22 at on the diagram?

23 A. Right. There might be three or four in a group that
24 look really good that stand out more than the rest.

25 Q. And how many points did we have here?

1 A. In this chart, I marked nine. There are actually more
2 than that, but we do not count. I don't have a total number
3 for you.

4 Q. And is there any kind of standard of how many ridge
5 points have to match?

6 A. No. That depends on the overall quality of the print
7 itself and how much of that print or the quantity that is
8 represented.

9 Q. So it's not like DNA where it's got to match so many
10 alleles?

11 A. No.

12 Q. So it could be five, it could be ten, it could be two?

13 A. Two, I would not identify anything on two, but five,
14 ten, 15, 20, there is no set number that you have to have.

15 Q. So there's no set number?

16 A. That's correct.

17 Q. I think at one time, and I could be wrong, but I heard
18 18, is that just made up?

19 A. In the United States it used to be 12, but that standard
20 went away in to 1970's, some European countries do still use, I
21 know some use 12, I know some use 16, I'm not sure specifically
22 about 18.

23 Q. And again, that number, I knew at one time there was a
24 number, I was not alive in the 70's to know it from there, but
25 I did know there was a number, and you showed us something

1 showing that there were nine points matching?

2 A. Yes. That is what I have marked on the chart.

3 Q. And in the United States there's no requirement as to
4 16, 18, and I think you said 12?

5 A. That is correct.

6 Q. But we can agree on what you showed the judge here was
7 only nine?

8 A. I have nine marked. There are more in agreement within
9 the two prints, but if I were to mark all of them then the
10 image would just be a bunch of red lines obscuring the print.

11 Q. I understand. So how many were in agreement in this
12 particular case?

13 A. We don't document a specific number so I'm not sure.

14 Q. So you don't know if it was 12 or 16 or 18?

15 A. Correct.

16 MS. LIVESAY: No further questions.

17 THE COURT: Any Redirect on what she went into?

18 **REDIRECT EXAMINATION**

19 BY MR. MARTIN:

20 Q. Any doubt about the fact that this was a clear
21 identification of Michael Pennington's known prints to the
22 latent print that you examined?

23 A. No, sir.

24 Q. Notwithstanding all that question about this point,
25 that point, how many points, what is marked, does that change

1 your opinion whatsoever this was a match of Michael Pennington
2 of the latent print?

3 A. No, sir.

4 MR. MARTIN: That's all I have.

5 THE COURT: Thank you, ma'am. You may step down.
6 Watch your step when you're stepping down.

7 MR. MARTIN: And then, Judge, obviously, unless and
8 until there is a trial we would be through with Ms. Mears for
9 today.

10 THE COURT: I take it that means you can leave, you
11 might want to talk with the lawyers to be sure.

12 THE WITNESS: Thank you.

13 THE COURT: Do you want to call your next witness?

14 MR. MARTIN: Yes. Jill Domogauer, D-o-m-o-g-a-u-e-r.

15 **DIRECT EXAMINATION**

16 BY MR. MARTIN:

17 Q. Jill, I hope I spelled your name correctly, but for the
18 record, your name is?

19 A. My name is Jill Domogauer, D-o-m-o-g-a-u-e-r.

20 Q. And you are employed with the Horry County Police
21 Department?

22 A. I'm currently a sergeant with the Horry County Police
23 Department assigned D Squad North Precinct.

24 Q. Back in May, specifically May 14, 2020 what was your
25 role with the Horry County Police Department?

1 A. I was a crime scene investigator with the Horry County
2 Police Department.

3 Q. Did you have an occasion to investigate the crime scene
4 in Mr. Yarnell's case?

5 A. Yes, I did.

6 Q. Let me show you, first of all, what's marked as Defense
7 Exhibits Number five and number seven. Let me show you what's
8 marked as number five, first of all, and ask you if you could
9 tell the Court what that is.

10 A. Defense Exhibit No. 5 is a latent lift from the driver's
11 side door of the vehicle I processed in this case.

12 Q. And did you take that latent lift yourself?

13 A. Yes, I did.

14 Q. And if you would, just tell the judge briefly why you
15 did that in the manner in which you did it.

16 A. I was processing a vehicle in reference to this
17 incident, the defendant's vehicle, I was processing it at the
18 Horry County Police Department impound yard. For that
19 processing I photographed it and I did dust for prints or use
20 chemicals for prints on the exterior of the vehicle and a print
21 appeared on the driver's side door.

22 (Defense Exhibits 10, 12 & 13 were marked for identification.)

23 Q. And let me show you what's marked for identification as
24 10, 12 and 13 and ask you if you can identify those.

25 A. Yes, I can.

1 Q. What are they?

2 A. Defendant's Exhibit 10 is a photograph that I took after
3 the latent lift was recovered from the vehicle. Defendant's
4 Exhibit 12 is the latent lift that I recovered from the vehicle
5 against the vehicle, and Defense Exhibit 13 is a latent lift
6 that's still on the vehicle prior to lifting it off.

7 Q. And all three are of that latent lift which you took?

8 A. Yes, sir.

9 MR. MARTIN: Let me move into evidence, Judge, 10, 12
10 & 13.

11 MS. LIVESAY: Without objection.

12 THE COURT: Without objection. Tell me, what is
13 Defense 7?

14 (Defense Exhibits 10, 12, & 13 were admitted into evidence.)

15 MR. MARTIN: Defense 7, Judge, was the known prints
16 of Michael Pennington, which the State has stipulated to, if I
17 recall, that were taken in this case by Heather Wilson.

18 THE COURT: Exhibits 5 & 7 were without objection as
19 well?

20 MR. MARTIN: Correct. Well, I'm getting ready to
21 offer 5 right now, so I do offer that. Exhibit 7 had been
22 offered without objection, if I'm correct.

23 MS. LIVESAY: No objection.

24 MR. HELMS: We don't have objection to any of those,
25 Your Honor.

1 THE COURT: Okay. Thank you.

2 (Defense Exhibits 5 & 7 were admitted into evidence.)

3 MR. HELMS: Yes, sir.

4 BY MR. MARTIN:

5 (Defense Exhibit No. 33 was marked for identification.)

6 Q. Let me ask you, Jill, if you can identify Defense
7 Exhibit Number 33.

8 A. Defense Exhibit 33 is my formal crime scene sketch of
9 the incident.

10 Q. Did you prepare this?

11 A. Yes, I did.

12 Q. Did you prepare it from the notes you took at the scene?

13 A. Yes, it was.

14 Q. And what do you call it again?

15 A. This is the formal computerized sketch from what's
16 called a rough sketch that I do of my field notes where I hand
17 draw it. This is just a computer generation of that particular
18 sketch.

19 Q. What would this show the Court?

20 A. The sketch indicates geographic locations such as roads
21 buildings, structures, vehicles. It has evidence listed
22 alleging for the evidence and it also has a title box with the
23 information pertaining to the incident case.

24 MR. MARTIN: We move to enter into evidence Exhibit
25 Number 33.

1 MS. LIVESAY: No objection.

2 THE COURT: Without objection.

3 (Defense Exhibit No. 33 was admitted into evidence.)

4 Q. And if you would, Jill, please maybe stand, if you
5 could, and show the Court what Exhibit 33 does show them?
6 Well, first of all, let's start with the body of Mr.
7 Pennington.

8 A. The body is found generally in this parking space right
9 here, so the Cross Gate building 290's parking lot.

10 Q. And the roadway, we'll get from another exhibit exactly,
11 but the roadway coming into this parking lot comes from where?

12 A. Deerfield Lakes Drive and you have to turn into this
13 Cross Gate Boulevard to go into the complex.

14 Q. And so would it be accurate then that in order for the
15 car of Mr. Yarnell to get here that it would in here and up
16 this way?

17 A. It would have to come through Deerfield Lakes up to
18 Cross Gate and into there.

19 Q. And then follow a driveway into this driveway?

20 A. Well, there's only one entrance in and one entrance out,
21 so it's the same entrance. You go in there, there is no
22 turnaround to come back out. You would have to go down and
23 then come back out.

24 Q. If you just kept going straight from this driveway you
25 would actually run into this building?

1 A. Yes.

2 Q. Okay. And FARO one, two and three, what does that tell
3 you, what does that tell the Judge?

4 A. I'm a FARO scanner operator. It is a device that we use
5 to digitally scan scenes if we want to make a 3D impression or
6 those kind of things at a later date and FARO one, two, three,
7 FARO one is the first position where I set my FARO scanner.
8 FARO two is the second position. FARO three would be the third
9 position of it all into that scene if I was to do a FARO sketch
10 or FARO diagram 3D visualization of the scene, we have the data
11 to do such.

12 Q. And is this to scale?

13 A. This is not, no.

14 Q. It's not to scale?

15 A. No.

16 Q. It's a general overview?

17 A. Yes.

18 Q. Alright. And you've got here listed here, NYIHKU6434,
19 do you recall what that is?

20 A. NY is the New York state and the IHKU6434 is a license
21 plate number to this vehicle right here.

22 Q. And so this SC and this FL are, once again, license
23 plates numbers to vehicles?

24 A. For the vehicles that are in these spots here. There
25 were other vehicles in all these other spots --

1 Q. I'm going to ask you that. There were vehicles
2 scattered up and down here?

3 A. Yes.

4 Q. More full than not full?

5 A. Extremely full.

6 Q. Extremely full. Now, let's go here and start with these
7 grids. Is that CS one?

8 A. That right there (indicating?) I can't read the
9 numbering. Yeah, that looks like CS one.

10 Q. And why is that noted on your diagram?

11 A. These were pieces of evidence that were identified and
12 collected.

13 Q. And what piece of evidence was CS one?

14 A. If I'm not mistaken, I'd much rather read it from my
15 notes. It's a more clearer version than that one version: A
16 Marlboro Lights cigarette butt located on the ground near the
17 victim's body.

18 Q. And how about, since you've got that out, CS two?

19 A. CS one is right here. That's CS four that you're
20 pointing to.

21 Q. Oh, I'm sorry. You tell the judge what's here.

22 A. CS one would be a Marlboro cigarette light butt by the
23 victim's body. CS two would be a Marlboro menthol cigarette
24 butt located on the ground -- more closer to this one.

25 Q. Next, CS -- what is your next number?

1 A. CS three is Michelob beer Ultra. There was a case of
2 eleven full cans and one opened partly can on the ground
3 between a silver Toyota and a Dodge van, between these two
4 vehicles here, sir.

5 Q. Now, that can that was open, did it have any beer in it?

6 A. Yes, it did.

7 Q. And had it spilled out or was it set up on the asphalt?

8 A. It was just sitting on the asphalt.

9 Q. What's the next number you got there?

10 A. CS four was this area right here.

11 Q. Yeah.

12 A. That's going to be a Marlboro Light cigarette butt
13 located on the ground near the silver Dodge van.

14 Q. How about the next one?

15 A. CS five, partly smoked cigar with green leafy substance
16 on the ground near the driver's side front of the Hyundai.

17 Q. Would that appear to you to be marijuana?

18 A. Green leafy substance, yes.

19 Q. Green leafy substance is code for what?

20 A. It's marijuana.

21 Q. And that was located where?

22 A. Right here by the Hyundai.

23 Q. The car with the New York tags?

24 A. Yes.

25 Q. What's the next number, CS six?

1 A. CS six is a swab from the ground near the front of the
2 Hyundai. This dot here is a blood trail and this indicates the
3 area of which I swabbed some of that blood into a collection.

4 (Defense Exhibit No. 32 was marked for identification.)

5 Q. Okay. Thank you. Jill, let me show you what is marked
6 as Defendant's Exhibit Number 32 and ask you if you can
7 identify what that is a photograph of.

8 A. This is the aerial photograph of the apartment complex
9 and some of the side roads.

10 Q. And in essence, I guess the aerial photograph of the
11 scene, the scene depicted in your crime scene sketch of this
12 Exhibit 33?

13 A. Yes, a bigger version of it.

14 Q. And it shows the area where this offense occurred; is
15 that correct?

16 A. Yes.

17 Q. I'd move to enter this into evidence.

18 MR. MARTIN: The Google Earth photograph.

19 MS. LIVESAY: Your Honor, we object to this Google
20 map for two reasons. One, is we did not receive it before
21 today. Two, it does not even show the inference to the
22 apartment complex, so I appreciate that Ms. Domogauer said it
23 mirrored her sketch, but in fact it doesn't even show the
24 entrance into the apartment complex.

25 MR. MARTIN: Well, Judge, it may not the entrance

1 into the apartment complex, but that's not the reason for the
2 exhibit. It is to exhibit to the Court an overview of where
3 this took place, the parking places where the people were for
4 the condominium at the end of the street is in order to
5 acclimate yourself as to what this incident location looked
6 like, and we believe that it is authentic and a foundation has
7 been laid and I ask you to admit it.

8 THE COURT: I'll allow it. Go ahead.

9 (Defense Exhibit No. 32 was admitted into evidence.)

10 Q. Ms. Domogauer, and again, I know you didn't create this
11 next photograph, but could you look on the Defendant's Exhibit
12 Number 32 and point out to the Court the approximate locations
13 that are depicted on your sketch which is 33?

14 A. May I have my sketch, please? This is a bigger version
15 of this. You can see the building, this here compared to here.
16 You can see partially Deerfield Lakes, you can see some of
17 Cross Gate. You can't see the entrance from Cross Gate into
18 the complex.

19 Q. Approximately where would the entrance be from your
20 recollection?

21 A. Approximately, it's going to be over here.

22 Q. Just a little further up here and then you turn back in?

23 A. Yes.

24 Q. Okay. That's good.

25 A. This would appear to be the road that would be, I guess,

1 in question where the incident took place.

2 Q. And when we say "road," we're talking not about the road
3 here, but the driveway?

4 A. The road.

5 Q. The road. So the roads, the cars that you have marked
6 with the New York, South Carolina and Florida tags would have
7 been approximately where here, Jill?

8 A. In this parking lot, this row, I'm not saying road, row.

9 Q. Row, R-o-w.

10 A. This row back here.

11 Q. And the blood that you depicted or took samples of would
12 have been where on Exhibit 32 here?

13 A. This is a car with the Florida tag, this was the van,
14 this was supposed to be empty. This is where the victim's body
15 was, this is where the Hyundai was, this is where the blood
16 trail was.

17 MR. MARTIN: You can see this right now.

18 THE WITNESS: To look at that one you would have to
19 look at that one, as well.

20 THE COURT: Thank you.

21 (Defense Exhibits Nos. 8, 9, 11, 14, 15, 16, 17, 18,
22 19, 20, 21, 23, 24, 25 and 43 were marked for identification.)

23 Q. Now, Jill, let me show you what I've marked as defense
24 Exhibits number 8, 9, 11, 14, 15, 16, 17, 18, 19, 20, 21, 23,
25 24, 25 and 43. Can you tell the Court if those were all

1 photographs that were taken by you in the course of your
2 investigation?

3 A. They are.

4 Q. And do they accurately depict what you photographed on
5 each occasion?

6 A. Yes.

7 MR. MARTIN: We would move to enter into evidence
8 then, Judge, these exhibits.

9 MS. LIVESAY: We have objections to Defense Exhibit
10 No. 9, 14 and 20.

11 THE COURT: Okay. So 8, 11, 15, 16, 17, 18, 19, 21,
12 23, 24, 25 & 43 are admitted without objection?

13 MS. LIVESAY: Yes, sir.

14 (Defense Exhibits Nos. 8, 11, 15, 16, 17, 18, 19, 21,
15 23, 24, 25 & 43 were admitted into evidence.)

16 THE COURT: You want to be heard on 9, 14 and 20?

17 MS. LIVESAY: We do, Judge.

18 THE COURT: Go ahead.

19 MS. LIVESAY: As to Exhibit 9, it's going to be a
20 five dollar bill that was taken out of the victim's pocket
21 that's got a white powdery substance in the five dollar bill.
22 We object. That's clearly irrelevant. It has nothing to do
23 with the incident and it also would violate 404 in trying to
24 get, I guess, into the fact that the victim possibly was guilty
25 of another crime, possession of cocaine, and 14 and 20 are

1 where Ms. Domogauer has, you know, kind of stuck the window
2 back in with a rod through the hole, but clearly, by this point
3 the window had already been pushed into the driver's door of
4 the car. So it no longer accurately reflects the shape that
5 the window was in the night of the incident. This is somebody
6 picking the window back up. And you can look on Number 14 and
7 tell clearly, that is not how the window was, as well as 20,
8 the window looks nothing like that the night of the incident.

9 THE COURT: Anything in regards to her objection to
10 Number 9 on the five dollar bill?

11 MR. MARTIN: Well, Judge, I believe it is relevant,
12 and to save us some time, Jill would testify that in going
13 through Mr. Pennington's wallet she found a five dollar bill
14 with this white powdery substance, which we've got the SLED
15 analyst, but Horry County analyst to testify it was, in fact,
16 cocaine. We believe it is relevant as it goes hand in hand
17 with the toxicology report that this individual, Mr.
18 Pennington, on the night in question, again, through the
19 testimony and the record, had ingested cocaine, that this is
20 corroboration that he had cocaine on his person at the time.
21 Of course, you know the toxicologist's testimony concerning the
22 effect that may have on the person, again, one of the issues
23 that you would have to determine in hearing our Stand Your
24 Ground Motion would be as to who was the aggressor in this
25 situation, and we believe, certainly, it's relevant for that.

1 THE COURT: In regards to 14 and 20, I think those
2 would go to the weight of it, so I'm going to let you
3 cross-examine her as to those things and the difference that
4 the State may view if there's a difference in those photographs
5 as to what you've referenced in court. I'm going to allow 9 to
6 come in. You all make a very good record about this issue with
7 the cocaine, so we don't have a jury so I tend to take into
8 consideration your arguments to 404 as to whether or not or how
9 much of any weight I give to that type of evidence.

10 (Defense Exhibit No. 9 was admitted into evidence.)

11 MR. MARTIN: Very well, Your Honor.

12 THE COURT: And do you understand that? Were you
13 able to hear me?

14 MS. LIVESAY: I do.

15 THE COURT: I just wondered. You made a face, I
16 wanted to be sure that you understood it.

17 MS. LIVESAY: I think the face, Your Honor, was just
18 as to that we don't know yet that it is cocaine. As of this
19 point, I guess it's just a white powdery substance on the five
20 dollar bill.

21 THE COURT: And you can point that out through
22 cross-examination. Okay. Thank you.

23 Q. So let me start with that photograph. Exhibit 9 is
24 what, and how did you come to take that photograph?

25 A. Exhibit 9 is my crime scene collected item of evidence

1 20. It is listed as a crumbled \$5.00 bill with white powdered
2 substance that was in a wallet that was in the possession of
3 the victim, the victim's wallet.

4 Q. And you opened it up and took that photograph?

5 A. When I was back at the Horry County Police Department in
6 our crime scene lab, yes.

7 Q. And then did you submit that substance to your local or
8 in-house analyst, Courtney Johnson?

9 A. I submitted it and put in what's called an Horry County
10 Drug Best Kit, Best Kit Number H "hotel," C, "Charlie," 003355.

11 Q. And let me show you Defendant's Exhibit Number 6 and ask
12 you if you could identify that.

13 A. This is the Best Kits and the item of evidence that you
14 see in the picture, but it's -- the Best Kit that I turned in
15 was sealed and different looking than this. This was after
16 it's come from the lab.

17 Q. That's after it came from the lab?

18 A. Yes.

19 Q. But when you say, Best Kit, is that B-E-S-T?

20 A. Yes.

21 Q. And that's simply the form and manner in which you
22 submit the substance that you found for analysis?

23 A. For things that are substances and stuff like that, yes,
24 we submitted what's called a Best Kit, a controlled kit.

25 Q. And when you say "submitted," what do you actually do

1 with it?

2 A. I seal the evidence and this Best Kit was tamper proof
3 envelope. It has a control number which I just read, HC003355,
4 and then I seal it. I turn it in for it to be analyzed by our
5 chemist. Before she analyzes it she has to check the security
6 envelope, it's called a security envelope, that's why it's
7 called a Best Kit.

8 Q. And so Courtney Johnson is the analyst?

9 A. In this particular case she would have been, yes.

10 Q. Now, let me show you what is marked as Defense Exhibit
11 Number 16 and ask you if you would stand up, if you would, and
12 show the Court what that photograph depicts.

13 A. Defense Exhibit 16 is of the incident day or night, just
14 an overview of some of the scene. You can see the victim.
15 Some evidence is marked. You can see the vehicles and some
16 evidence that is marked in that parking lot area.

17 Q. And let me show you what Defense Exhibit Number 17 and
18 ask you what that is and if it shows up in Defense Exhibit
19 Number 16.

20 A. Defense Exhibit Number 17 is a closer view with evidence
21 marks in the incident scene during that night. You can see it
22 in this photograph here. This is a close up of this area here.

23 Q. And it shows what?

24 A. It shows the Dodge van and it shows --

25 Q. I'm sorry, the latter exhibit, which is going to be for

1 the record, 17, shows what?

2 A. Seventeen shows the side of the Dodge van, that case of
3 beer, one beer, that still had some beer in it and the
4 cigarette butt.

5 Q. And Defense Exhibit Number 18 is a close-up of the beer?

6 A. Yes, sir.

7 Q. And is that beer can that is opened as you found it?

8 A. Yes, sir.

9 Q. Did it have beer in it?

10 A. Yes, sir.

11 Q. And it was sitting up in that manner?

12 A. It was sitting like this.

13 Q. Let me take those from you and show you what is marked
14 as Defense Exhibit Number 21 and ask you if you can identify
15 that and tell the Court what it shows.

16 A. Defense Exhibit 21 is an overview shot of a cigar, or
17 whatever you want to call it, the green leafy substance on the
18 ground. The vehicle with the New York plates right here, you
19 can see just a little bit of the bumper.

20 Q. And the cigar wrapper with the green leafy substance was
21 not tested?

22 A. I didn't test it.

23 Q. You didn't test it in any fashion?

24 A. No, sir.

25 Q. In your investigative work is that commonly known to you

1 or appear to you to be marijuana?

2 A. Yes.

3 Q. Let me show you Defense Exhibit Number 23 and ask you if
4 you would tell the judge about that photograph?

5 A. Defense Exhibit Number 23 is a photograph that I took on
6 the scene showing an overview of injuries to the victim's body.

7 Q. It shows some dicing and stippling?

8 A. Yes. Stippling up here by the neck area, what was later
9 told to me by pathology, dicing and a gunshot wound.

10 Q. And Dr. Proctor testified about the stippling around the
11 wound, of course, I know you're not a forensic pathologist, but
12 that's a photograph you took at autopsy --

13 A. This photograph was at the crime scene.

14 Q. -- or at the crime scene, that was at the crime scene.
15 Okay. Defense Exhibit Number 24?

16 A. Defense Exhibit Number 24 is a close-up shot of the
17 victim's shirt.

18 Q. And Defense Exhibit No. 25?

19 A. Defense Exhibit Number 25 would be a shot of the
20 victim's right arm and hand and the shirt, and I think it's
21 some possible fragmentation.

22 Q. And on 25, this was taken where?

23 A. That was on the scene.

24 Q. And did you alter or change it in any shape, form or
25 fashion?

1 A. The photograph?

2 Q. Right.

3 A. No.

4 Q. Alright. And the photograph is of the right arm,
5 correct?

6 A. Yes.

7 Q. And noted just below the shirt line and just in the
8 crack of just below the elbow, can you identify for the Court
9 what you see there?

10 A. I can see what appears to be possibly abrasions and
11 blood.

12 Q. Exhibit Number 8?

13 A. Exhibit Number 8 was a picture I took of the right side
14 of the victim during the autopsy or post-examination.

15 Q. And Exhibit Number 11?

16 A. Exhibit Number 11, we're going back to the scene the day
17 of the incident. What you don't see, there's not the marker
18 there, but that green leafy substance I was talking about here,
19 this is the victim here, the New York vehicle here, but this
20 coloring here is a blood trail, and you can see some swipes of
21 blood on this particular vehicle, as well.

22 Q. Defense Exhibit Number 15?

23 A. Defense Exhibit Number 15, we're now going back to the
24 autopsy. This is towards the conclusion of the autopsy where
25 the pathologist puts a rod into the wound. Now, keep in mind,

1 the victim is propped up, he's not laying flat. He's almost
2 kind of in a semi-seated type position during post-examination.

3 Q. Defense Exhibit Number 19?

4 A. Defense Exhibit Number 19 is a shot of the victim's
5 wounds to the right side. This is going to be at autopsy prior
6 to the washing of the body.

7 Q. And Defense Exhibit Number 14?

8 A. Defense Exhibit 14 is the day the vehicle was processed
9 at the Horry County Crime Lab where I processed the vehicle and
10 I manipulated the window and I manipulated the window and put a
11 trajectory rod through the window.

12 Q. Explain to the judge what you learned about how the --
13 when the car was transported, or at some point in time the
14 glass fell in and you had to pick it back up, just explain to
15 the judge what that is a photograph of.

16 A. I was working the scene, Your Honor, and advised that
17 detectives had located the vehicle the defendant was driving.
18 At that time we were not going to process that vehicle there,
19 we were going to be getting a search warrant to do a more in
20 depth search of the vehicle at our police precinct. I had the
21 sergeant or detective send me a picture of what the vehicle
22 looked like because there was a gunshot to the window. He sent
23 me a picture that night of the window mostly up with it beveled
24 out a little bit. I instructed him at that time to push the
25 window into the vehicle upon transporting which was shattered

1 out completely. So when I got to processing the vehicle the
2 window was already pushed in by our detectives and the tow
3 truck driver. It was not as it was found the day of the
4 incident and this photograph is just me trying to hold it back
5 up after it had been folded back down and lifted back up again.

6 Q. And Exhibit, again, Number 20 is also a photograph of
7 that.

8 A. It would be on the other side. Again, it is going to be
9 different because it looks like this window is going into the
10 car. It's going into the car because we pushed it in the car
11 the day of the incident when it was pushing out.

12 Q. And lastly, photograph Defendant's Exhibit 43. If you
13 would, does that show --

14 A. Forty-three is the parking lot, now we're going back to
15 the incident day. This is the parking lot with a better
16 photograph of the blood trail coming from this way and going
17 down towards that way.

18 Q. And the blood trail begins in the photograph where,
19 Detective?

20 A. May I see my sketch to kind of give you an overview, if
21 you don't mind?

22 THE COURT: Yes.

23 A. So basically, you have rows of parking here. You have
24 where the victim was located here. So the blood trail, and
25 I'll go from finish to beginning, comes down from this road but

1 it goes up to where you would have traffic going in and out of
2 that parking lot.

3 Q. Now, on the second page in the beginning, in other
4 words, what you've got here, the finish is where --

5 A. The deceased.

6 Q. -- is lying?

7 A. The deceased, uh-huh.

8 Q. And then the first blood drop, there's a trail from one
9 drop to where he goes, correct?

10 A. Up, yes. So the beginning area would be here. If I
11 were to turn in here and drive to the parking spot, I'm going
12 to be using this area here to drive, not by the rows. So the
13 area here where the cars come in and out of is where that
14 started.

15 Q. Alright. And would it be a fair comment to say that the
16 blood begins out in the driveway near where a car driving in
17 would be?

18 A. It would be in the area where cars would drive in and
19 out.

20 MR. MARTIN: Thank you.

21 (Defense Exhibit No. 1 was marked for identification.)

22 Q. Let me show you what's marked as Defense Exhibit Number
23 1. Can you tell us what that is, Detective?

24 A. Do you want me to open it or just tell you what it is?

25 Q. Yes, open it.

1 A. Defendant's Exhibit 1 is what I have labeled, CS three,
2 which is a case of Michelob Ultra beer, 11 full cans, and
3 should be one empty can, and that's what's inside the bags
4 there.

5 MR. MARTIN: I'll enter into evidence Exhibit Number
6 one.

7 MS. LIVESAY: No objection.

8 THE COURT: Without objection.

9 (Defendant's Exhibit No. 1 was admitted into evidence.)

10 Q. Did you take some buccal swabs?

11 A. I did.

12 Q. And let me show you what is Defendant's Exhibit No. 3
13 and ask you if you can identify that.

14 A. Defendant's Exhibit 3 is a buccal swab/cheek swab that I
15 collected from the victim during the crime scene investigation
16 portion of this case.

17 Q. And that eventually have gone into the crime scene
18 locker to be transported to SLED?

19 A. Yes. And this particular swab was transported to SLED.
20 I can tell by the envelope and everything else that this was a
21 swab that went to SLED.

22 Q. Let me show you Defendant's Exhibit Number 2 and ask you
23 if you can identify that.

24 A. Defendant's Exhibit Number 2 has a description of oral
25 swabs, Anijah Yarnell.

1 Q. An-i-jah Yarnell.

2 A. Anijah, I'm sorry.

3 Q. And, again, you collected that?

4 A. No, sir.

5 Q. You did not collect that? Do you know who did collect
6 it?

7 A. Give me a moment, sir. I know I didn't collect it.

8 Q. And that's the one marked "Anijah Yarnell," correct?

9 A. That's what it says on the envelope, yes, sir.

10 Q. Let me show you State's Exhibit Number 6 and ask if you
11 can identify that.

12 A. These were touch DNA swabs collected by myself among
13 processing firearms in this case.

14 Q. And was one of those touch DNA samples taken from the
15 slide of that gun?

16 A. Yes, it was.

17 MR. MARTIN: Judge, I'd move to enter into evidence
18 State's Exhibit 8 and Defense Exhibit No. 2.

19 THE COURT: You said State's 8 and Defendant's 2?
20 Is it Defendant's 8 and State's 2 or is it both Defendant's?

21 MR. MARTIN: Eight is a State's exhibit?

22 MR. HELMS: Yes.

23 THE COURT: And two is defense exhibit?

24 MR. HELMS: No, it can't be.

25 MS. LIVESAY: Judge, I don't know why this is marked

1 State's Exhibit No. 6, but we haven't marked any of the State's
2 items. I don't know why that's marked.

3 MR. MARTIN: Well, I don't know either, but I'll mark
4 it as a defense exhibit to clear that up. Again, I didn't put
5 that on there, and I don't know whether that's, I don't know.

6 THE COURT: Okay. Marking exhibits is pretty
7 important, that's part of my job. I'll get reversed if I don't
8 do this right.

9 MR. HELMS: Your Honor, just to be clear, we know
10 that's not our exhibit, we haven't entered it in yet.

11 MR. MARTIN: Have you all marked any yet?

12 MS. LIVESAY: I haven't marked any of the SLED items,
13 no.

14 MR. MARTIN: It wasn't used at the deposition to
15 proffer, was it?

16 MS. LIVESAY: No, not marked as proffer.

17 MR. MARTIN: Well, let me say, I know the Court wants
18 to clear up why this State's Exhibit 6, and I kept saying 8,
19 and that was wrong, that's 6, but I don't know why it's there,
20 only to say I can promise you I didn't put it there, but for my
21 purposes we can mark it as a defense exhibit and move forward,
22 but --

23 THE COURT: Can we mark it as Defense 6? Okay.
24 We'll mark it as Defense 6.

25 MR. MARTIN JR.: We've marked multiple different

1 exhibits, I want to make sure their aren't two defense sixes.

2 THE COURT: We need to get this cleared up, and this
3 does not need to take time on the record, or else the record is
4 going to read more confusing to any appellate court that reads
5 this, so let's go off the record and let's get the markings
6 taken care of.

7 (Recess taken.)

8 THE COURT: Yes, sir, we'll go back on the record.

9 MR. MARTIN: On the record, Defense Exhibit 44 has
10 been identified by Detective Domogauer as DNA swabs taken from
11 the trigger grip and slide of a Glock 17 pistol, and
12 Defendant's Exhibit Number 3 is the buccal swabs taken by
13 Detective Domogauer from Michael Pennington at autopsy, I
14 believe. And Judge, I'm not moving to enter those, I'm going
15 to call a SLED agent next to connect the dots before I enter
16 those, and that's that.

17 THE COURT: What about the two exhibits you asked the
18 State whether or not they had an objection to that started the
19 conversation?

20 MR. MARTIN: They have no objection, as I understand
21 it, to -- and that was 3 and what is now 44, and to my
22 understanding they have no objection.

23 THE COURT: Before we get to their objection let's be
24 sure we've got the numbers right. So State's Number 44 is what
25 used to be Defense 6?

1 MR. MARTIN: Six.

2 THE COURT: And is there another exhibit you're going
3 to ask the State about whether they have entered it?

4 MR. MARTIN: Defense Exhibit 3.

5 THE COURT: Which is the buccal swab?

6 MR. MARTIN: Yes.

7 THE COURT: Okay.

8 MR. MARTIN: So those are the two that I would ask to
9 move into evidence.

10 THE COURT: Any objection?

11 MS. LIVESAY: Yes, sir, Your Honor. Not as to the
12 swab from Michael Pennington, but we do have concerns about the
13 swabs from the gun because the gun has not been entered into
14 evidence so there would be no way for us to question Ms.
15 Domogauer about the location, where she took those swabs from,
16 without the gun being as an exhibit evidence, kind of how it
17 works for Stand Your Ground. I don't have a problem if Mr.
18 Martin wants -- I'll stipulate to the gun coming in so we can
19 properly question her about where the swabs were taken from on
20 the gun. I anticipate them calling the DNA expert about the
21 results from those swabs, and I think it would be imperative to
22 have the gun so we can see what was swabbed and where the swabs
23 were taken from, but I stipulate, if he wants to go ahead and
24 put that gun in so we can get these swabs in, I stipulate that
25 the State consents so we can kind of move along.

1 MR. MARTIN: Well, my point is that she can do that,
2 but again, these swabs say directly, trigger of a Glock 17,
3 slide of the Glock 17 and grip of the Glock 17, so I don't
4 think there is a need for the gun in order to introduce these.

5 THE COURT: I'm going to go ahead and admit them. I
6 understand your argument, but I'm going to go ahead and admit
7 it into evidence and you can cross-examine the witness as to
8 any deficiencies in her testimony as to the item. Again, there
9 is not a jury here and you can point that out to me later if it
10 becomes a material part of a piece of information you wish for
11 me to understand about the evidence when I analyze the
12 evidence. Go ahead.

13 (Defense Exhibit No. 3 was admitted into evidence.)

14 MS. LIVESAY: Yes, sir.

15 (Defense Exhibit 22 was marked for identification.)

16 MR. MARTIN: And for the record, Judge, Defendant's
17 Exhibit 22, they do object to the entry of that because we
18 don't have the person here.

19 MS. LIVESAY: Is that Michael Pennington's?

20 MR. MARTIN: No, it's Anijah Yarnell.

21 MS. LIVESAY: We do. She didn't collect Anijah
22 Yarnell's buccal swab.

23 MR. MARTIN: So I'm not offering that at this time,
24 they object to it.

25 (Defense Exhibit No. 4 was marked for identification.)

1 Q. Let me go back, Detective Domogauer, and show you
2 Defendant's Exhibit Number 4 and ask you if you can identify
3 that?

4 A. Defendant's Exhibit Number 4 is item that's marked CS
5 five, which stands for crime scene five. It is a partly smoked
6 cigar with green substance in it.

7 MR. MARTIN: We'd move to enter that into evidence.

8 Q. Is that depicted in the photographs you've shown the
9 Court?

10 A. Yes.

11 MR. MARTIN: We'd move to enter into evidence Defense
12 Exhibit Number 4.

13 MS. LIVESAY: Your Honor, we've got to object to
14 Defendant's Exhibit 4, two reasons. A, there was never any
15 testing done on this cigar, it was laying out in the parking
16 lot. We don't know what it is. I mean, nobody's tested it,
17 don't know if it's marijuana or what it is, and we also don't
18 know who it belongs to. So I feel like it would be unduly
19 prejudicial for the defense to get this in, I guess to allude
20 to the fact that it belonged to Michael Pennington.

21 MR. MARTIN: Well, Judge, let me say, it was found at
22 the crime scene just like the beer that was entered into
23 evidence and along with blood, different things, it just seems
24 to me that she's already testified to it and that it would be
25 admissible.

1 THE COURT: I'm going to allow it to come in. I
2 think the witness has testified sufficiently and laid a
3 sufficient foundation to the warrant its admission. I will
4 entertain any arguments later as to how important of evidence
5 it may be to the determination this court has to make.

6 (Defendant's Exhibit No. 4 was admitted into evidence.)

7 MR. MARTIN: Judge, I think at this time that's all
8 the questions I have for Ms. Domogauer.

9 (State's Exhibits 29, 30, 31, 32, 33, 34, 35 & 36
10 were marked for identification.)

11 MR. MARTIN: Judge, no objection as to State's
12 Exhibit No. 29. I would object to Exhibit 30 and 31, as they
13 fall within the --

14 THE COURT: She hasn't offered them yet.

15 MR. MARTIN: Well, she's going to. You're probably
16 right.

17 THE COURT: I'm not sure what you're arguing. I
18 don't know what they are.

19 MR. MARTIN: Okay. Maybe she's going to offer them
20 and I won't object. Okay.

21 THE COURT: I don't know what they are. It's hard
22 for me to rule on something whether this is a Toyota car or
23 whether you have a --

24 MR. MARTIN: I'm getting it out of order, Judge.

25 THE COURT: Okay.

1 MR. MARTIN: Okay. I've seen them.

2 **CROSS-EXAMINATION**

3 BY MS. LIVESAY:

4 Q. Ms. Domogauer, first things first. I want to go through
5 the items that have already been placed into, I guess evidence.
6 The first thing I want to get into is you collected the beer
7 cans?

8 A. Yes, ma'am.

9 Q. I don't have gloves. Defendant's Exhibit 1, can I get
10 that out?

11 THE COURT: Do you need gloves?

12 THE WITNESS: No, sir, not for this.

13 A. Do you want me to take them out?

14 Q. Yes, ma'am.

15 THE WITNESS: Your Honor, may I please take my jacket
16 off?

17 THE COURT: Yes, ma'am.

18 BY MS. LIVESAY:

19 Q. So how many cans are missing out of there?

20 A. One.

21 Q. And this is the one can that was missing?

22 A. Yes.

23 Q. And it's empty now, was it empty the night that you
24 collected it?

25 A. No, it was not.

1 Q. So only one can is missing out of this 12 pack?

2 A. Yes.

3 Q. And that can was never finished?

4 A. No. I pulled it off for transport.

5 Q. I understand. And did we ever swab to find out who was
6 drinking that can?

7 A. No.

8 Q. So we don't know if it was the victim if it was Darrin
9 Card or Jennifer Tassone or Emily Cerio?

10 A. This item was packaged. This item has not -- neither
11 this item or this item has been processed in any methodology,
12 no fingerprinting, no swabbing, nothing.

13 Q. So we don't know who that beer can belongs to?

14 A. In essence, no.

15 Q. And there's only missing one out of an entire 12 pack?

16 A. Yes.

17 Q. Okay. If you don't mind, put that back in the bag.
18 Now, Defense Exhibit 4, what are we looking at?

19 A. You're looking at a partly smoked cigar with a green
20 leafy substance in it. It was collected.

21 Q. Did we ever test to confirm that it was marijuana?

22 A. This item has not been tested.

23 Q. And did we ever take any DNA swabs?

24 A. This item, like the beer cans, have never been tested or
25 processed in any fashion.

1 Q. And it was at the crime scene?

2 A. Yes, ma'am, on the ground.

3 Q. And at some point the defendant was at the crime scene?

4 A. Yes, ma'am.

5 Q. Now, you also took some swabs from Defendant's Exhibit

6 44. Where did those swabs come from?

7 A. Defendant's Exhibit 44 this is an envelope that was
8 prepared by me that was put into a SLED envelope with items of
9 evidence labeled as touch DNA swab trigger Glock 17 serial
10 number BHBG367. Touch DNA swabs from Glock 17 serial number
11 BHBG367. Touch DNA swab slide Glock 17 serial number BHBG367.

12 Q. Okay. So you swabbed the gun belonging to that serial
13 number?

14 A. Yes, ma'am.

15 Q. So you would recognize that via the serial number now
16 that you swabbed?

17 A. I processed that weapon, yes, ma'am.

18 (State's Exhibit No. 37 was marked for identification.)

19 MS. LIVESAY: Could you mark this for me, please?

20 Q. State's Exhibit 37, there's a serial number on the box
21 along with the gun's make and model. Does that serial number
22 match the serial number of the gun you swabbed?

23 A. Yes, ma'am.

24 Q. And is the serial number on the actual weapon?

25 A. Would you like me to open the gun box?

1 THE COURT: Any objection?

2 MR. MARTIN: No objection.

3 THE COURT: Yes, ma'am.

4 A. The serial number on this is BHBG367.

5 Q. Is that the gun you swabbed?

6 A. This is the gun I swabbed.

7 Q. And is that how it looked when you swabbed it?

8 A. Yes, ma'am.

9 MS. LIVESAY: Your Honor, at this time the State
10 wishes to put State's 16 into evidence.

11 MR. MARTIN: And that is, in fact, the gun that the
12 DNA swabs were taken from the trigger of the stock and slide.

13 MS. LIVESAY: That's what she just said.

14 MR. MARTIN: No objection.

15 THE COURT: And it's State's 16?

16 MS. LIVESAY: Is it 37? It's 37.

17 THE COURT: State's 37.

18 (State's Exhibit No. 37 was admitted into evidence.)

19 Q. Show it to the judge.

20 A. It's got a safety through it. I just want to give you
21 that.

22 THE COURT: Alright.

23 Q. And show him where you swabbed it.

24 A. This is Glock 17. The serial number is on verifying.

25 You can see right through here: BHBG367. When I swab a weapon

1 for swabbing, when I say I swabbed the grip, I have taken a
2 swab, one wet, one dry, and I swabbed this entire area with the
3 wet swab first and then went back over that same area with the
4 dry swab. That is one swab submission of the grips. When I
5 swab the trigger portion of the gun, again, following the
6 wet/dry method, I would swab the trigger, inside of the loop,
7 and this little piece here. That is the trigger mechanism of
8 the gun. I would do that with the wet swab and the dry swab.
9 When I swab a slide I will swab, this is the top part here, it
10 is a slide. I will swab with, again, the wet and dry method,
11 the wet method first because it puts to moisture on there. I
12 swabbed this entire area, this area, and on the top, making
13 sure here because you catch with your hands and skin cells and
14 then I went back over the same area again with my dry swab and
15 then that would be what's considered the swab for the slide.

16 Q. Why did you swab those particular areas? You can give
17 it to him if you want.

18 A. When I process a firearm those are the general areas
19 that I swab. On occasion I may swab down the barrel, but when
20 I swab firearms I always swab the same three locations, grip,
21 trigger, slide. If it is automatic I will do the slide for
22 touch DNA, if it is a revolver, I will do what's called a
23 wheel, so it just depends on what type of weapon it is on where
24 or not. If it's a gun or long gun I might do a stock, with
25 this to particular gun those are the three areas that I would

1 definitely hit on because those are going to be areas most
2 touching.

3 Q. So you're trying to figure out who touched the gun?

4 A. Yes, ma'am.

5 Q. So you didn't touch the flashlight of the gun or any of
6 the accessories?

7 A. No, ma'am. Those would be minute.

8 Q. I understand. I understand. Most likely to collect
9 DNA, those are the areas you --

10 A. Those are your hard areas, yes.

11 Q. I understand. Now, I'm showing you State's Exhibit 29,
12 30, 31. If you don't mind, tell this Court what those are
13 pictures of.

14 A. State's Exhibit 29, 30 and 31 are photographs of the
15 defendant's vehicle after it was processed at the Horry County
16 Police Department, I believe it was the following day.

17 Q. So it was at ML Brown?

18 A. Yes, it's at the ML Brown Building. We're no longer --
19 it's daytime, and it's no longer on the scene.

20 Q. And this how you documented the car upon it coming to ML
21 Brown?

22 A. I photographed and then I processed. This is part of
23 that sequencing.

24 Q. I understand.

25 MS. LIVESAY: Your Honor, at this time the State

1 wishes to place 31, 30 and 29 into evidence.

2 MR. MARTIN: Well, those are the ones that I object
3 to a certain number. Can I ask her a couple questions about
4 them, Judge?

5 THE COURT: As to their admissibility?

6 MR. MARTIN: Ask her what they show because that
7 affects to what I object. One of them, Judge --

8 THE COURT: First of all, it's her witness right now,
9 why don't you let her ask.

10 MR. MARTIN: Twenty-nine, I have no objection to.
11 Thirty, what is that?

12 MS. LIVESAY: It's the center console.

13 MR. MARTIN: And what's in the center console?

14 MS. LIVESAY: The picture shows what's in it.

15 MR. MARTIN: But what is it?

16 MS. LIVESAY: You look in there and you tell me.

17 MR. MARTIN: I can't tell what it is. That's the
18 objection, I'm trying to figure out what it is.

19 THE COURT: Help him out. Why don't you ask the
20 witness what is in the picture. We're trying to move this
21 along, okay?

22 BY MS. LIVESAY:

23 Q. What is in the picture?

24 A. This is going to be State's Exhibit 30. You're looking
25 at the interior of the vehicle in the center console of the

1 vehicle. It looks like a screwdriver to me.

2 Q. Anything else?

3 A. It looks like wrappers. I'm not sure if those are blunt
4 wrappers or there's wrappers, they're just wrappers.

5 MR. MARTIN: Alright. That's enough. Judge, I have
6 no objection if it's a screwdriver. I couldn't tell what it
7 was. I do have an objection to that and I do have an objection
8 to 31 which shows a knife. Those are weapons, which, if you
9 remember back at the beginning I had a motion in limine about
10 the exclusion from entry into evidence any weapons other than
11 the murder weapon. That's the basis for the objection.

12 THE COURT: Okay. I'm going to allow them in. You
13 may cross-examine the witness if you wish to or make an
14 argument later if you'd like what's shown in the photographs
15 that is not material to the decision the Court has to make.

16 MR. MARTIN: Okay. That's fine. Thank you, Judge.
17 (State's Exhibits 29, 30 & 31 were admitted into evidence.)

18 BY MS. LIVESAY:

19 Q. If you don't mind, Jill, show the judge what you took
20 pictures of.

21 A. All three of them?

22 Q. Yes.

23 A. Your Honor, we're going to start off with State's
24 Exhibit Number 29. This is after the vehicle exterior had been
25 processed before the window was raised back up. So right now

1 the driver's side window that you see in the previous
2 photographs that was opened partially has been folded down, and
3 that happened when they towed it from the scene it was located
4 to the impound before processing. Does that make sense to you?

5 THE COURT: It doesn't matter if it makes sense to
6 me, it's got to be on the record. Okay?

7 THE WITNESS: Okay. Well, I just want you to know
8 the window was still in the car, it's just pushed in.

9 A. Okay. And these were where I did the latent examination
10 and the partial palm print.

11 Q. So can we agree when the window made it back to ML Brown
12 it was not the same as it was when it was at Winchester Circle,
13 at the defendant's apartment?

14 A. Yes and no. It was the same as when it left Winchester,
15 but not when it was found at Winchester. When the vehicle was
16 found and had been seen by law enforcement the window had been
17 shot out but was still up with the partial opening and the
18 window had a beveling outward. When they showed me that
19 picture and we needed to process the vehicle and transport the
20 vehicle the motions of putting the vehicle on a flatbed
21 wrecker, the banging and the shifting with the way to glass
22 was, it was shattered, however, it was being held together by
23 window tape. I made the determination the best way to try to
24 preserve anything from that window was to fold the window in
25 prior to putting it on the wrecker or prior to engaging to

1 wrecker's activity, so the detectives on scene with the vehicle
2 with pushed the window in prior to the wrecker hooking it up so
3 when it left it looked like this.

4 Q. I understand. And what are the other pictures of?

5 A. State's Exhibit 30, it's just kind of overview of the
6 center console. You can see wrappers in the console and a
7 screwdriver console and the top tray is still in the console of
8 this vehicle. Photograph 31 is the tray that you see in that
9 photograph has been removed, this piece here was removed, and
10 then you can see the entire console area, just these items were
11 also lifted up to see what was underneath them, and that's what
12 you see in this photograph here.

13 Q. Now, Jill, when you looked in the console there was a
14 screwdriver, but there were other items in there, too, as well,
15 correct?

16 A. Wrappers, pens, there was a knife, screws,
17 documentations, papers, yes.

18 Q. So normal center console stuff, right?

19 A. Yes.

20 Q. Now, do we have the defense's picture of the rod going
21 through the window? Do we know where that is?

22 A. I don't have it up here.

23 Q. Now, I'm going to show you what's been marked State's
24 Exhibits 14 and 20. You took those pictures?

25 A. Defendant's 14, defendant's 20, yes.

1 Q. And I'm going to show you State's Exhibit 23.

2 A. And State's Exhibit 23. I did not take this picture but
3 this picture was sent to me.

4 Q. Okay, I understand. Let me ask you this, can we agree
5 that the window when you're sticking the rod through it is not
6 identical to how the window appeared?

7 A. Oh, absolutely not, no.

8 Q. Okay. So this is more of a guess?

9 A. This photograph shows you that there was a bullet hole
10 through the window, that's pretty much all of this can really
11 show you with the glass?

12 Q. Okay. It's just that a bullet hole went through the
13 window?

14 A. Pretty much, more or less, I can't tell you anything
15 much more than that but the way the window's conditioning was.

16 Q. Okay. I understand. And I'm going to show you now, and
17 if you don't mind, show the Judge, I apologize.

18 THE WITNESS: This is how the window looked the day
19 of the incident when it was found. This is the photograph that
20 I received while I was working the crime scene and I made a
21 determination at the time due to the window's damaging and
22 through hopefully preserving evidence if I could I had the
23 window folded in before it was put on the wrecker. This is the
24 vehicle after the window was unfolded the way I can try to best
25 preserve it with what I had.

1 Q. But the only thing that we really can see from that is
2 that a bullet hole went through the window?

3 A. Yes.

4 Q. Now, if you don't mind, I'm going to show you State's
5 Exhibit 25. What are we looking at there?

6 A. Defendant's Exhibit 25.

7 Q. That's right, I'm so used to saying state.

8 A. I know. Okay. You're looking at the right arm and hand
9 and shoulder area of the victim on scene.

10 Q. And did Mr. Martin ask you some questions about injuries
11 to the arm?

12 A. He asked me what I could potentially see in this
13 photograph, yes.

14 Q. And do you know when those injuries were on the victim?
15 Do you know how he got the injuries, when he got the injuries?

16 A. No. I can tell you it was pre-mortal, meaning, before
17 death, but when before death, I can't tell you.

18 Q. So you don't know if he got them that night or not?

19 A. No, ma'am.

20 Q. And you don't know how he got them?

21 A. No, ma'am.

22 Q. And where is he laying at?

23 A. In an asphalt parking lot.

24 Q. So he could have gotten it while he was trying to get
25 out the parking lot, couldn't he?

1 A. Possibly.

2 Q. But you don't know how he got it and you don't know when
3 he got it?

4 A. No, ma'am.

5 Q. Now, I'm going to show you State's Exhibit 32 through 36
6 and the defense has already said they don't have any objection.
7 Let's take a look at that and tell me if you recognize those
8 pictures.

9 THE COURT: Those numbers again are what?

10 THE WITNESS: State's 36, State's 35, State's 34,
11 State's 33 and State's 32.

12 THE COURT: Thank you.

13 MS. LIVESAY: No objection?

14 (State's Exhibits Nos. 32, 33, 34, 35 & 36 were
15 admitted into evidence.)

16 MR. MARTIN: Well, let me look with you. No
17 objection.

18 THE COURT: Thank you.

19 Q. If you don't mind, show these pictures to the judge,
20 tell us what we're looking at.

21 A. They are kind of out of order, Your Honor, so I'm just
22 going to tell you what we got when we have it. This is State's
23 Exhibit 32. When I work a crime scene and I have a victim I
24 empty pocket their pocket contents and put their pocket
25 contents and correspond with the pocket. You can see these

1 pockets outturned, these items here were collected from his
2 pocket. This pocket's outturned, these items here, keys and
3 some change were collected from this pocket, keys up here as
4 well. This cargo pocket is where it came from and you can
5 outturn cargo pockets. This cargo pocket was empty. So this
6 just tells me, A, I searched the body and this is what it was.
7 Underneath was, I believe, the wallet, and that's in a
8 different picture, that's what you're seeing in this picture.

9 Q. And did you collect the weapon off the victim?

10 A. No, ma'am.

11 Q. Did you even collect a pocket knife off the victim?

12 A. No, ma'am.

13 Q. No kind of weapon at all?

14 A. No, ma'am.

15 Q. Did you collect a weapon anywhere from around the
16 victim?

17 A. No, ma'am.

18 Q. Did you collect a weapon from anywhere in the parking
19 lot?

20 A. No, ma'am.

21 Q. Now, let me ask you something. In that picture, his
22 belt, is it buckled up?

23 A. Yes, ma'am.

24 Q. Okay. Not even unbuckled?

25 A. No, ma'am.

1 Q. Okay.

2 A. State's Exhibit 33 is a picture of the victim in the
3 parking lot, it's a little dark. I removed his gray shirt and
4 other supplies from him to that photograph, and this is just a
5 picture of all that stuff removed. Also, on that area you can
6 see some, like, fragmentation from, like, a projectile.

7 Q. And these are injuries here?

8 A. Yes. These injuries were -- when I'm at this point in
9 the crime scene I can tell you this is a gunshot wound. I have
10 what we call other injuries that I will not define, I will wait
11 for the assistance of the pathologist for him to render
12 opinion. Now, I know that on the neck there was stippling, but
13 these other injuries here I waited for the coroner -- not
14 coroner -- the pathologist, to properly identify and name them.
15 State's Exhibit 34 is almost like the one for the defense, it's
16 the blood trail to the parking lot leading from kind of like
17 the middle of the drive area back towards this vehicle back
18 here with the vehicle. Your victim's on the other side of this
19 car.

20 Q. Were there any empty -- I'll ask you in the next
21 question, but the blood trail was not leading from a parking
22 spot?

23 A. No. I think -- I will use this picture because it seems
24 to be a little easier to try to explain. Okay. So this is the
25 vehicle here. This is a back row that there's nothing behind

1 it. This is a front row, again, both sides have, like, curved
2 or shuddering, and then you have, if you ever go in a parking
3 lot you've got the road where you go up and down to park. I
4 would call that the drive area. The blood trail starts in
5 what's called the drive area. It's not in a space but it's in
6 where a car would come and go.

7 Q. Are the spaces in front of where the victim's land, are
8 they filled up with cars or are they empty?

9 A. No, those spots are empty.

10 Q. Okay. So you could have pulled into one of those spots
11 if you wanted to?

12 A. Oh, yeah.

13 Q. And how about in front of that blood trail were there
14 any vehicles blocking the roadway to move forward or back?

15 A. No.

16 Q. So the parking spaces in front are empty and the roadway
17 in front and behind are both clear?

18 A. Well, behind is your only way in and out and front is a
19 building, so if you go front you're going to drive into a
20 building and a pond.

21 Q. Let me ask you this, was there some roadway there?

22 A. Yes.

23 Q. Okay. So he could have pulled up two to three feet?

24 A. Yes.

25 Q. And was anybody, was the entrance and exit, was that

1 blocked in any form or fashion?

2 A. Not that I know of, no.

3 Q. And how many condo buildings were out there?

4 A. In total? A lot.

5 Q. A lot?

6 A. A lot.

7 Q. Okay. So that wasn't the only parking lot out there?

8 A. No, no.

9 THE COURT: And the photograph you're referencing is
10 number what?

11 THE WITNESS: Oh, I'm sorry, sir, this is going to be
12 item State's Exhibit 36.

13 THE COURT: Thank you.

14 THE WITNESS: This is just an overview of the scene
15 I'm looking at. Here's that dark row, here's those other two
16 vehicles and beer cans, the victim. This one I haven't talked
17 about yet. This one is going to be State's Exhibit 35. This
18 is just a closer shot of that area where you see the New York
19 car, you see the victim, you see some medical debris, you see
20 the victim, a little cigar thing right there, and that's -- I
21 said that one, right?

22 THE COURT: You did.

23 THE WITNESS: Yes, sir.

24 Q. And let me show you what's already been put in this as
25 Defendant's Exhibit 33.

1 A. Defendant's 33 is the sketch.

2 Q. And does this sketch represent where the victim is
3 located?

4 A. Yes.

5 Q. And is this sketch, does this depict where the blood
6 trail starts?

7 A. Yes, in essence, yes.

8 Q. And so the entrance and exit is right here?

9 A. To the complex?

10 Q. Yes.

11 A. Well, you come down here through Lakes and then you go
12 to Cross Gate, you come in here and you can either turn right
13 to go to this complex area or you can turn left to go to this
14 complex area, or you can bust a U-ie and turn back out.

15 Q. So when you got there was there anything blocking any of
16 the entrance exit roadway?

17 A. There was law enforcement calling for scene security,
18 but other than that, no.

19 Q. And how about from here upward, was anything blocking a
20 vehicle from moving forward?

21 A. No.

22 Q. Okay. Because there were cars parked along here,
23 correct?

24 A. Yes, ma'am.

25 Q. Okay. So the car could have moved from here forward?

1 A. Yes, ma'am.

2 Q. And the car could have been moved backward?

3 A. Yes, ma'am.

4 Q. Do you know who the gun belonged to, BHB, the serial
5 number that was swabbed, did you ever run a --

6 A. I believe I ran a trace on it, if you'll give me a
7 moment. I do know that I ran a trace. I don't know if I
8 necessarily have the trace results, but I did run a trace on
9 BHBG367.

10 Q. I believe it came back to Carrie Yarnell, does that ring
11 a bell?

12 A. I'm not quite sure, but it is possible.

13 Q. Did you ever swab any guns belonging to Michael
14 Pennington? I'm sorry. Keep looking, keep looking.

15 A. I don't have the actual results, but I do know that I
16 ran them and I can get that information for you.

17 Q. I know I got the results.

18 A. Okay.

19 Q. I don't have them right there in front of me. I think
20 it's towards the end of the crime scene report. Did you all
21 get the results for the ATF trace?

22 MR. MARTIN: I may have, I may have, I don't have it
23 here.

24 MS. LIVESAY: I'll make sure everybody's got them.

25 Q. Did you swab any kind of gun belonging to Michael

1 Pennington?

2 A. No.

3 Q. And in fact, did you search the vehicle with the New
4 York plate that Michael was laying right beside?

5 A. It was searched in my presence, yes, ma'am.

6 Q. And did you find any weapons in that vehicle?

7 A. In the operations of search no weapons yielded from that
8 vehicle.

9 Q. And you didn't find anything like this on Mr.
10 Pennington?

11 A. No, ma'am.

12 MS. LIVESAY: No further questions.

13 THE COURT: Any Redirect on what she went into?

14 MR. MARTIN: Nothing further at this time, Judge, but
15 I would ask that Ms. Domogauer stay with us just in case. I
16 may need her later, I do not think I do, but I don't want her
17 to leave right now.

18 THE COURT: Okay. He's saying you're not released
19 from your subpoena so talk to him about leaving.

20 THE WITNESS: Leaving the courtroom grounds?

21 MR. MARTIN: You can leave the courtroom, just don't
22 leave the courthouse grounds.

23 THE COURT: Talk to him about that.

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: You may step down. Let's take a short

1 recess and come back. Do you have your next witness ready?

2 MR. MARTIN: Yes, I do, Judge.

3 (Recess taken.)

4 THE COURT: Call your next witness.

5 MR. MARTIN: Courtney Johnson.

6 THE COURT: Come right over here and let the Clerk
7 swear you in.

8 **Courtney Johnson being first duly sworn, testified as**
9 **follows:**

10 THE WITNESS: Courtney Johnson, C-o-u-r-t-n-e-y,
11 J-o-h-n-s-o-n.

12 **DIRECT EXAMINATION**

13 BY MR. MARTIN:

14 Q. Ms. Johnson, you're employed with Horry County Police
15 Department?

16 A. Yes, sir.

17 Q. In what capacity?

18 A. I am a forensic chemist assigned to the drug analysis
19 laboratory.

20 Q. Let me show you what's marked as Defendant's Exhibit No.
21 6 and ask if you can identify that exhibit.

22 A. Yes, sir, I can.

23 Q. And what is it?

24 A. This outer bag is a Kapak bag and inside of the Kapak
25 bag is a Best Kit.

1 Q. Did you come in possession of that?

2 A. Yes, sir, I did.

3 Q. And tell the Court if you did what you did in connection
4 with it?

5 A. So after I received it from Merrell Hopkins (ph) on
6 May 20th of 2020 I performed analysis on May 21st of 2020 and
7 rendered results.

8 (Defense Exhibit No. 29 was marked for identification.)

9 Q. Let me show you what's marked as Defendant's Exhibit
10 Number 29 and ask you if you can identify that?

11 A. Yes, sir, I can. This is a drug analysis report.

12 Q. On Exhibit Number 5, or what is the number there?

13 A. Defendant's Exhibit Number 6.

14 Q. Defendant's Exhibit 6. Alright.

15 MR. MARTIN: Judge we would move to enter that into
16 evidence.

17 THE COURT: Defendant's 29 or Defendant's 6?

18 MR. MARTIN: Both 6 and 29.

19 THE WITNESS: 29 is the report and 6 is the actual
20 drugs.

21 THE COURT: Thank you. Any objection?

22 MS. LIVESAY: Yes, sir, Your Honor, to the same
23 objection we had before. This is going to be the cocaine that
24 was found in the victim's pocket. The State believes it's
25 irrelevant. Certainly the fact that he had cocaine in his

1 pocket has no bearing on whether or not he was a victim of
2 murder and we also believe it is inadmissible under 404 and
3 that it's nothing more than character evidence in an effort to
4 tarnish the victim in the case.

5 THE COURT: What about the other? So it's just an
6 objection to one of them or as to both of them?

7 MS. LIVESAY: Yes, sir, Your Honor, I think one is
8 the bag of drugs and I think the other is the report, so I
9 object to both.

10 MR. MARTIN: My argument is the same as its been, it
11 is relevant, as this is part and partial of the toxicology
12 findings which goes back to the fact to not only did the victim
13 tests positive for Benzoylecgonine, the metabolite for cocaine,
14 but that he had cocaine in his pocket and I'd be quick to add
15 it's not done in this case to attack the character of Mr.
16 Pennington. It is, though, we believe, relevant in this
17 particular case based on the findings that you have to make.

18 THE COURT: I'm going to allow it, and again, as I've
19 stated earlier, you all have made a very good record as to this
20 of 404 issue of character issues so I will be examining that in
21 regards to the evidence.

22 (Defense Exhibit 29 was admitted into evidence.)

23 Q. And again, I don't know whether I asked this or not, but
24 the substance tested positive for what?

25 A. Item 1.1 was a zip locked back containing a five dollar

1 containing powder substance and the results was cocaine
2 schedule II found, 0.1 grams, 1.5 grams.

3 MR. MARTIN: Thank you. That's all the questions I
4 have for Ms. Johnson.

5 THE COURT: Yes, ma'am?

6 MS. LIVESAY: No questions for this witness.

7 THE COURT: Thank you, ma'am. You may step down.

8 THE WITNESS: Thank you.

9 MR. MARTIN: And she can be released, Judge.

10 THE COURT: From your subpoena?

11 MR. MARTIN: Yes.

12 THE COURT: Thank you, ma'am.

13 MR. MARTIN: Well, for the purposes of this hearing.

14 THE COURT: Okay. For purposes of this hearing.

15 THE WITNESS: Yes, sir.

16 THE COURT: Thank you, ma'am.

17 THE WITNESS: Thank you.

18 MR. MARTIN: Judge, we have agreed to stipulate that
19 Officer Shawn Wydra here took the buccal swabs from the
20 defendant, Anijah Yarnell that night at the time that he was
21 arrested. Those buccal swabs were then taken to SLED and I'm
22 getting ready to call the SLED agent to testify. We are also
23 stipulating that Mr. Wydra took photographs of the defendant
24 that night at the detention center --

25 MS. LIVESAY: ML Brown.

1 MR. MARTIN: -- at the ML Brown Building, that's
2 right, after he was arrested and that they got the photographs
3 that they took of his mouth and hands and his face and things
4 of that sort, and I would further stipulate that if he
5 testified, that he would say that he did not see any injuries
6 or blood to the defendant.

7 THE COURT: The officer?

8 MR. MARTIN: The officer would say that.

9 THE COURT: Yes, ma'am?

10 MS. LIVESAY: I was going to let her mark it first.
11 She's trying to mark so I didn't want to say anything until she
12 got it marked. So I'm handing up now State's evidence 38
13 through 48. These are the photographs of the defendant taken
14 by Shawn Wydra that myself and the defense have agreed to.
15 Now, we are stipulating to that, but upon whatever Mr. Martin
16 puts up we may call him in our case to address whatever is put
17 up by defense counsel.

18 MR. MARTIN: Next witness, Judge, Sara Zapata.

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2 **Sara Zapata being first duly sworn, testified as follows:**

3

VOIR DIRE

4 BY MR. MARTIN:

5 Q. Sara, if you would give the Court your full name and
6 title.7 A. Sara Zapata, Z-a-p-a-t-a. I am a DNA analyst with the
8 South Carolina Law Enforcement Division, commonly known as
9 SLED.10 Q. A DNA analyst, and how long have you served in that
11 position?

12 A. Approximately seven and a half years.

13 Q. And can you give us the basis of your qualifications to
14 serve as an expert in that area?15 A. Yes. I have a Bachelor of Science in Forensic Science
16 from the Pennsylvania State University, and then upon
17 employment at SLED I went through a training process under a
18 court-qualified DNA analyst for approximately a year and a half
19 and that covers all of our laboratory procedures, our
20 statistics, interpretation for court writing and ends in
21 several written exams, several oral exams, several mock cases,
22 a mock trial and then a competency exam before we're allowed to
23 perform case work, and then I have to successfully complete two
24 proficiency tests every year, as well as attend conferences and
25 additional training for continuing education.

1 Q. Have you been qualified in the courts of South Carolina
2 as an expert in your field?

3 A. Yes, I have.

4 Q. On multiple occasions?

5 A. Yes.

6 MR. MARTIN: We offer her as an expert in the field
7 of DNA analysis.

8 MS. LIVESAY: The State agrees that she is an expert.

9 THE COURT: As a DNA analyst?

10 MS. LIVESAY: Yes, sir.

11 THE COURT: We'll proceed in any questions.

12 **DIRECT EXAMINATION**

13 BY MR. MARTIN:

14 Q. Sara, did you do some DNA testing in this particular
15 case?

16 A. Yes, I did.

17 Q. And what did you test?

18 A. I had several buccal swabs, as well as some swabs from
19 the driver door of a Hyundai, and several swabs from different
20 parts of a Glock 17.

21 Q. I want to focus, if we might, on the Glock 17 at the
22 moment.

23 A. Okay.

24 Q. And focus on the buccal swabs from the slide of the
25 Glock 17.

1 A. Item 17 is swabs from the slide of Glock 17.

2 Q. What did you test there?

3 A. So that item was submitted for touch DNA analysis and so
4 I took it through our laboratory procedures to develop a
5 profile that way.

6 Q. And were you able to develop a DNA profile?

7 A. Yes.

8 Q. And you tested it against what?

9 A. So when we determined that a profile is suitable for
10 comparison we will compare that profile to all of the standards
11 that are submitted in a case.

12 Q. Were standards submitted to you in this particular case?

13 A. Yes.

14 Q. And did you test it against those standards?

15 A. Yes. I made those comparisons.

16 Q. What determinations were you able to make?

17 A. So the way that our comparisons work, we are making a
18 comparison between two opposing scenarios, and we are always
19 going to compare each individual person to the DNA profile. So
20 we set up the scenario as the DNA profile was interpreted as
21 the mixture originating from two individuals, and so the first
22 scenario is the person that we are comparing, the person whose
23 scenario we are comparing, an unidentified unrelated individual
24 contributed to that mixture, and then the second scenario is
25 two unidentified unrelated individuals contributed to the

1 mixture. We make that comparison for each individual person.

2 So would you like me to go person by person?

3 Q. Yes.

4 A. Okay. For the comparison to Anijah Yarnell the result
5 is the DNA profile is approximately 13 octillion times more
6 likely if Anijah Yarnell and an unidentified unrelated
7 individual contributed to the mixture than if two unidentified
8 unrelated individuals contributed to the mixture. Then make
9 that same comparison, that same scenario with Emily Cerio, and
10 she was excluded as a contributor to the mixture and to less
11 propositions and then again for Michael Pennington the third,
12 and the result for that is the DNA profile is approximately
13 three times more likely if two unidentified unrelated
14 individuals contributed to the mixture than if Michael
15 Pennington the third and an unidentified unrelated individual
16 contributed to the mixture.

17 Q. So after your DNA testing were you able to exclude Emily
18 Cerio as a source of the DNA?

19 A. She was excluded as the contributor to the mixture.

20 Q. Were you able to exclude Anijah Yarnell as a source of
21 the DNA?

22 A. Anijah Yarnell was included as a possible contributor to
23 the mixture.

24 Q. Were you able to exclude Michael Pennington as a source
25 of the DNA from the slide of the gun?

1 A. So for that comparison it is in support of exclusion.
2 It is trending in support of that scenario, but it doesn't meet
3 our threshold for full exclusion.

4 Q. So again, I ask you, were you able to exclude Michael
5 Pennington as a source of the DNA you tested on the slide of
6 the gun?

7 A. It's not a full exclusion.
8 (Defense Exhibit No. 27 was marked for identification.)

9 MR. MARTIN: Judge, with that, I'd just move to enter
10 into evidence -- well, let me show you -- Judge, Exhibit 27, is
11 that the written report on your findings?

12 A. Yes. This looks like a copy of my report.

13 Q. Now, a couple questions, touch DNA will stay on an
14 object for a considerable length of time, possibly, correct?

15 A. Potentially. It depends on the environment and some
16 other factors.

17 Q. Let's just say I've got a gun and I hold it today or I
18 hold it last week, or even if I held it a month ago, my touch
19 DNA may be present on that gun when you test it, right?

20 A. Yes.

21 Q. And the more I handle it or the less I come in contact
22 with it the more or less likely I may leave some of my DNA on
23 it, right?

24 A. Right. The more you handle it the more you would expect
25 your DNA to be on an item.

1 Q. Alright. And in a case like we've got here, if Anijah
2 Yarnell owns a gun it wouldn't be unusual to find his DNA on
3 the gun because he may handle the gun often and much, correct?

4 A. Correct.

5 Q. He'd have greater opportunity to leave touch DNA?

6 A. That's correct.

7 Q. And if, let's say Michael Pennington grabs for the gun
8 and his hand goes across the slide but that's the only contact
9 he has with it, he would be less likely to leave touch DNA even
10 though he touched it, correct?

11 A. The shorter the contact the less you would expect to
12 find.

13 MR. MARTIN: We would enter into evidence Exhibit
14 Number 27.

15 MS. LIVESAY: No objection. If that's the full
16 report, no objection.

17 MR. MARTIN: I think it's the full report --

18 MS. LIVESAY: It should be four pages?

19 MR. MARTIN: Well, let me say, I don't want to enter
20 into evidence Exhibit 37 because it doesn't include things that
21 she's testified about, I'll just say that. No, I do, I will
22 enter in the exhibit.

23 THE COURT: And again, no objection to 27?

24 MS. LIVESAY: No objection, Your Honor.

25 THE COURT: It will be admitted.

1 (Defense Exhibit No. 27 was admitted into evidence.)

2 MR. MARTIN: Answer any questions that Ms. Livesay
3 has for you.

4 **CROSS-EXAMINATION**

5 BY MS. LIVESAY:

6 Q. I don't know that we went through kind of everything,
7 but am I correct -- and you have a copy?

8 A. I've got a copy.

9 Q. Okay, perfect. So you got a buccal swab from Emily
10 Cerio; is that correct?

11 A. Correct.

12 Q. One from Anijah Yarnell?

13 A. Correct.

14 Q. And one from Michael Pennington?

15 A. Yes.

16 Q. Okay. And you compared that, or you also received swabs
17 to compare those two, swabs from the driver door of the
18 Hyundai; is that correct?

19 A. Yes.

20 Q. And that was insufficient, there was not enough DNA to
21 determine anything about it?

22 A. Correct.

23 Q. And you also got a swab from the trigger of Glock
24 17BHBG367?

25 A. Yes.

1 Q. And there was not enough DNA on that, as well, to do
2 anything with it; is that correct?

3 A. There are no DNA profile developed at all.

4 Q. Okay. So there was no DNA on the trigger?

5 A. Nothing that was developed, no.

6 Q. And there was a partial DNA profile, but it was
7 insufficient from the grip?

8 A. Correct.

9 Q. So we don't know anything about the driver door of the
10 Hyundai and there was no DNA at all on the trigger of the Glock
11 17 and there was not enough DNA on the grip?

12 A. Correct.

13 Q. So we know really nothing about those items?

14 A. Correct.

15 Q. And the slide of the gun had enough DNA to make a
16 comparison?

17 A. Correct.

18 Q. And it's my understanding that there were two
19 contributors to the DNA on the slide of the Glock; is that
20 correct?

21 A. It was interpreted as a mixture of two individuals.

22 Q. And there was only two individuals or maybe more than
23 two?

24 A. We say two when we are running our statistic, we have to
25 tell -- we tell the software that we are interpreting it as

1 two.

2 Q. Okay. And so that's what we're looking at, that there's
3 two. And then you look at whether or not Anijah Yarnell is a
4 contributor to that mixture of two individuals?

5 A. Correct. We'll compare each person to that mixture
6 independently.

7 Q. And the report says that the DNA profile is
8 approximately 13 octillion times more likely if Anijah Yarnell
9 contributed to the mixture, correct, than if two unidentified
10 folks were there?

11 A. Right, Anijah Yarnell and an unidentified unrelated
12 individual versus two unidentified unrelated individuals.

13 Q. So the number for him -- and how many zeros are in
14 octillion?

15 A. Twenty-seven after the 13.

16 Q. And then the proposition whether or not Michael
17 Pennington and an unidentified unrelated individual contributed
18 to the mixture; is that correct?

19 A. Correct. That's the first scenario and then what we're
20 contrasting it to is two unidentified unrelated individuals
21 contributed.

22 Q. I understand. And on that proposition it said three,
23 you found out that it was three times more likely if two
24 unidentified unrelated individuals contributed to the mixture
25 than if Michael Pennington contributed to the mixture; is that

1 correct?

2 A. Right, that if Michael Pennington and an unidentified
3 unrelated individual.

4 Q. Okay. And there is a chart in the back of the report;
5 is that correct?

6 A. Yes.

7 Q. And as to that proposition where it's three times more
8 likely if it's two unidentified people than if Michael
9 Pennington contributed, that would be moderate support; is that
10 correct?

11 A. That's correct.

12 Q. So it's three times more likely that the victim did not
13 contribute; is that correct?

14 A. Three times more likely if two unidentified unrelated
15 individuals contributed than if Michael Pennington and an
16 unidentified unrelated individual contributed to the mixture.

17 Q. And for that proposition the chart indicates that's
18 moderate support for that finding?

19 A. Yes.

20 Q. Okay. Now, just because you could not totally exclude
21 Michael Pennington does that mean that he contributed to the
22 mixture?

23 A. Statistically, it's in support of two unidentified
24 unrelated individuals contributing more so than Michael
25 Pennington and an unidentified unrelated individual

1 contributing to the mixture.

2 Q. So it's more likely that it's two unidentified people
3 than if it would be the victim and an unidentified individual?

4 A. Yes.

5 MS. LIVESAY: No further questions.

6 MR. MARTIN: One last question.

7 **REDIRECT EXAMINATION**

8 BY MR. MARTIN:

9 Q. Would that be based to some degree on the lack of data
10 or DNA that you had to compare enough points?

11 A. Yes. The smaller amount of DNA that we have the more
12 uninformative the statistic can be, so on the chart that she
13 referenced, a one is uninformative and then for two to 99 is
14 moderate, and so we're at three which is not very far off from
15 one so just the smaller amount DNA present the less strong the
16 statistic is going to be.

17 Q. And that's the point I'm trying to make. Is there a
18 number of locations along the DNA strand that you use to make a
19 comparison in an analysis?

20 A. So we test 24 locations and we run the statistic. The
21 software is looking at all of the information present, but
22 there's not a specific cut off of how many alleles we need to
23 have to be able to do that in a mixture like this, but the less
24 amount of information that we have then the lower the statistic
25 is generally going to be.

1 Q. And part of that could be because there's not enough DNA
2 to check all of the alleles that you want to check before you
3 can get a strong match?

4 A. Right. The more alleles are present, the more robust
5 the statistic is going to be.

6 Q. Right. And the more DNA present the more likely you are
7 to be able to check the alleles one against the other?

8 A. Right.

9 MR. MARTIN: That's all I have. Thank you.

10 THE COURT: Thank you, ma'am. You may step down.
11 Watch your step when you're stepping down. Can she be excused?

12 MS. LIVESAY: She's still under our subpoena, Your
13 Honor.

14 THE COURT: Thank you, ma'am. Just stay in touch
15 with the lawyers, they'll let you know your schedule.

16 MR. MARTIN: Judge, we've got Emily Cerio.

17 THE COURT: Come up and let the Clerk of Court swear
18 you in.

19 **Emily Cerio being first duly sworn, testified as**
20 **follows:**

21 THE WITNESS: Emily Cerio, E-m-i-l-y, C-e-r-i-o.

22 **DIRECT EXAMINATION**

23 BY MR. MARTIN:

24 Q. Ms. Cerio, you live currently where?

25 A. In New York.

1 Q. And your relationship to this case was, I believe, that
2 you were the girlfriend of Mr. Pennington at the time all of
3 this happened?

4 A. Yes.

5 Q. And you were there the night all of this happened?

6 A. Yes.

7 Q. And did you live in New York at the time?

8 A. No.

9 Q. You lived here in Myrtle Beach?

10 A. Yes.

11 Q. And did you live with Mr. Pennington?

12 A. Yes.

13 Q. And since then you are currently living in New York?

14 A. Yes.

15 Q. And did you go out to dinner with a group that night?

16 A. Yes.

17 Q. And your relationship to Remi was what?

18 A. She's my cousin.

19 Q. She's your cousin?

20 A. Uh-huh.

21 Q. And your relationship to Anijah Yarnell was what?

22 A. I didn't have a relationship with him.

23 Q. You didn't have one?

24 A. Uh-uh.

25 MR. MARTIN: Judge, we would ask that Ms. Cerio be

1 declared a hostile witness so that I can walk her through her
2 statement.

3 MS. LIVESAY: The State objects. At this time there
4 is no evidence that this young lady has any intentions of being
5 hostile. She's answered every question he's asked so far.

6 THE COURT: Do you want to lay a better foundation?

7 MR. MARTIN: Yes.

8 Q. Let me ask you, Emily, that night you actually called
9 911, I believe?

10 A. Yes.

11 Q. And you were there when the police officers came?

12 A. Yes.

13 Q. And you gave a statement to Detective Drew Edwards that
14 night --

15 MS. LIVESAY: Your Honor, at this time I object to
16 the fact that it's a leading question and this young lady has
17 not been declared hostile.

18 THE COURT: Okay. I'm going to allow him to lead,
19 this does not seem to be material questions as to why this
20 witness was called, I think he's helping to move the case
21 along. Go ahead.

22 Q. Emily, again, you were there when the police came?

23 A. Yes.

24 Q. You gave a statement to the police?

25 A. Yes.

1 Q. And in that statement you told them things about what
2 happened that night?

3 A. Yes.

4 Q. And you told them things about your being with Remi that
5 day?

6 A. Yes.

7 Q. Now, do you remember Remi turning off her phone during
8 the day?

9 A. Yes.

10 Q. So she didn't talk to Mr. Yarnell?

11 A. Yes.

12 Q. And she just cut it off and had no contact with him,
13 correct?

14 A. As far as I know.

15 Q. As far as you know?

16 A. Uh-huh.

17 Q. For relatively most of the afternoon?

18 A. Yeah.

19 Q. And how long were you with Remi?

20 A. I was with Remi all day.

21 Q. All day?

22 A. Yeah.

23 Q. Okay. And again, do you remember her talking to Anijah
24 Yarnell about 9:30 that night?

25 A. When we got back, do you mean from dinner?

1 Q. After you got back from dinner, before you got back to
2 the apartment, do you remember her talking to Anijah Yarnell by
3 telephone?

4 A. No. I don't remember her directly talking to him. I
5 just remember her reading a text message from him.

6 Q. Let me ask you this. Did you tell the detective that
7 night that, quote -- let me find out where I want to start
8 here -- that quote: So then we just sat in the car for a
9 minute because Remi was talking to Anijah on the phone. She
10 was on the phone with him and he was just saying that he, like,
11 had, like, all her stuff, or something like that, and she told
12 him to leave it and go, and like I'll get it then, then go
13 home.

14 A. I don't recall saying that, no.

15 Q. You don't recall saying that?

16 A. I don't know.

17 Q. Well, let me show you a copy of your statement. So let
18 me ask you this. Let me hand you that, page four.

19 A. Yes, sir.

20 Q. Turn back, if you will, to page two, Emily.

21 A. Alright.

22 Q. And this is the detective speaking to you and the
23 detective says, speak up for me.

24 MS. LIVESAY: Can we get a look at that, Judge?

25 THE COURT: Can you tell her what you're referring

1 to?

2 MR. MARTIN: I'm referring from the transcript of
3 Emily's statement to the detective that night.

4 MS. LIVESAY: And where are you at?

5 MR. MARTIN: Let me give you a copy of mine so that
6 she can follow along. Here you go.

7 MS. LIVESAY: What page are we at?

8 MR. MARTIN: Number two, page two.

9 Q. And the detective says, speak up, what's your phone
10 number, Emily? Do you see that?

11 A. Yes.

12 Q. What did you tell him?

13 A. 315-657-0005.

14 Q. And he says, alright, so just run through with me what
15 happened tonight. Correct?

16 A. Correct.

17 Q. And you answered: Me and my family were going out to
18 Handley's Pub in Carolina Forest, we were all going to get some
19 food. Right?

20 A. Yes.

21 Q. So this was your statement that you made to the police
22 officer that night, correct?

23 A. Yeah.

24 Q. Now, turn with me to page four. And look at the very
25 bottom of page four. Your answer starts with, yeah. Okay?

1 But if you look down at the bottom of page four at line 19. Do
2 you see line 19?

3 A. Yes, sir.

4 Q. Read your answer to the detective's question there.

5 A. So then we sat in the car for just a minute because Remi
6 talked to an Anijah on the phone.

7 MS. LIVESAY: Your Honor, at this time the State
8 wishes that she read the entire answer under the rule of
9 completion, not just one line.

10 MR. MARTIN: Well, I think I can cross-examine her as
11 I like.

12 THE COURT: She's your witness. I'm going to let him
13 do it, and you can give the rest of the statement on
14 cross-examination.

15 A. -- on with him and he was saying that he had, like, all
16 her stuff, or something like that, and she told him, leave it
17 or, like, I'll get it, and then you need to go home. I don't
18 want to go home with you and I don't want to see you.

19 Q. And so it is accurate that Emily and Anijah -- strike
20 that -- sorry.

21 A. That's okay.

22 Q. -- Remi and Anijah talked that night?

23 A. Yes. When you asked I was confused at what time you
24 meant.

25 Q. Okay. And would you agree with me that this

1 conversation that they had is after you had gone to dinner and
2 you and Remi -- who were riding together that night, weren't
3 you?

4 A. Uh-huh.

5 Q. -- and that you and Remi had gone to the Speedway
6 Station?

7 A. Yes. This conversation took place when we had already
8 left the apartment complex the first time.

9 Q. And when you say, "the first time," this conversation
10 had taken place after you all had gone to dinner?

11 A. Yes.

12 Q. And but before you got back to the apartment complex?

13 A. No.

14 Q. Tell me when it took place.

15 A. We got back from dinner and we were in the apartment
16 complex. We then left the apartment complex to go to the gas
17 station to meet Michael and that's when the conversation took
18 place.

19 Q. But at that time Remi knew Anijah was at the apartment
20 complex?

21 A. When we originally got back from dinner and we pulled
22 into the parking lot, she had told me that he was there and we
23 immediately left.

24 Q. And then they had the conversation that we just talked
25 about on the phone?

1 A. Yes.

2 Q. And you went back with her to Speedway, right?

3 A. Me and her road to the gas station, yes, Speedway.

4 Q. And you went to look for Mike?

5 A. We went to meet Michael, yes.

6 Q. And you asked Michael to come back there at that time?

7 A. Yes.

8 Q. Right? Okay. But clearly, Remi knew Anijah was at the
9 apartment complex, didn't she?

10 A. Not until we had already gotten back from dinner and
11 pulled into the complex.

12 Q. I understand that, but I mean, she's on the phone, of
13 course, and do you know that he had text her and told her he
14 was there?

15 A. I don't recall how she found out. I believe it was a
16 text.

17 Q. And then the two of them talked on the telephone?

18 A. Correct.

19 Q. And she knew then that he was at the apartment complex?

20 A. Correct.

21 Q. In parking lot?

22 A. Correct.

23 Q. And did you talk to Anijah at all that day?

24 A. No.

25 Q. Did you text with Anijah at all that day?

1 A. No.

2 Q. Did you have any communication at all with Anijah that
3 day?

4 A. No.

5 Q. But there's no question that Remi talked to him and told
6 him that she would get her stuff but then he needed to leave
7 and go home?

8 A. She asked him to just leave it there. She didn't want
9 to see him.

10 Q. Well, your statement -- again, let me just read your
11 statement so we're dealing with that. So she was on the phone
12 with Anijah and he was saying: That he had, like, all her
13 stuff or something like that, and she told him to leave it, and
14 go, and like, I'll get it, and I'll get it then, right?

15 A. Right.

16 Q. And then, turn to page seven, Emily. And so the second
17 page of this. Now, you and Emily -- you and Remi, I'm sorry
18 about that.

19 A. That's alright.

20 Q. You and Remi drove back to the apartment complex --

21 A. Yes.

22 Q. -- and Anijah was still there?

23 A. He was -- as we were pulling in he was starting to pull
24 out.

25 Q. He was pulling out as you were pulling in?

- 1 A. Correct.
- 2 Q. And you passed each other?
- 3 A. Correct.
- 4 Q. And who was driving?
- 5 A. My car?
- 6 Q. Yes.
- 7 A. Remi was.
- 8 Q. Who?
- 9 A. Remi.
- 10 Q. Remi is driving your car?
- 11 A. Yes.
- 12 Q. Had you been drinking that night, Emily?
- 13 A. Yes.
- 14 Q. A good bit, a little bit, what would you say?
- 15 A. Just a little bit, a couple drinks.
- 16 Q. Was she driving because you didn't want to drive because
- 17 of the drinking?
- 18 A. Correct.
- 19 Q. You had been drinking so you didn't want to drive?
- 20 She's driving your car?
- 21 A. Yeah.
- 22 Q. Is your car a local car or a New York car?
- 23 A. It was actually Michael's car, so it would have been a
- 24 local car.
- 25 Q. A local car. Alright, but when you all -- when the cars

1 passed there in the driveway leaving from the apartment, Remi
2 and Michael stopped and talked -- I mean, not Michael -- Remi
3 and Anijah, they are there with each other side by side for a
4 few seconds, minutes, or whatever?

5 A. Yeah. He just yelled at her through the window.

6 Q. And they spoke with each other, correct?

7 A. He yelled at her and she said one thing back and that
8 was it.

9 Q. And then, where was Mike at this time?

10 A. He was in the car. He was already parked in the parking
11 lot.

12 Q. Are you sure, or was he in the car behind you?

13 A. No. He had parked before us.

14 Q. He had already parked.

15 A. Yes, sir.

16 Q. But at any rate, when they came through -- so he had
17 already come in and had parked?

18 A. Uh-huh.

19 Q. And so as -- after Emily -- after Remi and Anijah got
20 through talking and Remi pulled on in to the parking lot, she
21 parked the car, right?

22 A. Correct.

23 Q. And you and she went upstairs?

24 A. Yes.

25 Q. And who was in the parking lot?

1 A. My Aunt Jen, Darrin and Michael.

2 Q. And Michael, alright. And Michael had brought some
3 beer?

4 A. He had a case of beer, yep.

5 Q. But you and Remi had gone on upstairs, right?

6 A. Yes.

7 Q. And at that time Anijah was not there, right?

8 A. We believed he had pulled out. We don't know if he was
9 still in the complex or not, but we assumed.

10 Q. But at any rate, the two of you had come in and he was
11 heading out, right?

12 A. Yes.

13 Q. And you had got up to the apartment, right?

14 A. Yes.

15 Q. And now, Anijah never went up to the apartment that
16 night?

17 A. No.

18 Q. He pulled his car up into the parking lot after you and
19 Remi had gone upstairs?

20 A. No.

21 Q. No?

22 A. No. As I was walking back downstairs I saw him pull
23 back in.

24 Q. I agree. Or I say I agree, you tell it, but you and
25 Remi had walked up there and you left her and you walked back

1 down to get a phone charger maybe?

2 A. Yes.

3 Q. And so down in the parking lot is Mike, Darrin,
4 Jennifer?

5 A. Uh-huh.

6 Q. Right. And when you walk up is Anijah already down
7 there or does he pull up as you're walking up?

8 A. He is pulling up as I'm walking up.

9 Q. Do you see Michael there in the parking lot?

10 A. Yes.

11 Q. Is he drinking a beer at that time?

12 A. No.

13 Q. Is he smoking a marijuana blunt at that time?

14 A. I don't recall. I don't recall if he was or not.

15 Q. Do you know whether he had a marijuana blunt that night?

16 A. I don't know.

17 Q. Do you know if he had cocaine?

18 A. I do not know.

19 Q. So do you recall Michael saying to Anijah: I'm from
20 Virginia and if you pull a gun you better pull the trigger?

21 A. Yes.

22 Q. So what did you see happen there, Emily?

23 A. After I walked downstairs Anijah pulled up, from what I
24 recall Michael had just told him he needed to go home, and that
25 was it, and Michael saw the gun, said that he's from Virginia,

1 if you're going to pull a gun pull the trigger. Anijah pulled
2 the gun up, cocked the gun and Michael moved to the side and
3 then reached in and punched Anijah.

4 Q. So how many times did he punch him?

5 A. Once.

6 Q. Did Anijah ever get out of the car?

7 A. No.

8 Q. Did he park, did he stop the car in the driveway?

9 A. Yes.

10 Q. Did Michael approach him?

11 A. He pulled up to Michael.

12 Q. Well, so Michael is standing in the middle of the
13 driveway?

14 A. Michael was standing -- yeah, he was standing right
15 there and Anijah pulled right up next to him.

16 Q. And they started talking?

17 A. Uh-huh.

18 Q. And Anijah -- and the window was rolled down?

19 A. Yes.

20 Q. And did you hear Michael tell him to get out of the car?

21 A. No.

22 Q. Did you hear him tell him to get the fuck out of the
23 car, I'm gonna fuck you up?

24 A. No.

25 Q. Did you see Michael punch him?

1 A. I saw Michael swing. I don't know if he made contact.

2 Q. And he punched him through the window of the car?

3 A. Yes.

4 Q. And the window was rolled down or partially down?

5 A. I don't recall.

6 Q. When you say he cocked it, what are you talking about
7 when you say that?

8 A. He had the gun held up and he pulled the, I don't know
9 what is.

10 Q. That automobile's got some tinted glass, doesn't it?

11 A. I don't know.

12 Q. Well, do you recall whether its got tinted glass or not?

13 A. Well, the window was down.

14 Q. The window was down.

15 A. I don't recall.

16 Q. So did you see the gun yourself?

17 A. Yes.

18 Q. What color was the gun?

19 A. Black.

20 Q. And what did you -- how close were you standing when all
21 of this happened?

22 A. Right behind Michael, not far.

23 Q. And then you say: And then Anijah starts kind of
24 backing out. Do you remember that?

25 A. Yeah.

1 Q. And I told Michael, I said, stop, don't. Do you
2 remember that?

3 A. Yeah.

4 Q. And I said, Michael, let it go, just let it go. Do you
5 remember that?

6 A. Yeah.

7 Q. Michael wasn't letting it go, was he?

8 A. He did.

9 Q. Well, and Anijah was backing out, do you remember?

10 A. And then stopped, yes.

11 Q. Did what?

12 A. He started backing out and then he stopped.

13 Q. And then you say: And the door opened and he shot.

14 A. Yeah. So I believe that the door had opened, but
15 recalling it I know that he had tried -- Michael tried to open
16 to door and did not get it open.

17 Q. Michael was trying to open that door, wasn't he?

18 A. He tried one time, yes.

19 Q. He wanted to get Anijah out of there, didn't he?

20 A. I think he wanted to protect us from the gun Anijah had.

21 Q. Well, maybe so, but the guy's got a gun, and Michael is
22 trying to get him out of there, right?

23 A. Yes.

24 Q. And that wasn't Michael's car, was it?

25 A. No.

1 Q. And there's no question that Michael was pulling on the
2 door handle trying to open it, right?

3 A. Correct.

4 Q. And that he was hitting him through the door, wasn't he?

5 A. He hit him once, yes.

6 Q. Do you know whether he tried to get the gun or not?

7 A. I believe that he did attempt to, yes.

8 Q. Would you agree with me, Emily, that Michael was
9 aggressive and belligerent towards Anijah?

10 A. No.

11 Q. Well, he tried to openly hit him, didn't he?

12 A. Yeah, once he saw Anijah had a gun.

13 Q. Well, and of course, you're judging from what you saw,
14 right?

15 A. Yes.

16 Q. You never talked to Michael about what he saw or didn't
17 see?

18 A. I couldn't because he passed away, no.

19 Q. I understand that. But at any rate, there's no question
20 did he reach through the window and hit him?

21 A. Yeah.

22 Q. Grabbed him at the door?

23 A. Yes.

24 Q. You were telling him to stop, let it go, weren't you?

25 A. Yes.

1 Q. Now, let me turn you to page nine. I mean, page 10.

2 The detective asked you about Remi and Anijah arguing that day.
3 Do you see that?

4 A. Yes.

5 Q. And your response was: I think it's common, they argue
6 all the time, but I guess he was upset because she wasn't home
7 when he got home from work and then she just turned off her
8 phone and he kept just blowing up her phone. Do you see that?

9 A. Yes.

10 Q. Do you see down below, they asked you where Anijah
11 works, and you said Lowes?

12 A. Lowes, I think, yes.

13 Q. Now, Emily, you didn't talk to Anijah that night before
14 he got there, did you?

15 A. No.

16 Q. And to your knowledge, nobody talked to Anijah except
17 Emily, did they -- I mean, Remi, the time we're talking about?

18 A. To my knowledge, no.

19 Q. To your knowledge, Darrin didn't talk to her?

20 A. Not that I'm aware of, no.

21 Q. Nobody did. Okay. And this happened in the parking lot
22 of that apartment complex, correct?

23 A. Yes.

24 Q. And you don't live there, do you?

25 A. No.

1 Q. And Michael didn't live there, did he?

2 A. No.

3 Q. Darrin nor Jennifer lived there --

4 A. No.

5 Q. -- did they?

6 A. No.

7 Q. And the reason that Mike came over was you and Remi, and
8 you, went over to the Speedway to tell him to come over there
9 to deal with Anijah, didn't you?

10 A. No. Actually, Michael was on his way over to me to hang
11 out with our family. We just went there to come walk us
12 inside.

13 Q. Well, again, you went to get him, and again, I'm just
14 trying -- again, you went to get him and I'm assuming, or you
15 tell me, you told him while you were with him, Anijah is over
16 there?

17 A. And Remi was scared, yes.

18 Q. And you said Remi was scared?

19 A. Yes.

20 Q. Of course Remi can testify to whether she was scared or
21 not. Would it surprise you if Remi tells the police she was
22 not scared of him?

23 A. It surprised me to begin with that that was her first
24 initial statement, yes.

25 Q. But that's what she said, that she weren't afraid of

1 him, right?

2 A. Right, as far as I know.

3 Q. But you went to get Michael. Anijah didn't go looking
4 for Michael, did he?

5 A. No.

6 Q. Michael came to be there when Anijah came, right?

7 A. Yes.

8 MR. MARTIN: Answer any questions they have for you.
9 One second, Judge, give me one second. I'm through.

10 THE COURT: Are you done? Thank you, sir.

11 **CROSS-EXAMINATION**

12 BY MS. LIVESAY:

13 Q. Ms. Cerio, if you don't mind, am I pronouncing that
14 right?

15 A. Yes, ma'am.

16 Q. Okay, good. First of all, let me ask you something.
17 Who lives at Maddington Place? Who lived in that condo.

18 A. My brother and my father.

19 Q. And had you lived there at some point?

20 A. Yes.

21 Q. And did you have a key to it?

22 A. Yes.

23 Q. And could you come and go whenever you pleased?

24 A. Yes.

25 Q. And you could invite whoever you wanted?

1 A. Yes.

2 Q. Did you invite that defendant over there?

3 A. No.

4 Q. And Mr. Martin just asked you, nobody talked to him. To
5 your knowledge, did anybody invite Anijah Yarnell to that
6 condo?

7 A. No, ma'am.

8 Q. And in fact, Remi told him to leave; is that correct?

9 A. Yes.

10 Q. When she asked him to leave did he leave?

11 A. No.

12 Q. And Michael Pennington asked him to leave, didn't he?

13 A. Yes.

14 Q. And did he leave then?

15 A. No.

16 Q. So two people asked him to leave before the shooting
17 ever happened?

18 A. Yes.

19 Q. And he was uninvited?

20 A. Yes.

21 Q. Okay. So he came over there, uninvited, two people ask
22 him to leave and he will not leave?

23 A. Yes.

24 Q. Now, Mr. Martin -- and again, you had a key to the
25 condo, you had lived there, your family's condo?

1 A. Yes.

2 Q. Was Michael Pennington welcome over there?

3 A. Yes.

4 Q. Now, let me ask you this. Did Michael go out to dinner
5 with you all?

6 A. He met us there after we had already gotten there.

7 Q. And how long was he there?

8 A. I can't say an exact time, but it wasn't very long,
9 maybe 30 minutes, 45 minutes.

10 Q. And what restaurant was it?

11 A. Handley's Pub.

12 Q. Okay, so probably pretty it was pretty crowded, isn't it?

13 A. Yeah.

14 Q. Okay. And did he have any problems with anybody at
15 Handley's at dinner?

16 A. No, ma'am.

17 Q. Did he have any problems with anybody in the family?

18 A. No, ma'am.

19 Q. And was he welcome to be with the family?

20 A. Yes.

21 Q. And was he invited over to the condo that night?

22 A. Yes.

23 Q. In fact, when you met him he was on his way to the
24 condo; is that correct?

25 A. Yes.

1 Q. And was he acting aggressively or out of the way?

2 A. No.

3 Q. And in fact, after you all were around him at Handley's,
4 you said, hey, come over to the condo and let's all spend time
5 together?

6 A. Yes.

7 Q. Now, Mr. Martin asked you that Remi turned her phone
8 off?

9 A. Uh-huh.

10 Q. Why did she turn her phone off?

11 A. Anijah had been harassing, messaging her, texting her,
12 calling her all day and she just wanted a break from him.

13 Q. And so because he was just burning that phone up. Could
14 she even use the phone?

15 A. No.

16 Q. Okay. Because every time she picked it up it's ringing?

17 A. Yes.

18 Q. So she had to turn it off?

19 A. Yes.

20 Q. To get some relief?

21 A. Yes.

22 Q. Now, Mr. Martin asked you -- so he's tearing up the
23 phone all day. She finally has to turn the phone off; is that
24 right?

25 A. Yes.

1 Q. Now, is Michael Pennington tearing up her phone?

2 A. No.

3 Q. Is he tearing up your phone?

4 A. No.

5 Q. Did anybody in the family have to turn their phone off
6 because Michael kept calling?

7 A. No.

8 Q. So you all leave dinner, the plan is for everybody to
9 come back to the condo; is that correct?

10 A. Yes.

11 Q. When you get back to the condo is this defendant already
12 there waiting?

13 A. Yes.

14 Q. Uninvited --

15 A. Yes.

16 Q. -- unwelcome?

17 A. Yes.

18 Q. Now, when you get there and you see him there, what
19 happens?

20 A. I put my dog back in the car and I told Remi to leave.
21 I told Remi to back out in the car.

22 Q. And how was Remi reacting when she saw him there?

23 A. She was terrified, she was shaking and scared.

24 Q. And is that why you all left?

25 A. Yes. I saw the fear in her face and I didn't know what

1 else to do, it was just me and her.

2 Q. And at that time was that when she said, leave, go home
3 I don't want to see you?

4 A. She said that when we got to the gas station and she
5 spoke with him, yes.

6 Q. So you all go to the gas station because Remi is afraid
7 of Anijah?

8 A. Yes.

9 Q. And you're a woman and she's seven months pregnant?

10 A. Yes.

11 Q. And neither one of you are equipped to deal with this
12 man?

13 A. Yes.

14 Q. Okay. So you go get Michael because that's somebody
15 that you and her find comfort in?

16 A. Yes.

17 Q. Looking for protection?

18 A. Yes.

19 Q. So you go there, you're afraid. How long are you gone
20 at the gas station?

21 A. Maybe ten minutes. It wasn't very long at all. I don't
22 recall exactly how long, but I don't think it was very long.

23 Q. And while you're at the gas station she's telling him go
24 home?

25 A. Yes.

1 Q. I don't want to see you?

2 A. Yes.

3 Q. Well, when you get back from the gas station has he
4 left?

5 A. No.

6 Q. Okay. So he's still there?

7 A. Yes.

8 Q. You've left, you've had to get somebody to protect you.
9 She tells him to leave and low and behold when you get back
10 he's still there?

11 A. Yes.

12 Q. Are you glad that Michael Pennington is with you when
13 you get back and this man is still waiting in the parking lot
14 for you?

15 A. I'm not glad that he was still waiting there, no. I'm
16 glad that Michael was with us, yes.

17 Q. And how far along was Remington at the time?

18 A. Seven or eight months.

19 Q. Seven or eight months?

20 A. Yes.

21 Q. And who was the father of the child?

22 A. Anijah Yarnell.

23 Q. So there was a deep connection there?

24 A. Yes.

25 Q. But she had told him at the gas station go home?

1 A. Yes.

2 Q. And that's what you told the police?

3 A. Yes.

4 Q. She tells him to go home. You all had to go get
5 somebody to protect you. By the time you get back he's still
6 sitting there waiting?

7 A. Yes.

8 Q. What happens when you get back?

9 A. We're trying to pull in and he's just starting -- as we
10 pulled into the parking lot he's just starting to try and pull
11 out and we go to drive past him and he accuses her of trying to
12 block him in.

13 Q. And what does he say to you?

14 A. I don't remember exact words, I just remember he was
15 screaming at her about blocking him in and not letting him
16 leave, and she explained to him that was the only way into the
17 parking lot and that she was not trying to block him in.

18 Q. So would you describe him, the defendant, screaming at
19 her, as aggressive behavior?

20 A. Yes.

21 Q. At that time was there anybody else out there screaming
22 and hollering?

23 A. No.

24 Q. Was Michael out there screaming and hollering?

25 A. No.

1 Q. Nobody else was screaming and hollering?

2 A. No.

3 Q. And what happened after he's screaming and hollering at
4 her?

5 A. We believed that he had left. We didn't know and didn't
6 watch him, but we assumed he left and we pulled into our own
7 parking spot.

8 Q. And during this time he's screaming and hollering do you
9 ever say, hey, come on in the condo, come visit?

10 A. No.

11 Q. Does she ever invite him over?

12 A. No.

13 Q. So then when you all pull in you think he's left?

14 A. Yeah.

15 Q. And what do you and Remington do?

16 A. We get out of the car and we start walking past Michael,
17 Darrin and Jen, and I had stopped to talk to them for a second
18 and Remi had asked me to bring her upstairs.

19 Q. Why did she want to go upstairs?

20 A. She was scared.

21 Q. Who was she scared of?

22 A. Anijah.

23 Q. Was anybody out there scared of Michael?

24 A. No.

25 Q. Was anybody screaming and hollering out there at that

1 point? Was Michael out there screaming and hollering?

2 A. No.

3 Q. And so you and Remi walk upstairs?

4 A. Yes.

5 Q. And then what happened?

6 A. I tell her I forgot my charger so I go back downstairs
7 to the car to get it.

8 Q. Does she want to go downstairs?

9 A. She didn't say if she did or not. She was sitting on
10 the couch and I told her just stay right there, I'll be right
11 back.

12 Q. And you walk downstairs?

13 A. Yeah.

14 Q. And then what happens?

15 A. I walked up to Michael.

16 Q. And who is all standing out there at this time?

17 A. Darrin, Jen, Michael. Jen was back by the car more, she
18 wasn't right there.

19 Q. And what are you all doing, just visiting?

20 A. Darrin and Michael were just talking.

21 Q. Were they fighting?

22 A. No, they were laughing.

23 Q. Was anybody screaming?

24 A. No.

25 Q. They were laughing?

- 1 A. They were laughing.
- 2 Q. Having a good time?
- 3 A. Yes.
- 4 Q. So nobody was fighting at that time?
- 5 A. No.
- 6 Q. Then what happens?
- 7 A. By the time I had gotten to Michael, Anijah had pulled
8 up in his car right next to Michael.
- 9 Q. So that's something else. Anijah pulls up to you guys?
- 10 A. Yes.
- 11 Q. So nobody, does anybody call him after he leaves?
- 12 A. No.
- 13 Q. So nobody's chasing after him?
- 14 A. No.
- 15 Q. And when he wheels back around, he wheels back around to
16 talk to you all?
- 17 A. Yes.
- 18 Q. Again, she's already told him to leave?
- 19 A. Yes.
- 20 Q. She's upstairs in the condo?
- 21 A. Yes.
- 22 Q. And at that point does Michael ask him to leave?
- 23 A. Yes.
- 24 Q. And does he leave?
- 25 A. No.

1 Q. Then what happens?

2 A. Michael had saw that Anijah had a gun and they had said
3 some -- Michael had told him, you know, oh, you have a gun, and
4 at that point then Anijah had raised it and I saw it.

5 Q. Before Anijah breaks that gun out, does Michael ever lay
6 hands on him?

7 A. No.

8 Q. Does anybody else pull a gun out?

9 A. No.

10 Q. Does anybody threaten him with a gun?

11 A. No.

12 Q. Has anybody laid hands on Anijah Yarnell?

13 A. No.

14 Q. Has anybody laid hands on the vehicle at that point?

15 A. No.

16 Q. So Michael at that point has not struck him, touched the
17 vehicle, pulled a weapon, anything?

18 A. No.

19 Q. How about anybody else out there?

20 A. No.

21 Q. And then once Anijah comes up and pulls a gun on Michael
22 then what happens?

23 A. He pulls the gun and he cocks it back, Michael moves off
24 to the side a little bit and then he comes back and punches him
25 through the window.

1 Q. And then what happens?

2 A. Anijah then -- Michael tried to reach for the gun and he
3 tried pulling on the door handle and it didn't open and then
4 Anijah shot him.

5 Q. Where was Michael when Anijah shot him?

6 A. He was back away from the car.

7 Q. Was he touching the car in any form or fashion?

8 A. No, he wasn't.

9 Q. And Michael was not upset or yelling or putting his
10 hands on anybody until the defendant pulled a gun on him?

11 A. Correct.

12 Q. And there was no problem before that?

13 A. Correct.

14 Q. And two people had already asked him to leave and he
15 would not leave?

16 A. Yes.

17 Q. And in fact, when he was asked to leave he reacted by
18 pulling a gun on Michael?

19 A. Yes.

20 Q. And then of course, like any normal human being, Michael
21 is somewhere where he was invited and somebody shows up
22 uninvited, unwelcome, won't leave, and has the nerve to pull a
23 gun on him; is that right?

24 A. Yeah.

25 Q. Now, Mr. Martin asked you about your statement and asked

1 you to read one line from it, do you remember that?

2 A. Yes.

3 Q. If you don't mind, under the rule of completion, read
4 the entirety of the answer.

5 A. Which line was it, I'm sorry?

6 Q. He had had you read line 19.

7 A. Correct.

8 Q. This is the complete answer.

9 A. Yes.

10 Q. If you don't mind, read the complete answer for the
11 record.

12 A. Yeah, and she was saying she was scared, she didn't know
13 what to do so I got the dog, I got back in the car and I said,
14 start the car. She started the car, and I'm, like, pull off,
15 let's go. We started driving down the road and I called and
16 told them she's scared, she's scared, like, get out of this car
17 without you or somebody, she's pregnant. And he's like, I'm
18 right here at Murphies Gas Station. I said, okay, we'll be
19 right there. We meet him there to talk just a minute. I was
20 on the phone with my aunt telling her what was going on, that
21 we were not going back unless we were with Michael. Then we
22 sat in the car for just a minute, Hmmm, because Remi talked to
23 Anijah on the phone. She was on the phone with him and she was
24 saying, like, that he had all of her stuff or something like
25 that and she told him, leave it and go or I'll get it, you need

1 to go home, I don't want to see you. So then she said she
2 didn't want to go back and leave, Remi, let's just go, so we go
3 back here and we're right here and we're about -- like right
4 there and Anijah was backing out of those parking spots over
5 there trying to get out.

6 Q. So he's still there waiting for you?

7 A. Yeah.

8 Q. Would you have felt the need to go get Michael if this
9 defendant was not sitting in the parking lot waiting for you
10 all?

11 A. No.

12 Q. And why did you go get him?

13 A. We were scared.

14 Q. You were scared. And there had not been any problems at
15 all until the defendant showed up?

16 A. Yes.

17 Q. Even then there wasn't a problem, was there?

18 A. No.

19 Q. The problem started when he pulled his gun?

20 A. Yes.

21 MS. LIVESAY: No further questions, Your Honor.

22 THE COURT: Any Redirect limited to what she went
23 into?

24 MR. MARTIN: Just a little bit, Judge.

25

REDIRECT EXAMINATION

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BY MR. MARTIN:

Q. Let me ask you, and let me show you Defendant's Exhibit Number 33 which is a sketch of the parking lot.

MS. LIVESAY: Your Honor, I'm going to object, as that is outside the scope of my cross-examination.

THE COURT: I don't know what he's going to ask so let him ask the question first.

MS. LIVESAY: Okay.

Q. Well, she said that this in reference to the idea that Anijah pulled up to Michael.

A. Yes.

Q. Do you remember that? Okay. Now, this sketch shows blood drops in the middle of the driveway.

A. Yes.

Q. Can you on this sketch, can you show me where you were standing where the car was parked?

MS. LIVESAY: Again, Your Honor. Objection. I never asked any questions regarding to blood drops or the diagram.

THE COURT: Okay. I'm going to let him ask the question.

Q. Can you show me where Anijah's car was parked on the sketch?

A. When he shot him or before that?

Q. Well, when he pulled up. You said that he pulled up.

1 You were there when he pulled up, where did he pull up and
2 stop?

3 A. Right around here (indicating.)

4 Q. Here?

5 A. Yeah, right around this area here (indicating.)

6 Q. Let the record reflect that she's pointing to the area
7 of South Carolina tag number car in the driveway, correct?

8 A. Correct.

9 Q. And where was Michael standing?

10 A. Right there (indicating.)

11 Q. He was standing there?

12 A. Yes. Anijah pulled up to him.

13 Q. And he was standing in front of his car?

14 A. Yes.

15 Q. And so if Anijah is pulling up, did you hear Anijah say,
16 is Remi going to get her stuff?

17 A. I don't know.

18 Q. Did you hear Anijah say anything?

19 A. No. I heard him speaking. I just don't recall what it
20 was he said.

21 Q. Would you deny that Anijah said, hey, is Remi coming to
22 get her stuff, or is she going to get her stuff?

23 A. I wouldn't deny that, no, because I don't know what was
24 said.

25 Q. And do you know that Michael said something to him?

1 A. He told them to go home.

2 Q. And then he asked him to get out of the car?

3 A. I don't recall that.

4 Q. You don't recall that?

5 A. No.

6 Q. So Anijah -- at the time that the shot was fired where
7 was the car?

8 A. It had moved back a little bit from the original
9 starting point.

10 Q. Is it possible that it's back where the blood drops
11 start?

12 A. Not -- I believe it was more in this area, Michael
13 stumbled backwards a little bit.

14 Q. No question that Anijah was backing out?

15 A. And then he stopped.

16 Q. And Michael was following along with him as he was
17 backing out?

18 A. He had his hands on the car handle and he started
19 backing out and Michael let go and Anijah stopped.

20 Q. And again, no doubt Michael had his hands on the car,
21 had his hands on the car door?

22 A. Yes.

23 Q. And Anijah is backing out?

24 A. Yes.

25 Q. And he still got his hands on the car?

1 A. Once Anijah started backing out Michael let go of the
2 car.

3 Q. And he never went any further back towards the car?

4 A. He was right next to the car. Anijah stopped when
5 Michael let go of the car.

6 Q. Well, where was he when Michael was hitting Anijah?

7 A. He was in the original, first original spot.

8 Q. So he's reaching in the car door at the original spot?

9 A. He -- yes.

10 Q. And he starts hitting him?

11 A. He hit him once, yes.

12 Q. And Anijah starts backing up?

13 A. Yes.

14 Q. And Michael's still got his hand on the car door?

15 A. Michael let go of the car door when he started backing
16 up and then Anijah then stopped.

17 Q. And you're telling Michael to let it go, let it go?

18 A. Yes.

19 Q. And so under your theory, or under your version of how
20 this happened, how far away was Michael when he was shot on the
21 night?

22 A. I mean, he was away from the car. I don't know exactly
23 how far, but he wasn't right next to the car.

24 Q. So that having been said, there's no question -- she had
25 you read again, and I noticed you left out a word on page five.

1 Okay? Have you still got that statement on page five? Do you
2 got it there?

3 A. Yes.

4 Q. And again, and my point to you is, Emily, not to belabor
5 this, but when you read this statement, Anijah and Remi talked,
6 right?

7 A. Yes.

8 Q. And first of all, Remi had invited Anijah to go to
9 dinner with you all that night, had you known that?

10 A. No.

11 Q. You don't think she had?

12 A. No.

13 Q. You don't think that when Anijah went to work that
14 morning that the plan was he was going to come down and go to
15 dinner with you all?

16 MS. LIVESAY: Objection. It's outside the scope of
17 my cross-examination.

18 THE COURT: Okay.

19 MR. MARTIN: Well, she said, uninvited, uninvited
20 repeatedly.

21 THE COURT: I'm going to let him ask it.

22 A. Do I think that he was invited? No, I don't.

23 Q. So you don't think she ever planned for Anijah to come?

24 A. No.

25 Q. Okay. Going back to five, she says there that she was

1 on the phone with him, right?

2 A. Yes.

3 Q. And he was saying that he had, like, all her stuff,
4 right?

5 A. Uh-huh.

6 Q. Or something like that, and she told him, like, leave
7 it, then you need to go home.

8 A. No. That's not what it says.

9 Q. Then what does it say? Read it word for word.

10 THE COURT: Hang on one second.

11 MS. LIVESAY: Just for the record, we transcribed the
12 statement, as well, and I believe there's going to be a
13 difference in Mr. Martin's transcription and ours.

14 MR. MARTIN: Well, mine was by a certified court
15 reporter.

16 MS. LIVESAY: Upon the end of the questioning and
17 I'll put on what I need to on the record.

18 MR. MARTIN: Well, mine's by a certified court
19 reporter. Who transcribed yours?

20 MS. LIVESAY: Whitney.

21 MR. MARTIN: Anyway, to the extent what's in the
22 original when we need to, but I got it by a certified court
23 reporter and I'm going to try to put it into this.

24 Q. Just read that paragraph, page five, top paragraph for
25 me, okay?

1 A. -- phone with him, and he was saying that like that he
2 had, like, all of her stuff, or something like that, and she
3 told him, like, leave it and go, or, like, I'll get it then,
4 you need to go home.

5 Q. I'll get it, then you need to go home.

6 A. I'll get it then, after he leaves it.

7 Q. You need to go home. Well, that depends on how you look
8 at it. She said either you need to leave it, I'll get it, then
9 you need to go home.

10 A. No. She said, you leave it, I'll get it then.

11 Q. But there's no doubt in terms of what happened here that
12 when it is that -- Anijah didn't hit anybody, did he?

13 A. No.

14 Q. He didn't try to get into anybody's car, did he?

15 A. No.

16 Q. He drove into that public parking lot, right?

17 A. Yes.

18 Q. And Michael tried to get into his car, didn't he?

19 A. After Anijah pulled a gun on him.

20 Q. Well, for whatever reason, you said that, but again, did
21 Michael try to get in the car or not?

22 A. Yes.

23 Q. Did he hit him or not?

24 A. Yes.

25 Q. Did he have his hand on the door opening that door or

1 not?

2 A. Yes.

3 Q. You told Michael to stop, didn't you?

4 A. Yes.

5 Q. Because you didn't think Michael needed to be doing what
6 he was doing, did you?

7 A. To an extent, yes.

8 Q. Yeah. And do you deny that he was acting belligerent
9 and saying, get the fuck out of the car, I'm gonna fuck you up,
10 get out, it's on, let's go. Do you deny all of that?

11 A. Yes.

12 Q. Was he acting like a Sunday school little boy?

13 A. No. I deny he said all that.

14 Q. Would you please go home, would you please go home,
15 Anijah, is that the way he was saying it?

16 A. He was nice about it, yes.

17 MR. MARTIN: That's all the questions I have.

18 MS. LIVESAY: I just have a couple more things.

19 **RECROSS-EXAMINATION**

20 BY MS. LIVESAY:

21 Q. Ms. Cerio, this thing about Remi's clothes, did he ever
22 attempt to just drop her clothes off?

23 A. No.

24 Q. And when you were at the gas station was Jennifer
25 Tassone and Darrin Card right there at Maddington Place?

1 A. Yes.

2 Q. And could Anijah have dropped the clothes off with them?

3 A. Yes.

4 Q. Okay. And when Remington had gone up to the room

5 couldn't he have come back and just left the clothes?

6 A. Yes.

7 Q. Did he do that?

8 A. No.

9 Q. Did he ever get out of the car?

10 A. No.

11 Q. Did he ever make any attempt to drop the clothes off?

12 A. No.

13 Q. And did Remington have a car?

14 A. No, not there with her, I don't believe it was.

15 Q. And she was riding with you?

16 A. Yes.

17 Q. And would you have taken her to go get the clothes if

18 she needed to?

19 A. Yes.

20 Q. And Mr. Martin talked about one word's missing, "then."

21 Is it clear that she told him to leave?

22 A. Yes.

23 Q. And after that when you got back he was still there?

24 A. Yes.

25 Q. And when he was screaming and yelling was he saying

1 anything then about dropping her clothes off?

2 A. No.

3 MS. LIVESAY: No further questions.

4 MR. MARTIN: Nothing further, Judge.

5 THE COURT: Thank you, ma'am, you may step down.

6 Okay. Given the hour that it is, we're going to break for the
7 evening and we'll see you all at 9:30 in the morning. Given
8 the information that the Court received previously about the
9 number of witnesses, I do not conceive that we would be able to
10 call this case for a trial, regardless of if, in fact, if the
11 decision of this Court was made this week, and if a decision
12 went in favor of the State, I don't see how we could conduct a
13 trial with the number of witnesses that the State anticipates
14 calling.

15 MR. MARTIN: Very well, Your Honor.

16 MS. LIVESAY: Your Honor, just so I'm clear, we are
17 not going to move forward with a trial this week?

18 THE COURT: It would be impossible.

19 MS. LIVESAY: The State would ask if Mr. Martin, and
20 now that we're both on the same page, I think we are both kind
21 of prepared now, and I think we would both, if it was possible,
22 would like to go ahead and go forward with the trial. Both of
23 us have had a time of getting the witnesses here from New York.
24 They come down, we've already, by tomorrow we will have taken a
25 week of their time. If we can get on the same page, I think

1 Mr. Martin would agree, we would like to go ahead and go
2 forward while we're ready and while we've got everybody here.
3 Again, this thing has been scheduled out months in advance
4 because we do have to do out of state subpoenas. There's
5 numerous people from Columbia, so it is an ordeal to get 28
6 people here, including out of town, out of state witnesses, so
7 if at all possible we would like to forge forward. We know
8 that it would go into next week, and I don't know what his
9 thoughts are regarding that, but I would anticipate us wrapping
10 it up, probably Monday. I think the State could be done with
11 our case by Friday at lunch, and I don't know if he plans on
12 putting anything forward. I'm assuming so since it's self
13 defense, but I do believe this is something we could finish
14 Monday.

15 MR. MARTIN: Well, let me say, I disagree with her
16 about what I want to do. I didn't anticipate this hearing
17 taking as long as it's taking, and it's not over yet, and I
18 don't know how long we're going. I know I have at least one
19 more witness and I may have more than that. It is Tuesday
20 night, it would be Wednesday afternoon, and the other thing is,
21 Judge, you've heard a lot of evidence in the last two days,
22 you've taken a lot of notes, and I do think that this is a
23 substantial Stand Your Ground Motion that we've got. I do not
24 any rushing it through that process by this Court, or any other
25 Court, for that matter. It is inconvenient for witnesses, but

1 this isn't the only case that that's the case in, so my point
2 is, the Court makes that decision, but I never like to start
3 cases and trying to get through on Friday or Saturday or
4 Monday. I think having the jury out over the weekend is an
5 invitation for trouble. In my ways I'd like to move the case
6 myself, but I disagree that I agreed with her that we need to
7 to move forward given as much time as it's taken. I think,
8 frankly, you have the right approach to it, and I think there's
9 a lot of evidence, again, that needs careful deliberation, the
10 legal issues, as well, in connection with this motion, but this
11 is a Stand Your Ground Hearing that is critical to this young
12 man and needs due deliberation.

13 MS. LIVESAY: Your Honor, the Stand Your Ground
14 Motion has already been continued twice. Originally, it was
15 meant just to have the hearing and the trial at a later date.
16 It was continued twice because once Mr. Martin had not been
17 able to get his out of state witnesses prepared. The next time
18 Mr. Martin had a trip planned and we consented, we understood
19 the trip was planned, and that's how we got to today. I say
20 that because, again, out of state witnesses require out of
21 state subpoena, which means months in advance. Twenty-eight
22 witnesses, the majority of them from out of town, takes a
23 tremendous amount of ability to get them all here within this
24 week. And in fact, the Court sees the State took Dr. Proctor's
25 testimony out of order in an effort that the trial would not be

1 continued. That was to our disadvantage because none of the
2 other testimony had gone up in questioning Dr. Proctor. I was
3 told then by Mr. Martin that doing that would prevent him from
4 needing a continuance. Now, I know this hearing has lasted
5 longer than maybe we thought or hoped it would, but for the
6 State, everybody is here, everybody is ready. The lay
7 witnesses have taken a week off work to delay it, would mean
8 Mr, Pennington, these folks have to take another week off work,
9 this crowd for the defendant has to take another week off work.
10 So we would like to forge forward if the Court is in agreement
11 and feels that that's appropriate.

12 THE COURT: Conducting a hearing of this magnitude is
13 not an exact science, and predictability, if we each had the
14 crystal ball that we could look into and know what the future
15 held then the court system probably as a management function
16 could operate for what observers would say would be a more
17 efficient manner, but unfortunately, when justice is shifted
18 through with lawyers, the quality of lawyers that I've had in
19 this hearing, with the amount of evidence that has been
20 presented in great detail by so far the defendant in this
21 hearing, but has shifted through with great detail by the State
22 with their extensive cross-examination, these hearings get
23 lengthened. Prior to my arriving here on Monday, I had not
24 been led to believe anyone anticipated this hearing would not
25 be concluded by now, and we are not concluded with this hearing

1 yet. It is a great burden on both sides to prepare for a
2 hearing like this, as well as prepare for a trial. It takes a
3 lot of effort. I know that this is a case that is important to
4 both sides. I have witnessed and seen the people sitting in
5 the audience and just on their faces I can read that they have
6 a lot of interest in this hearing as well as the outcome of the
7 case. I do not want to intend to want to cause anymore
8 hardship to either the State's witnesses or the defense
9 witnesses. I'll ponder it, but I cannot tell you that I will
10 get up from this bench now with the great anticipation that
11 there's a strong likelihood that we would do this case Thursday
12 and Friday, extend it over a weekend and run into Monday,
13 especially with next week being Thanksgiving. There takes more
14 to conducting a trial of this magnitude other than just a judge
15 saying, let's do it. It requires, we've got these jurors, they
16 have been asked to participate. We haven't selected a jury
17 yet, but we've asked that we qualify a jury. They have not
18 been advised that this case would, in fact, run into a second
19 week. We didn't tell them that at the start of when I was
20 doing the qualification process and I know many of them
21 mentioned to me through the qualification process of things
22 that they've got to take care of and we would try to massage
23 the jury into a position to which we could actually have a pool
24 from which we could select qualified jurors to participate in a
25 trial of this case within the time constraints that we knew.

1 It requires not only the jurors, but it requires courthouse
2 staff and courthouse personnel, and I am not going to sit here
3 and act as if I am some omission of a judge that can direct
4 people that I have so only had the pleasure of meeting on
5 Monday to tell them, well, we have to now stay into a second
6 week and come back in. There's just a lot of aspects on
7 scheduling a trial, especially of this nature that I am not
8 familiar with and I do not know. I will do my best to try to
9 find out what is the likelihood of conducting this trial, but I
10 will tell you that with the number of witnesses that I've now
11 been told that the State intends to call, which is 29, I do not
12 believe this is a case, even if we did the trial, even if the
13 motion goes against the defendant, I don't think this is a case
14 that needs to be rushed. This case is too important to just
15 rush and I'm afraid that if we try to squeeze in 29 witnesses
16 from the State just within two days and then try to run it into
17 Monday, I think that that would be something that I fear that I
18 never like to have a jury to begin their deliberations after
19 2:30 in the afternoon on a particular day because I don't want
20 them to get rushed due to the fact of a time constraint because
21 some of them feel like 5:00 is approaching, we need to get out,
22 so I don't feel this is something that needs to be rushed, but
23 I'll check into it and let you all know in the morning.

24 MR. MARTIN: Judge, let me put on the record, since
25 you made a statement. As I think about this, which I haven't

1 contemplated it until today, I would not move to go forward. I
2 did think we could get it all done this week, I was wrong, I
3 was wrong. I never think it's a good idea to have these
4 hearings the same week, but that's the way it turned out here.
5 This turned out to be lengthy, in my humble opinion there are
6 substantial issues regarding his right to be granted the Stand
7 Your Ground Hearing. I don't want the Court to rush through it
8 and I don't want to start a trial on Wednesday afternoon or
9 Thursday that would inevitably go into next week, and not to
10 mention what you mentioned about staff and all of that, but I
11 do want the record to reflect that we don't think to start a
12 trial at this stage, because it would be tomorrow afternoon at
13 the earliest or Thursday, and it's foolish to start a case of
14 this magnitude then, in my opinion.

15 THE COURT: Anything else?

16 MR. HELMS: Not from to the State, Your Honor.

17 THE COURT: Okay. As you all know, I'm not the
18 administrative judge, and I don't think I have the authorities
19 to order that anyway, so there was no objection, I'll check
20 with the administrative judge and get his input on it and see
21 what he says.

22 MR. HELMS: We understand.

23 MR. MARTIN: Thank you, Judge.

24 THE COURT: Thank you all very much. See you all at
25 9:30.

1 (Concluded for the day on Tuesday, November 15, 2022)

2

3 (Whereupon proceedings reconvened Wednesday, November
4 16, 2022 at 9:30 a.m.)

5 THE COURT: Alright. Last night I talked with Judge
6 Culbertson, briefly, and he's willing to do whatever I want to
7 do, but he did say that if you all had any questions about
8 scheduling to reach out to him because he is the administrative
9 judge. At this juncture where we are now I just think it's an
10 unrealistic expectation for us to consider, after this hearing
11 for me to make a decision and then the decision goes against
12 the defendant, then for us to proceed into a trial, especially
13 given the number of witnesses the State intends to call. This
14 is a substantial case and I just wish that I desire to have
15 enough time to, as the trier of fact, as I would put myself in
16 the place of a jury to have enough time to consume and digest
17 and give proper consideration to the evidence and information
18 that's been presented by both sides, and I anticipate right
19 now, I might not, but I anticipate, I might need your all's
20 assistance in understanding some of the positions on the law
21 that you all have given to me, so I might need some briefing on
22 one or more issues, not definite on that, but I might need that
23 as well. So I just don't think it's realistic for us to expect
24 that after this hearing the decision to be made and decision
25 was adverse to the defendant, then for us to move into trial,

1 given how long this hearing is taking and it's still ongoing.

2 MR. MARTIN: Very well, Your Honor.

3 THE COURT: Okay. Anything else before we start with
4 the testimony?

5 MR. MARTIN: Judge, we're ready to proceed.

6 MS. LIVESAY: No, sir, we're ready.

7 THE COURT: Okay.

8 MR. MARTIN: Elizabeth Lawson.

9 **Elizabeth Lawson being first duly sworn, testified as**
10 **follows:**

11 **DIRECT EXAMINATION**

12 BY MR. MARTIN:

13 Q. Ms. Lawson, you work with Horry County Detention Center?

14 A. I do.

15 Q. Did you give them your full name and all of that yet?

16 A. My full name is Elizabeth Lawson.

17 Q. And you work at Horry County Detention Center?

18 A. I do.

19 Q. In what capacity?

20 A. I'm a help service administrator over the medical
21 department.

22 (Defendant's Exhibit No. 45 was marked for identification.)

23 Q. Let me show you what's marked as Defendant's Exhibit
24 Number 45 for identification and ask you if you can identify
25 that for the Court.

1 A. Yes.

2 Q. What is it?

3 A. This is a booking screening that is done on all inmates
4 that are brought into the jail at booking, and it's a medical
5 screening.

6 Q. A medical screening?

7 A. Yes.

8 Q. Okay. And was that taken -- is that that one as related
9 to Anijah Yarnell when he was brought into the detention center
10 after his arrest?

11 A. Yes, it is.

12 Q. And it is a compellation of the medical screening
13 department's document related to his health as he came into the
14 detention center?

15 A. Yes.

16 Q. Done regularly on all individuals?

17 A. Yes.

18 MR. MARTIN: Judge, we'd move to enter into evidence
19 this document, Defendant's Exhibit Number 45.

20 THE COURT: Any objection?

21 MS. LIVESAY: Yes, sir, Your Honor. We only have an
22 objection as to the Defendant's statement and we object under
23 801d2. That clearly states under the rules that an admission
24 by a party upon it, the statement is offered against a party
25 and is the party's own statement in either an individual or

1 representative capacity. Of course, Mr. Yarnell's statement,
2 and I'm looking at page 182 of that little book that you're
3 looking at, and what that says is that you can only get into
4 the defendant's statement as a party upon it. That's what
5 allows the State to get into the defendant's statement. The
6 defendant cannot get in his own statement other than to testify
7 because it's self-serving. It is a means to circumvent the
8 State's right to cross-examine the defendant on that statement.
9 So we believe the law is clear as to 801d2, that any statement
10 by the defendant should not be considered on these records
11 because it's inadmissible as self-serving.

12 THE COURT: And what do you intend to use it for?

13 MR. MARTIN: Judge, it's solely for the purpose that
14 the entry was here on the intake, that: Dental problems,
15 answer, yes. Teeth hurt on left side from being hit in the
16 jaw.

17 THE COURT: Let me ask you a question.

18 MR. MARTIN: Okay.

19 THE COURT: She said she prepared that?

20 MR. MARTIN: I don't know. She didn't prepare it.
21 She is the, from what she might say, is the custodian of
22 record. She's head of the department and responsible for it,
23 and I would say in this particular case Mr. Yarnell is going to
24 take to the witness stand and they can cross-examine him on it,
25 but I would say, first of all, that this is admissible in the

1 medical records exception.

2 THE COURT: I'm going to allow it in in addition upon
3 that the defendant does testify and the State then is allowed
4 to cross-examine him on it.

5 MR. MARTIN: Very well.

6 (Defense Exhibit No. 45 was admitted into evidence.)

7 Q. Then I want you, if you will, Ms. Lawson then, to
8 publish the portion of the record related to the dental
9 problems that you and I just went over that I just went over
10 with the judge, I want you to go over for the record.

11 A. When the screening occurred, under the section, under
12 major dental problems, Mr. Yarnell answered: Yes, teeth hurt
13 on left side from being hit in jaw.

14 MR. MARTIN: Answer any questions that Ms. Livesay
15 has for you.

16 **CROSS-EXAMINATION**

17 BY MS. LIVESAY:

18 Q. Ms. Lawson, how are you?

19 A. I'm good. Thank you.

20 Q. No problem. And for the purposes of this hearing, this
21 is State's Exhibit 45. Now, you are the head of the medical
22 department at J. Reuben Long, correct?

23 A. Correct.

24 Q. But are you the individual that saw Yarnell when he came
25 into the jail?

1 A. I am not.

2 Q. So you didn't actually prepare that report?

3 A. I did not.

4 Q. And you didn't actually hear from Yarnell or take any
5 statements regarding his condition?

6 A. No.

7 Q. Okay. So you wouldn't be able to answer any questions
8 regarding that statement?

9 A. Correct.

10 Q. And but, does the record indicate whether or not he
11 required any medical care while he was at J. Reuben Long?

12 A. He did not.

13 Q. And do you know how long he was in J. Reuben Long?

14 A. I believe he was there a couple days short of a month.

15 Q. And he never required any kind of medical care?

16 A. No. He did receive Ibuprofen for a few days, and that
17 was all.

18 Q. But no kinds of stitching?

19 A. No.

20 Q. Did he require to be taken to an orthodontist?

21 A. No.

22 Q. To a dentist?

23 A. No.

24 Q. To Conway Medical Center?

25 A. No.

1 Q. Does it indicate whether or not he was bleeding when he
2 entered the jail?

3 A. No.

4 Q. So he was not bleeding when he entered the jail?

5 A. No.

6 Q. And none of his injuries required any kind of medical
7 care, not even a Band-Aid?

8 A. No.

9 Q. Now, Mr. Yarnell said in the statement in the medical
10 records that his mouth hurt; is that correct?

11 A. Correct.

12 Q. And that it was hurting because he was hit in the face;
13 is that right? You can look at this. That's why we put it in
14 there.

15 A. From being hit in the jaw.

16 Q. Well, did he tell you or tell the nurse that he shot
17 somebody?

18 A. I wouldn't have access to that. That's not documented
19 in here.

20 Q. It is not documented that he said that. So he mentioned
21 that he was hit and his mouth hurt?

22 A. Yes.

23 Q. But there is nothing documented that he mentioned that
24 he shot somebody?

25 A. No.

1 Q. Did he mention that he went over somewhere uninvited
2 that night?

3 A. That is not documented.

4 Q. Did he mention that he called his girlfriend 200 times
5 before he went over there?

6 A. No.

7 Q. And did he mention after he shot the guy he fled the
8 scene?

9 A. No.

10 Q. So none of that is mentioned?

11 A. No.

12 Q. Did he mention that the guy died from the gunshot wound?

13 A. No.

14 MR. MARTIN: Judge, I hate to, but I'm going to
15 object. Obviously, this witness knows none of that, and it's
16 not relevant to the introduction of the evidence that they
17 have.

18 THE COURT: She's on cross-examination, she's got
19 some leeway. I understand the witness's capacity. You've laid
20 the foundation for the witness. Go ahead, madam.

21 Q. So the only thing in that document is not that he shot
22 anybody, not that he killed anybody, not that he went over
23 uninvited, but that his mouth hurt; is that correct?

24 A. That is correct.

25 Q. Okay. So the only thing that he told the jail was

1 something that would be self-serving to him; is that correct,
2 that he was injured?

3 A. Correct.

4 Q. He didn't mention that the other guy was fighting for
5 his life in the parking lot at Maddington Place, that got left
6 out?

7 A. Correct.

8 MS. LIVESAY: No further questions.

9 THE COURT: Any Redirect to what she went into?

10 MR. MARTIN: No, sir. Even though I can think of a
11 few, I'm not going to ask them.

12 THE COURT: Thank you, sir. You may step down.

13 MR. MARTIN: Anijah Yarnell. Come down here and be
14 sworn.

15 THE COURT: Come over here and let the Clerk of Court
16 swear you in.

17 **Anijah Yarnell being first duly sworn, testified as**
18 **follows:**

19 THE WITNESS: Anijah Yarnell, A-n-i-j-a-h,
20 Y-a-r-n-e-l-l.

21 **DIRECT EXAMINATION**

22 BY MR. MARTIN:

23 Q. Anijah, let me talk with you and ask you about you and
24 about what happened on May 14th. Okay? And obviously, you sat
25 through this hearing and you know that the judge the one that

1 is the trier of the fact here and so you direct your comments
2 to him, okay, and you look at him when you talk to him.

3 A. Yes, sir.

4 Q. Anijah, how old are you?

5 A. Twenty-three.

6 Q. And where do you live currently?

7 A. Myrtle Beach off of Winchester Court.

8 Q. And how long have you lived in Myrtle Beach area?

9 A. For about, I believe, six to eight years, around there.

10 Q. And where were you born, Anijah?

11 A. I was originally born in Beaver County, Pittsburgh area.

12 Q. Pittsburgh area. And you've been in the Myrtle Beach
13 area for about six years now?

14 A. Six to eight years, yes, sir.

15 Q. Did you go to high school?

16 A. Yes, sir.

17 Q. Where?

18 A. Carolina Forest.

19 Q. Did you graduate?

20 A. Yes, sir.

21 Q. Have you gone to any schooling since you graduated from
22 high school?

23 A. No, sir.

24 Q. And the young man in the military outfit that was here
25 yesterday, is that your brother?

1 A. Yes, sir.

2 Q. And I understand he had to go back to Washington, and
3 he's not here today?

4 A. Yes, sir.

5 Q. Where since you finished high school have you worked,
6 Anijah?

7 A. When the situation happened I was working at Lowe's Home
8 Improvement, and before that I worked at the Hollywood Wax
9 Museum.

10 Q. The Wax Museum there in Myrtle Beach?

11 A. Yes, sir.

12 Q. And at the time that this occurred you were working at
13 Lowe's Home Improvement?

14 A. Yes, sir.

15 Q. And did you, in fact, work May 14th, the day that this
16 occurred?

17 A. Yes, sir.

18 Q. And what time did you go to work?

19 A. I believe around 5:30 to 6:00 a.m.

20 Q. How long had you been working at Lowe's at that time,
21 approximately?

22 A. I'd say maybe a month or two.

23 Q. And what time did you get off work that day?

24 A. Around 3:00, three to four o'clock.

25 Q. Now, Remi, or Remington Hargrove, what was your

1 relationship with Remi back in May of 2020?

2 A. It was my girlfriend.

3 Q. And was she, in fact, living at your apartment with you
4 at that time?

5 A. Yes, sir.

6 Q. And how long had she been there living with you?

7 A. I'd say a couple months. I was staying with her at her
8 apartment. We would switch back and forth to where we stayed
9 at that night because we worked together.

10 Q. And she was pregnant at the time?

11 A. Yes, sir.

12 Q. And when you went to work that morning were there any
13 plans about what you would do when you got off work?

14 A. Yes, sir. I was invited to dinner with her family that
15 day.

16 Q. And she invited you to go to dinner with her family?

17 A. Yes, sir.

18 Q. And was that your plan when you went to work that day?

19 A. Yes, sir.

20 Q. Did those plans change some time during the course of
21 the day?

22 A. Yes, sir.

23 Q. And I guess the question is, what happened that changed
24 the plans, Anijah?

25 A. So basically, her family ended up switching the time of

1 the dinner so me and her got into an argument about that
2 because it was supposed to be as soon as I got off of work,
3 then the plans changed.

4 Q. Okay. And you had adjusted your lunch around that
5 aspect of it?

6 A. Yes, sir.

7 Q. And so you and Remi got into an argument about that?

8 A. Yes, sir.

9 Q. Was it common or uncommon for you and Remi to argue?

10 A. It was very common.

11 Q. And so you got off work about what time?

12 A. I'd say 3:00, 3:30 to 4:00.

13 Q. And where did you go when you got off work?

14 A. I went straight home.

15 Q. And at some point in time that day did you go down to
16 Cross Gate Villa Apartments?

17 A. Yes, sir. Later on that night I did to drop her clothes
18 off.

19 Q. And did you talk with Remi -- to your recollection, do
20 you talk with her at some time during the day?

21 A. Yes, sir.

22 Q. And I think that there is a call where you and she
23 talked about 9:30 at night, but prior to that time how long
24 would you say it had -- what time of the day did you have any
25 conversation with her?

1 A. It was right after I got off. She basically told me to
2 still come, even though I didn't want to come anymore she said,
3 I'll give you gas money, please, I really want to to see you
4 and I love you.

5 Q. And what time was that?

6 A. I would say right as soon as I got off. I don't know
7 the exact time.

8 Q. And of course, by this time you are upset with her and
9 you are arguing with her, right?

10 A. Yes, sir.

11 Q. And so when you left your apartment there at Winchester
12 Court did you drive straight down to Cross Gate Villa's or did
13 you go anywhere else?

14 A. Straight to Cross Gate Villas.

15 Q. And your purpose for going to Cross Gate Villas was
16 what, Anijah?

17 A. To solely drop her clothes off to her.

18 Q. And did you want to see her in connection with doing
19 that?

20 A. Yes, sir. I also wanted to see her and talk to her.

21 Q. Did you want to hurt her?

22 A. No, sir.

23 Q. Did you want to shoot her?

24 A. No, sir.

25 Q. Now, did you know Darrin Card?

1 A. Yeah. I believe I met him one time before this
2 situation happened.

3 Q. And did you know Emily Cerio?

4 A. Yes, sir. I met her a few times, as well.

5 Q. That was Remi's cousin?

6 A. Yes, sir.

7 Q. And did you know Jennifer Tassone?

8 A. Yeah, I met her, I believe, once or twice before this
9 situation, as well.

10 Q. Had you been down to Cross Gate Villas to the
11 condominium of some member of the family that lived there
12 before this night?

13 A. Yes, sir. I was invited over there multiple times. One
14 time was for Emily's birthday and the other time was to help
15 them move some things out of the apartment.

16 Q. And during this day, May 14th, did anybody or any member
17 of that family tell you not to come to the residence?

18 A. No, sir. The only person I had contact with was Remi.

19 Q. Anybody tell you not to come to the parking lot?

20 A. No, sir.

21 Q. So when you went down that day to talk that afternoon,
22 do you know how long you got -- or what time you got there?

23 A. I don't know the exact time I got there, no, sir.

24 Q. Now, was there a gun in your car at the time you went
25 down there?

1 A. Yes. I always kept a gun in my center console.

2 Q. And do you go to the gun range to shoot, Anijah?

3 A. Yes, sir.

4 Q. And you like guns and to shoot guns, right?

5 A. Yes, sir, at the gun range.

6 Q. Now, again, when you left your apartment that day to go
7 down to Cross Gate Villas did you put that gun in there for a
8 specific purpose or was the gun already there?

9 A. The gun was already there in my center console.

10 Q. Were you anticipating any trouble with anybody when you
11 went down to Cross Gate Villas?

12 A. No, sir.

13 Q. Do you know or did you know Mr. Pennington?

14 A. Yeah, I met him a few times, as well.

15 Q. Did you have any idea that he would -- know whether he
16 would be at Cross Gate Villas or not?

17 A. I had no idea at all that he was going to be there.

18 Q. And did you go down -- and that being the case,
19 certainly, you didn't go down there looking for him or looking
20 for trouble with him?

21 A. No, sir, he came looking for me.

22 Q. And when you got there you stayed in the -- you waited
23 for a while?

24 A. Yes, sir.

25 Q. Why, Anijah??

1 A. To solely just drop Remi's stuff off to her, her clothes
2 and her belongings.

3 Q. And you figured she was coming, at some point in time
4 coming back to the apartment complex?

5 A. Yes, sir, from dinner.

6 Q. And how long were you there?

7 A. I'm not exactly sure how long I was there.

8 Q. And you and I looked at the phone records that to the
9 State had produced. They took your phone when you were
10 arrested, didn't they?

11 A. Yes, sir.

12 Q. And you did talk to Remi after you arrived at the
13 apartment parking lot, but before she got there, didn't you?

14 A. Yes, sir.

15 Q. And was that when you called her and she answered the
16 phone?

17 A. Yes, sir.

18 Q. And do you recall approximately how long the two of you
19 talked?

20 A. I'd say it was a couple of minutes.

21 Q. And so at that time from that conversation did she learn
22 that you were at the Cross Gate Villas Apartments?

23 A. Yes, sir.

24 Q. Did she tell you to leave before she got there?

25 A. No, sir.

1 Q. What did she say to you, Anijah?

2 A. She said, basically, to drop her stuff off then leave.

3 Q. And did you take that to mean to leave it in the street
4 or wait until she got there, or what?

5 A. I took it as to wait until she got there to give her her
6 stuff and then leave.

7 Q. And so you waited, right?

8 A. Yes, sir.

9 Q. And so when was the first time that you saw Remi after
10 that conversation?

11 A. Basically, I was backing out of that parking space
12 because I felt like I was waiting too long because I did have
13 to work and wake up at 5:00 in the morning. I decided to back
14 out and it seemed like a car was blocking me in. I hit the
15 curb and did a three-point turn.

16 Q. And let me show you what's marked as Defense Exhibit
17 Number 32 and ask you if you can show the judge in this case
18 where you're talking about that you backed out and hit the curb
19 and made the three-point turn.

20 THE COURT: Can you put it up here on the ledge
21 somehow?

22 MR. MARTIN: Yes.

23 THE COURT: There you go.

24 A. So basically, I was parked right here waiting on Remi
25 and I went to back out of here and I ended up hitting this curb

1 because it seemed like the car was blocking me in right here.

2 Q. And did you finish making the turn?

3 A. Yes, sir.

4 Q. And did you recognize and realize that Remi was in a car
5 there?

6 A. Yes, sir. She was in a car I hadn't seen before. It
7 was her and Emily side by side, Remi was driving.

8 Q. And where in Exhibit 32 did you and she cross paths?

9 A. She was right here, I was right here (indicating.)

10 Q. And you were headed out?

11 A. Yes, sir.

12 Q. And she was headed in?

13 A. Yes, sir.

14 Q. And did the cars come to a stop?

15 A. Yes, sir, we both stopped.

16 Q. And were your windows rolled down and that two of you
17 talked to each other?

18 A. Yes, sir.

19 Q. So if you're -- you can sit back down -- if you're there
20 with the idea of leaving her her stuff, did you take that
21 opportunity to do that?

22 A. No, I did not because there was a car behind her stopped
23 in the middle of the road, as well.

24 Q. So there was a car behind her?

25 A. Yes, sir.

1 Q. And you didn't feel like you needed to stop and talk
2 with her any further there?

3 A. No, sir. I did not want to block the roadway for the
4 other car.

5 Q. But there's no question as far as seeing Remi, you saw
6 her there, and if you had wanted to shoot her was there
7 anything that would have stopped you from doing it then and
8 there?

9 A. No, sir, we talked, and all I said to her, are you
10 blocking me in?

11 Q. And then you pulled out and she pulled in?

12 A. Yes, sir.

13 Q. And then what did you do then, Anijah?

14 A. I circled back around the parking lot to finally drop
15 her stuff off to her.

16 Q. And you were in your car alone, right?

17 A. Yes, sir.

18 Q. And you had some of her things in your car?

19 A. Yes, sir.

20 Q. And if you would then, tell the judge, in your words,
21 what happened when you came back into the parking lot?

22 A. So when I came back into the parking lot I saw Michael,
23 Darrin and Emily standing side by side. Michael had a beer in
24 his hand, he was drinking a beer, I pulled up and rolled my
25 window down and asked, is Remi going to get her stuff or not, a

1 general question to everybody that was out there. The only
2 person to respond to that question was Michael Pennington. He
3 responded by screaming at me, get the fuck out of the car, get
4 the fuck out of the car so I can fuck you up. He lifted his
5 shirt up at a point in time and started wrapping something
6 around his hand, it was so dark I didn't see what it was. He
7 approached my vehicle. He was forcefully trying to get in my
8 vehicle. I tried to back up and leave. He was moving along
9 with my car, punched me through the window, because at that
10 point I was trying to roll window up. He was punching me
11 through the window, I reached in the center console for my
12 weapon, and he saw that I had a weapon. He said, if you pull
13 it out you better use it, and he reached in for it, and I fired
14 one shot in his general direction to get him off of me out of
15 fear for my life. I had no clue if he had a weapon in his
16 pocket, gun or knife. I didn't know what his intentions were
17 at all.

18 Q. Now, Anijah, I know you're nervous and you talk kind of
19 quickly there. Okay? I want you to slow down just a minute
20 and let's go through that again.

21 A. Yes, sir.

22 Q. You know, that's what this is all about. First of all,
23 let me ask you this. At the time you fired the shot were you
24 in fear?

25 A. Yes, sir.

1 Q. Of what?

2 A. Of him taking my gun from me and killing me.

3 Q. And/or doing what to you without a gun?

4 A. Hurting me.

5 Q. And let's back up again now and go through. When you
6 pulled up, let me ask you this. Did you pull up to the feet of
7 Mr. Pennington and the others, or did you stop in the middle of
8 that driveway some distance from them?

9 A. I stopped in the middle distance from them. I stopped
10 in the middle a distance from them.

11 Q. And did anybody else say anything to you?

12 A. No, sir.

13 Q. And you said, is Remi gonna get her stuff, in the
14 general form of a question?

15 A. Yes, sir.

16 Q. And had you rolled your window down to do that?

17 A. Yes, sir.

18 Q. So the only one that responded was Mr. Pennington,
19 right?

20 A. Yes, sir.

21 Q. And what was the first thing that he said to you?

22 A. Get to fuck out of the car so I can fuck you up,
23 repeatedly over and over.

24 Q. Repeatedly. Did he try to open your car door?

25 A. Yes, sir.

1 Q. Do you recall him telling you that if you pull a gun
2 that you better use it?

3 A. Yes, sir.

4 Q. Do you recall which hand, arm, that he was hitting you
5 with, Anijah?

6 A. Yes, sir, his right arm.

7 Q. And how far down was the window rolled at the time this
8 happened or all of this started? Tell the judge what you did
9 with the window or not with the window during this event?

10 A. I'm not sure exactly how far up the window was, but I
11 know he had enough room to reach in and attack me multiple
12 times and reach for my firearm.

13 Q. Let me ask you this: Now, when you came, drove up to
14 the, and you made that comment, is Remi going to get her stuff,
15 how far down was your window then, if you recall?

16 A. I'm not sure exactly how far it was down at that point,
17 but it wasn't all the way down.

18 Q. Now, at some point in time did you, after this event has
19 ended, we'll go back to the event, did you roll the window up
20 to any degree?

21 A. Yes, sir. When I fled the scene I did roll my window
22 up.

23 Q. And that was on your way back to the apartment?

24 A. Yes, sir.

25 Q. But it wouldn't go all the way up?

1 A. No, sir.

2 Q. So the position that the window was in when it was left
3 at your apartment was not the same position the window was in
4 at the time the shot was fired?

5 A. No, sir.

6 Q. And ever how far down it was, Mr. Pennington was able to
7 to reach in and hit you?

8 A. Yes, sir.

9 Q. There might well be some questions, Anijah, about if he
10 hit you or not, so let me show you Defendant's Exhibits Numbers
11 30 and 31. As a matter of fact, let me just wait, I'll do that
12 in just a minute. So did you at any time get out of the car?

13 A. No, sir.

14 Q. Did you at any time threaten Mr. Pennington --

15 A. No, sir.

16 Q. -- verbally?

17 A. No, sir.

18 Q. And at the time you pulled up and rolled down your
19 window and asked about Remi, where was the gun?

20 A. In the center console.

21 Q. When did you get it out of the center console?

22 A. When he was forcefully trying to enter my vehicle and
23 attacking me.

24 Q. Did you have to lock your doors of your car in this
25 process?

1 A. Yes, sir, when he first approached my car I did lock my
2 doors.

3 Q. And what was his demeanor at the time that he was
4 approaching the car and talking to you?

5 A. He was belligerent, aggressive, his eyes were actually
6 wide open and it looked like his eyes were bulging out of his
7 head. I could tell he wasn't in the right state of mind at
8 all.

9 Q. And all of that had what effect on you, Anijah?

10 A. I was terrified.

11 Q. Did Darrin or Emily -- did Darrin say anything or did he
12 involve himself in this at all?

13 A. No, sir.

14 Q. And you say that when you pulled up Mr. Pennington had a
15 beer?

16 A. Yes, sir, he was drinking a beer.

17 Q. Did he have that beer when he approached your car?

18 A. No. Before he approached the car he put the beer down
19 on the ground.

20 Q. Did he ever say to you, you need to just leave nicely?

21 A. Not at all.

22 Q. Now, to your knowledge, did Mr. Pennington own that
23 parking lot?

24 A. No, sir.

25 Q. Did Darrin or Emily own that parking lot?

1 A. No, sir.

2 Q. Did you ever go into the residence?

3 A. No, sir.

4 Q. Did you ever go onto the porch of the residence?

5 A. No, sir.

6 Q. Did you ever do anything but drive up in a parking lot?

7 A. All I did was pull up in the parking lot.

8 Q. And you have done that in that particular parking lot on
9 different occasions?

10 A. Yes, sir.

11 Q. Anybody ever told you you can't go in there?

12 A. No, sir.

13 Q. And so how many shots did you fire?

14 A. Just one shot.

15 Q. Do you remember racking the gun?

16 A. No, I do not recall racking the gun.

17 Q. Now, they're going to say there's some bullets there and
18 caught one or two bullets, I think there's two that are unfired
19 as well as a fired cartridge, do you know why they would be
20 there if it weren't racking of a gun?

21 A. Because my car is messy, and I did go to the gun range.

22 Q. So was it a habit of yours to go to the gun range to
23 shoot from time to time?

24 A. Yes, sir.

25 Q. And had you been recently, or do you recall?

1 A. Yes, sir. I did go recently before this situation
2 happened.

3 MR. MARTIN: One second, Judge.

4 Q. And so did you at some point in time attempt to back
5 out?

6 A. Yes, sir.

7 Q. And the attempt to back away was to do what?

8 A. To leave the parking lot.

9 Q. To deescalate or get away from Mr. Pennington?

10 A. Yes, sir.

11 Q. And so were there other cars and things parked there?

12 A. Yes, sir.

13 Q. And so, first of all, were you able to drive straight on
14 out and leave?

15 A. No, sir. If I drove straight I would have ran into the
16 condos.

17 Q. And so you had to back out or turn around?

18 A. Yes, sir. My only way was to back out of the parking
19 lot, yes, sir.

20 Q. And you attempted to start backing?

21 A. Yes, sir.

22 Q. Did that dissuade Mr. Pennington from attacking your
23 car?

24 A. No, sir. He moved along with the car still trying to
25 force his way inside the vehicle.

1 Q. And I want to ask you this, clearly, Anijah, was there a
2 gun for him to see before he became belligerent with you?

3 A. No, sir.

4 Q. And was there a gun for him to see before he tried to
5 open the car door?

6 A. No, sir.

7 Q. Did you attempt to roll the window back up to any degree
8 while this was going on with Mr. Pennington?

9 A. Yes, sir. I tried but he put his hands on the window
10 stopping me from doing it and then he started reaching in and
11 attacking me.

12 Q. And at the time that he was reaching in, he was standing
13 up and the car was there, was, to your recollection, and you
14 may remember and you may not, but was his body bent in any
15 manner towards you?

16 A. Yes, sir. He was leaning in the car punching me.

17 Q. And at the time he was punching you what was he saying?

18 A. He kept repeating, get the fuck out of the car so I can
19 fuck you up, over and over.

20 Q. And of course, he was there in the parking lot by his
21 car, correct?

22 A. I'm not sure what kind of car he had.

23 Q. Did you know whether or not he had any weapons of any
24 kind?

25 A. No, sir.

1 Q. And were you fearful that he may?

2 A. Very fearful.

3 Q. Why?

4 A. Because I didn't know him, I didn't know his intentions,
5 I only met him a few times. I had no issue with him, I had no
6 idea why he was being so aggressive with me.

7 Q. And you were in your car?

8 A. Yes, sir.

9 Q. And was that, in fact, your car?

10 A. Yes, sir. I was making payments on that car. It was
11 owned by me.

12 Q. Owned by you, you're making payments on it. Mr.
13 Pennington had no legal interest in your car, did he?

14 A. No, sir.

15 Q. I think you have answered this, but I want to make the
16 record reflect, did he act mad or pissed off at you?

17 A. Very, very, very aggressive.

18 Q. And you did at some point in time get the gun out of the
19 console?

20 A. Yes, sir.

21 Q. As you were trying to back up?

22 A. Yes, sir. I stopped my car when he started attacking me
23 because I couldn't back up while getting attacked. I didn't
24 want to hit anybody that could have been behind me or injure
25 myself even more.

1 Q. And this all happened, frankly, in the twinkling of an
2 eye?

3 A. Yeah, it happened so fast. I had no time to think.

4 Q. And he did, in addition to hitting you, reach for the
5 gun?

6 A. Yes, sir. He tried to take my weapon from me, yes, sir.

7 Q. And again, at the time this is happening and at the time
8 the fatal shot was fired describe to the judge your state of
9 mind.

10 A. I was in fear for my life. I just fired one shot in his
11 general direction to get him off of me. I was in fear for my
12 life. I didn't -- I didn't know what his intentions were.

13 Q. And even if he didn't have a gun or never got your gun,
14 if he had gotten you out of the car could he have physically
15 hit you better than he was hitting you when you were in the
16 car?

17 A. Yes, sir. He wasn't able to land good punches because
18 he was punching me through the window and I had my hand up like
19 this (indicating) at a point in time, as well.

20 Q. So he never got a square hit on you?

21 A. No, sir.

22 Q. But he was doing his best?

23 A. Yes, sir. He was trying really hard.

24 Q. Did you think that you could back out or turn around and
25 get away without further increasing the risk to you of his

1 ability to to get to you?

2 A. No, sir.

3 Q. Now, did you see Remi at all that second time you went
4 back up there?

5 A. No, sir. She was upstairs in the condo.

6 Q. And you never attempted to go up there?

7 A. No, sir.

8 Q. And did you see Emily?

9 A. Yes, sir.

10 Q. And do you recall Emily telling Mike to stop, don't do
11 that, or was you not paying any attention to that?

12 A. Yes, sir. At first she was laughing as he was taunting
13 me out of the car, but then eventually as he was trying to
14 force his way in attacking me in the car as I was backing up,
15 she said, stop, stop, don't do it, but he did not stop, he kept
16 going.

17 (Defense Exhibits Nos. 30 & 31 were marked for identification.)

18 Q. Anijah, let me show you what's marked as Defense
19 Exhibits 30 and 31 and ask you if you can identify those?

20 A. Yes, sir.

21 Q. What are they?

22 A. They're marks left by Michael Pennington on my mouth.

23 Q. Well, first of all, they're pictures, right?

24 A. Yes, sir.

25 Q. Alright. And pictures of who?

1 A. Of me.

2 Q. And taken by who?

3 A. My mother.

4 Q. And taken when?

5 A. Right after the shooting.

6 Q. After you got back to your apartment?

7 A. Yes, sir.

8 Q. And did you take a look at your lips before those
9 pictures were taken?

10 A. No, sir.

11 Q. And did you get a chance to see whether or not those
12 pictures accurately show the condition of your mouth or your
13 lips at that time?

14 A. Yeah. It looks like that was the actual time of the
15 pictures were taken of what my mouth looked like in that
16 moment.

17 Q. Alright, look at both of them. Would the same be
18 correct for both, Anijah?

19 A. Yes, sir.

20 MR. MARTIN: Judge, we move to enter into evidence
21 Exhibits 30 and 31, and I have sent this to the State long ago.
22 Again, Judge, I'm going to move into evidence 30 and 31.

23 THE COURT: Any objection?

24 MS. LIVESAY: Without objection.

25 THE COURT: Without objection. Thank you very much.

1 (Defense Exhibit Nos. 30 & 31 were admitted into evidence.)

2 BY MR. MARTIN:

3 Q. Now, Anijah, how far from you in the car was Mr.

4 Pennington at the time the shot was fired?

5 A. He was directly at my car door attacking me and reaching
6 for my firearm.

7 Q. So I know you didn't have a ruler and you weren't
8 measuring, but he was close enough that his hand could get
9 inside the car?

10 A. Yes, sir.

11 Q. And the window was rolled down far enough for that to
12 happen?

13 A. Yes, sir.

14 Q. Did you know Mike Pennington was anywhere around when
15 you came back into the parking lot?

16 A. No, sir. The first time I saw him was when I first got
17 back.

18 Q. And so after the shot was fired, Anijah, what did you
19 do?

20 A. I backed up, I had to roll my window up, and went home,
21 backed up and left out of the parking lot.

22 Q. Did you ever come back to that parking lot?

23 A. No, sir.

24 Q. You went straight out 17 and headed north and went to
25 your apartment?

1 A. Yes, sir, to see my mother.

2 Q. Now, you had talked before this event to Remi's mother,
3 Michelle, and to Missy Cannon at times during the day, right?

4 A. Yes, sir.

5 Q. And after this event occurred and you had started back
6 to Myrtle Beach, who did you call on your way back?

7 A. I believe I called Remi right after, and I believe my
8 mother and Missy, I don't recall.

9 Q. And did you tell all or one of them something to the
10 effect that, oh my God, this has just happened and I shot?

11 A. Yes, sir.

12 Q. You did? Okay. And did you know -- first of all, did
13 you know whether you had hit Mr. Pennington?

14 A. No, sir.

15 Q. So you didn't know how seriously he was injured or that
16 he might die or not?

17 A. No, sir.

18 Q. And did you attempt to flee and, well, let me ask the
19 question that maybe when you fled the scene, why did you leave
20 Anijah?

21 A. Because he had friends and family out there and I didn't
22 know if they were armed with weapons or if he was even injured
23 or not and he was going to attack me again.

24 Q. So you weren't trying to hide?

25 A. No, sir.

1 Q. As a matter of fact, you went home, right, and you had
2 discussed with Missy and maybe Michelle about turning yourself
3 in or not hiding or any of that, right?

4 A. Yes, sir.

5 Q. And when you got back to your apartment your mother was
6 there?

7 A. Yes, sir.

8 Q. You tell her, again, you and she discussed what
9 happened?

10 A. Yes, sir.

11 Q. And these pictures were taken?

12 A. Yes, sir.

13 Q. And I think the record shows that within about 25
14 minutes the police were at your apartment?

15 A. Yes, sir.

16 Q. And they placed you under arrest?

17 A. Yes, sir.

18 Q. And brought you over to the J. Reuben Long Detention
19 Center that night?

20 A. Yes, sir.

21 Q. Did you know at the time you were arrested the condition
22 of Mr. Pennington?

23 A. No, sir.

24 Q. When did you find out that he had passed away?

25 A. During my interrogation with Detective Shawn Wydra.

1 Q. When you came up to the parking lot there, I know you
2 said that Mr. Pennington didn't say anything about leaving, did
3 Darrin Card or Emily or anybody at that point in time say
4 anything to you about you ought to go home or to leave?

5 A. No, sir, nobody told me to leave.

6 Q. Was it your anticipation from your conversations that
7 you had had with Remi during that three-minute telephone call
8 we talked about, was it your anticipation that she would meet
9 you and get her stuff and that you would then leave?

10 A. Yes, sir. She said just drop the stuff off and leave,
11 so I assumed that she wanted had her stuff then I was gonna
12 leave.

13 Q. And of course, I think in terms of what happened to you,
14 you even told the officers there at your house when you were
15 under arrest that Mr. Pennington had hit you or tried to hit
16 you --

17 A. Yes, sir.

18 Q. -- in your face. And you told the detectives that later
19 at the interrogation room?

20 A. Yes, sir.

21 Q. And they actually, because of that, took pictures of
22 your mouth, correct?

23 A. Yes, sir.

24 Q. And then when you were checked in at the jail they asked
25 you questions and you told them about that then; is that

1 correct?

2 A. Yes, sir.

3 MR. MARTIN: Just a second, Judge.

4 Q. Now, Anijah, just so the record's clear, you've never
5 had any trouble with Michael Pennington before that day?

6 A. No, sir.

7 Q. And you didn't know Michael Pennington would be there
8 when you went down that way?

9 A. No, sir.

10 Q. And you never threatened Michael Pennington that night
11 --

12 A. No, sir.

13 Q. -- in any shape, form or fashion?

14 A. No, sir.

15 Q. You never got out of your car?

16 A. No, sir.

17 Q. You simply asked, is Remi gonna get her stuff?

18 A. Yes, sir, as a general question to everybody that was
19 standing out there.

20 MR. MARTIN: One second, Judge. Judge, that's all
21 the questions I have.

22 THE COURT: Can I see 30 and 31? Give me one second.
23 Can I see those two exhibits that you introduced that I didn't
24 see?

25 MR. MARTIN: Yes, I'm sorry. As to State's Exhibit

1 Number 50, we have no objection to that if she attempts to
2 enter it. Judge, let me say, this exhibit we've got is a
3 compellation of text messages. It appears to me, and I haven't
4 read them all other than I have looked at them prior to the
5 trial. I would object to the introduction of these text
6 messages between him and Remi, as they are not relevant to the
7 confrontation. Well, he says these are between him and
8 Michelle Hargrove, so even further attenuated.

9 THE COURT: Why don't you let her try to introduce
10 them.

11 MR. MARTIN: Well, she handed them to me and so I
12 know she's going to try to put them in and I'll wait, but --
13 My objection is a general one unless she's got one between him
14 and Michael Pennington, and I'll state my reasons whenever you
15 want me to.

16 THE COURT: I just think it's cleaner if you let her
17 try to introduce them and then do your objection.

18 MR. MARTIN: Okay.

19 THE COURT: And plus, I have a very simple mind, then
20 I can focus on what it is she's trying to use them.

21 MR. MARTIN: Okay, Judge, okay fine. Thank you.

22 THE COURT: Thank you. Yes, ma'am?

23 **CROSS-EXAMINATION**

24 BY MS. LIVESAY:

25 (State's Exhibit No. 50 was marked for identification.)

1 Q. First, Mr. Yarnell, I'm going to show you State's
2 Exhibit Number 50. Do you recognize that?

3 A. I don't recognize the photo, but, yeah, that's me, it's
4 a picture of me.

5 Q. Is that you at the jail?

6 A. Yes, ma'am.

7 MS. LIVESAY: Your Honor, at this time the State
8 wishes to put into evidence State's Exhibit Number 50?

9 MR. MARTIN: No objection.

10 THE COURT: Without objection.

11 (State's Exhibit No. 50 was admitted into evidence.)

12 Q. Mr. Yarnell, I'm showing the judge now State's evidence
13 Number 50. Is that you?

14 A. Yes, ma'am.

15 Q. Anything look different about you then than today?

16 A. It's not a close-up picture of my mouth, it's a backed
17 up picture.

18 Q. I understand. Anything else?

19 A. My face looks a little swollen on that side.

20 Q. Face looks swollen. Is your lip -- oh, okay. On your
21 right side, your right side? Which is swollen, your right or
22 your left?

23 A. I believe that's the right side, I'm not sure.

24 Q. So you think your right side of your mouth was swollen?

25 A. Wherever he punched me at, yes, ma'am.

1 Q. And is your eye black?

2 A. No, ma'am.

3 Q. Are you bleeding?

4 A. I was in the beginning. This is hours after the
5 altercation.

6 Q. But your lip is not bleeding in this picture?

7 A. Yes, ma'am, because it's hours after the altercation.

8 Q. Is your lip bleeding in this picture?

9 A. No, ma'am, because it was hours after the altercation.

10 Q. And is this picture taken after the altercation when you
11 were arrested?

12 A. Hours after, yes, ma'am.

13 Q. And you would agree you're not bleeding at this point?

14 A. Yes, ma'am, hours after I was not bleeding.

15 Q. Okay. Your eye is not black?

16 A. No, ma'am.

17 Q. And you didn't require any medical care at the jail?

18 A. I took Ibuprofen for my mouth, yes.

19 Q. Anything else?

20 A. No, ma'am.

21 Q. Any stitches?

22 A. No, ma'am.

23 Q. And did you need a Band-Aid?

24 A. They didn't put a Band-Aid on me, no, ma'am.

25 Q. How about Neosporin, did you need any Neosporin?

1 A. No, ma'am.

2 Q. Now, when you went to Dr. Green's office, wasn't that
3 your orthodontist?

4 A. Yes, ma'am.

5 Q. Did they have to put you in any stitches?

6 A. No, ma'am, but they did have to fix my brace that he
7 knocked out.

8 Q. They did have to fix your brace?

9 A. Yeah, months after.

10 Q. We got your records.

11 MS. LIVESAY: Would you mark this?

12 (State's Exhibit No. 52 was marked for identification.)

13 MS. LIVESAY: State's 52 is Dr. Green's records.

14 MR. MARTIN: Well, I'm going to object to the records
15 unless and until a foundation is laid for it.

16 THE COURT: Do you want to try and lay a foundation?

17 MS. LIVESAY: Sure.

18 BY MS. LIVESAY:

19 Q. You're Anijah Yarnell, correct?

20 A. Yes, ma'am.

21 Q. And you went to Dr. Green's office, correct?

22 A. Yes, ma'am.

23 Q. And he was your orthodontist, correct?

24 A. Yes, ma'am.

25 Q. And this incident happened 5/14/2020, correct?

1 A. Yes, ma'am.

2 Q. Okay. And you saw him on 4/28/2020, you saw your
3 orthodontist?

4 A. What date?

5 Q. These are your records, 4/28/2020. It was before the
6 incident.

7 A. That's what it says, yes, ma'am.

8 Q. And what does it say happened at that appointment?

9 MR. MARTIN: Again, Judge, around the time that she's
10 putting into the record, I object to those simply because I
11 don't think the foundation has been laid. I don't think he can
12 lay for the foundation for the dental records he hasn't seen.

13 THE COURT: I'm going to let her ask the questions.
14 She hasn't offered to introduce the document yet.

15 A. I don't understand any of this, I'm not in the field of
16 orthodontics.

17 Q. I'm sorry?

18 A. I'm not in the field of orthodontics so I can't
19 understand what this says.

20 Q. Okay. Well, let me ask you something. Can you look at
21 it and tell me if it says anything different on April when you
22 saw the orthodontist and when you saw the orthodontist again
23 when you got out of jail? Is there anything different on how
24 you were treated?

25 A. I don't know how to read this. I'm not in this field.

1 No, ma'am, I don't know how to read this.

2 Q. But you can look at it and tell, they didn't document
3 it, they had --

4 MR. MARTIN: Judge, I object.

5 A. Once again, I'm not in the field of this, I don't know.

6 THE COURT: If he says the word, objection, just stop
7 talking.

8 THE DEFENDANT: Sorry.

9 THE COURT: Yes, sir?

10 MR. MARTIN: I object. He has said that he doesn't
11 know how to read them --

12 THE COURT: Okay.

13 MR. MARTIN: -- and she's asking, yet, another
14 question about how they read.

15 THE COURT: Okay. I think she's coming to a
16 conclusion.

17 MS. LIVESAY: Okay.

18 THE COURT: Yes, ma'am?

19 Q. But you would agree these are your documents?

20 A. Yes, ma'am.

21 Q. Okay. From your orthodontist?

22 A. Yes, ma'am.

23 Q. And would it surprise you that these documents don't say
24 anything needed to be repaired --

25 MR. MARTIN: Object again --

1 Q. -- and I've spoken to Dr. Green and he said the same --

2 MR. MARTIN: Objection.

3 Q. -- did you know that?

4 MR. MARTIN: Objection.

5 THE COURT: Okay. I think that's your last question?

6 MS. LIVESAY: Yes.

7 THE COURT: Okay. That's her last question. Thank
8 you.

9 Q. Now, I'm going to show you, first of all, Michelle is
10 who? Who is Michelle Hargrove?

11 A. Remington's mother.

12 Q. And you know her, right?

13 A. Yes.

14 Q. And she stayed at your apartment sometimes, correct?

15 A. Once or twice, yes.

16 Q. Okay. And you had her phone number and you and her
17 would text back and forth, correct?

18 A. Yes, ma'am.

19 Q. And sometimes you all would call each other, all that
20 kind of stuff?

21 A. Yes, ma'am.

22 Q. Okay. And your phone number at the time was 465-9460,
23 correct?

24 A. I believe so, yes.

25 (State's Exhibit No. 51 was marked for identification.)

1 Q. Okay. Good. Take a look at State's 51. That's the
2 conversation between you and Michelle. Does that look familiar
3 to you? That's your phone number.

4 A. Yes.

5 Q. Okay. So that's your conversation with Michelle and
6 that's your phone number?

7 A. I guess so.

8 Q. Okay. So you told your attorney that you were over
9 there dropping off her stuff, correct?

10 A. Yes, ma'am.

11 Q. But you told Michelle that day on 5/14/2020 at 5:47:
12 Hey, you better tell Remi to come get your shit before I throw
13 it all out? Is that what you told Michelle?

14 A. Yes. I planned on throwing it out, but Michelle begged
15 me not to throw it out.

16 Q. I'm giving her ten more minutes. Is that what you told
17 Michelle, I'm giving her ten more minutes?

18 A. I haven't seen it yet, maybe I did, maybe I didn't.

19 Q. Sure (indicating.)

20 A. Yes, ma'am.

21 Q. You told her you're giving her ten more minutes, and
22 that's at 5:54, right? And then at 5:57 you told her, I
23 already threw out most of her pics, didn't you tell her that?

24 A. Can I see it?

25 Q. You sure can.

1 A. Yes, I did.

2 Q. Okay. So you had already thrown out some of her stuff?

3 A. No, ma'am, I was just talking.

4 Q. That was just talk, just trying to scare somebody?

5 A. No, not trying to scare somebody, just --

6 Q. Just trying to bully somebody?

7 A. Just talking.

8 Q. I understand. Trying to get a reaction?

9 A. No, ma'am.

10 Q. Okay. Well, how about when you told her: She's trying
11 to act tough around Ally and I guess she forgot I was the wrong
12 one to fuck with. I haven't ate all day because of them. Is
13 that what you told them? You were the wrong one to fuck with?

14 A. Once again, I was just talking.

15 MR. MARTIN: Objection. At this point, these -- this
16 line of testimony, whether through the records or without the
17 records, I would object to as being not relevant, more
18 prejudicial than probative under 403, and for the purpose of
19 attacking his character, and for those three reasons, 401, 403
20 and whatever character is, I believe that's 404, I would object
21 to this line of questioning and to the introduction of any of
22 these records. And I'll say this while I'm talking, they are
23 not admissible as a state of mind because it's clear that the
24 state of mind exception says that you can testify about
25 somebody's state of mind but you can't give the basis for that

1 state of mind in evidence.

2 THE COURT: These are his statements, right?

3 MS. LIVESAY: Yes, yes.

4 THE COURT: Okay.

5 MS. LIVESAY: And I believe they come in under party
6 opponent the same way that I was arguing they did not come in
7 on the medical records, but we can't let his statements in from
8 the medical record --

9 THE COURT: Keep it on this issue. Okay?

10 MS. LIVESAY: Okay.

11 THE COURT: Medical records are done. Alright?

12 MS. LIVESAY: Okay.

13 MR. MARTIN: Judge, they are statements, no question,
14 but that doesn't mean that every statement he ever made is
15 admissible, that's my point. There are certain areas in every
16 case, or different from case to case, that either side can't
17 bring into evidence, even including a defendant who is on
18 trial, particularly including a defendant on trial, so that's
19 the basis of my objection.

20 THE COURT: Okay. Anything else?

21 MS. LIVESAY: Just, these statements are from the day
22 of the murder. There are, I've given it over to him. The
23 phone dump is over 80 thousand pages of his statements. We're
24 only trying to get in the statements leading up to the
25 incident, not the other ones from March or April or January.

1 THE COURT: I'm going to let them in. You've noted
2 on the record for the objection. They are his statements. He
3 is sitting in this witness stand. He is being cross-examined
4 on his statements. I think it's a proper line of questioning.

5 MS. LIVESAY: Thank you, Judge.

6 Q. And then, Mr. Yarnell, at around 5:59, you said: No,
7 she thinks everything is a game. She's been there all day and
8 I asked her to come get her shit. She thinks I'm bluffing. Do
9 you remember that?

10 A. I may have said it, I haven't seen it yet to see it.

11 Q. And that's what you were telling her mom, right?

12 A. Can I see it?

13 Q. Okay. You can see it, and if you remember, her mom was
14 telling you that she was trying to get an MRI that day when you
15 were texting these messages to her.

16 A. Yes. I said I wanted her to get her stuff.

17 Q. So you were saying, you're going to throw it out, right?

18 A. To basically get her to get her stuff, yes, ma'am.

19 Q. Right. And you even said: She thinks I'm bluffing.
20 Right?

21 A. About throwing her stuff out.

22 Q. Uh-huh, but you weren't bluffing, were you?

23 A. I was, because I didn't throw it out.

24 Q. Okay. And then you said: Because she's moving in with
25 Ally. Now she won't have shit to to move with. Isn't that

1 what you told her?

2 A. I may have, I haven't seen it.

3 Q. You may have? Here you go.

4 A. Yes, I did.

5 Q. Then you told her: She's moving with Ally. She said,
6 because we're done. She's too weak to have a child on her own.
7 We both know that she needs me, or you, because she's weak.
8 Right? She's weak. Is that what you said?

9 A. Maybe.

10 Q. Here you go. Doesn't need to be maybe, you can look at
11 it.

12 A. Yes, ma'am.

13 Q. She's weak. Right?

14 Q. That was just my opinion of her, and I do regret sending
15 those messages. Yes, they were very hurtful, and I do regret
16 sending those messages. I'm not here to deny the messages, I
17 regret sending them.

18 Q. Okay. And 6:02, you said, today, since she wants to
19 leave so bad, I'll gladly throw her shit out. Do you remember
20 saying that?

21 A. Yes, ma'am.

22 Q. And how about her clothes are at the dump. I don't care
23 anymore.

24 A. Yeah. That was basically me trying to insinuate to get
25 her home to tell her to get her stuff.

1 Q. Okay. She chose Ally over me today so I don't care,
2 along with her photos and shit I'm getting every last thing
3 out. She will not succeed as a single mother, she's too weak.
4 Is that what you said?

5 A. Once again, that was my opinion of Remi, and I regret
6 that opinion because I still do love Remi.

7 Q. Then you told her at 6:06: We both know the truth.

8 MR. MARTIN: Objection.

9 THE COURT: Hang on.

10 MR. MARTIN: Just to be clear, Judge, that I don't
11 have to make continuing objections to every one of these
12 questions on the record. I'm assuming that your ruling on my
13 earlier objections would protect the record for me, that's all.

14 THE COURT: I'm going to say, yes. I'm afraid that
15 an appellate court might view it differently and that the State
16 then, if by chance you have an appeal or one of you have it as
17 an appeal one of you might argue differently, but my opinion is
18 you don't have to continue to stand up and object when she's
19 questioning on these items unless there is a new issue that is
20 raised because I have made a ruling that this line of
21 questioning is proper. So for purposes of the record I would
22 consider you arguing with me about my rulings for you to
23 continually to object on the same grounds over and over and
24 over.

25 MR. MARTIN: And I'd like the record to reflect that

1 I don't want to argue with you.

2 THE COURT: Well, you can argue with me but I will
3 consider it.

4 MR. MARTIN: In that fashion, I don't want to argue
5 with you in that fashion. I do want to protect the record --

6 THE COURT: Certainly.

7 MR. MARTIN: -- of what it's worth because I'll say
8 again, that I believe that these are irrelevant and they are at
9 least a frontwards or sideways attempt to attack his character
10 because they aren't relevant to the ultimate determination that
11 you have to make, and so therefore, I object under 401, 402,
12 403 and 404.

13 THE COURT: Okay. And that's the same objection made
14 before so my ruling will be the same as it was before. I think
15 this a proper use of this information because they're his
16 statements, he's on the witness stand, and so she gets to
17 cross-examine him.

18 MS. LIVESAY: Thank you, Judge.

19 BY MS. LIVESAY:

20 Q. And then at around 6:00 you told Michelle: We both know
21 the truth, I'm a dick, I know that, but I'm the only guy that
22 will put up with Remi. She's learned so much from me, but what
23 have I learned, Michelle? Jack shit.

24 Q. Isn't that what you told her?

25 A. Yeah, I may have said that because in the moment I felt

1 like I didn't --

2 Q. Here you go.

3 A. I did say it, yes, ma'am.

4 Q. Okay. So you told Michelle: We both know I'm a dick?

5 A. Can I explain my answer, Judge?

6 Q. Okay. And she told you then: Look, I'm on medicine
7 they gave me for an MRI. Do you remember that?

8 A. Yeah, I remember that.

9 Q. And you responded, and you said, well, just relax, but
10 I'm throwing all her shit out. That's what you told her mom,
11 right?

12 A. Basically, for her to get her stuff, yes.

13 Q. Okay. Then she said: Please don't throw out the pics
14 of her dad. Isn't that what she asked you, please don't throw
15 those pics out?

16 A. She may have, yes.

17 Q. And did you know at that time Remi's dad was deceased?

18 A. Yes, ma'am.

19 Q. And did you know those pictures were the only thing she
20 had of him?

21 A. Yes, ma'am, once again, it was very hurtful, and I
22 didn't --

23 Q. You were upset, right?

24 A. I regret saying those things to Remi, yes, ma'am.

25 Q. And when she told you that, you responded: Nope, she's

1 still being a smart ass. Didn't you?

2 A. If that's what it says, yes, ma'am.

3 Q. And that meant you're still throwing them pictures out,
4 right?

5 A. No. I didn't throw the picture out. I was just talking,
6 once again.

7 Q. And you said, she doesn't seem too worried so I'm not
8 worried. Then you asked: Does Remi want these crystals?

9 A. Yes, ma'am.

10 Q. Because you were going to throw those out next, right?

11 A. No. I wasn't throwing anything out, I just wanted her
12 to get her stuff.

13 Q. Read the Court what you told her. Right here, that's
14 you.

15 A. Yes. Once again, I was just talking. I really didn't
16 throw it out.

17 Q. Would you read to the Court what you wrote Michelle?

18 A. Because I'm throwing that out next.

19 Q. That's right, that's right. So at that time you were
20 going to throw all Remi's shit out, or you had maybe thrown
21 some of it out already, correct? That's what you were telling
22 her mom, right?

23 A. That's incorrect. That's what I was telling her, but I
24 did not do it.

25 Q. That's incorrect. Did you tell her you were going to

1 throw it out?

2 A. I did, but I did not.

3 Q. Did you tell her that she was fucking with the wrong
4 one? Did you tell her that?

5 A. I did, but once again, I was talking.

6 Q. And did you tell her, I'm not bluffing?

7 A. That was not bluffing about throwing her stuff out, but
8 once again, I was just talking.

9 Q. And you talked to Mr. Martin. You didn't get into a lot
10 of detail, but sometimes the details are important, right?

11 A. Yes, ma'am.

12 Q. Okay, good. And you also talked to Remington Hargrove
13 that day, correct?

14 A. Yes, ma'am.

15 Q. And again, you talked to her on that phone number,
16 465-9460; is that correct?

17 A. Yes, ma'am.

18 Q. And you told her when all of this was going on that you
19 weren't going to Andrew's, right?

20 A. That's when dinner plans changed.

21 Q. Did you tell her, I'm not going to Andrews?

22 A. Can I see it?

23 Q. Yeah, you sure can. And if you don't mind, read it to
24 the Court. That way we can all be on the same page.

25 A. Yes, I did say that because Remi wanted me to come over

1 and in that moment I did not want to come over because dinner
2 plans changed.

3 Q. And then you told her two more times, right? I'm not
4 driving all the way up there. Right?

5 A. That was earlier that day, yes, ma'am.

6 Q. But you did tell her you weren't coming?

7 A. Earlier that day.

8 Q. Right. Okay. I don't care because I'm not catering to
9 Ally and her family, right?

10 A. Yes, ma'am.

11 Q. That's what you told her. Then later on you were
12 getting real mad. About 3:40 you said: I can't believe I fell
13 in love with a girl that got passed around by ugly white boys
14 at someone's grandma's house.

15 MR. MARTIN: Objection. Again, Judge, I re-enter the
16 objection because this is a new set of text messages related to
17 another person, that is Remi Hargrove as opposed to Michelle
18 Hargrove. The objection is the same. None of these texts
19 mention Michael Pennington or issues surrounding him. They are
20 the same thing, an attempt to -- the only reason is this is
21 some form of character assassination that he was a jackass that
22 day, so I object under the 401, 402, 403 and 404 and any
23 subsets thereof which are relevant.

24 THE COURT: Any additional position that I haven't
25 articulated already?

1 MS. LIVESAY: Our position is the same. It's the
2 Defendant's statement.

3 THE COURT: I still, my understanding is these are
4 statements he made, regardless of the substance of them, he's
5 on the witness stand, I think she gets to cross-examine him.
6 Your arguments to me on these issues, if we had a jury present,
7 might require more analysis, but I'm going to hear them anyway,
8 and so you can argue to me later that they are irrelevant or
9 you can argue to me later that that materiality of them to the
10 decision that have be made should be minimal or nonexistence,
11 I'm not saying that you can't, but I believe she is engaging in
12 a proper cross-examination of this gentleman because he's on
13 the witness stand and they are statements that he made.

14 MR. MARTIN: Very well.

15 THE COURT: Okay.

16 MS. LIVESAY: And I'm not going to get into this, all
17 I need is a few more. I'm just trying to paint a picture what
18 was going on that day.

19 Q. Then you told her, I swear on Kal-en-a. Who is Kalena?
20 (ph)?

21 Q. Kalana (ph.)

22 Q. Your daughter?

23 A. Yes, ma'am.

24 Q. How far along was Remington at that time?

25 A. I believe seven months, six months.

1 Q. With your child?

2 A. We haven't gotten the DNA test, I'm not sure.

3 Q. So now it may not be your child?

4 A. Possibly.

5 Q. Okay. But at the time did you think it was your child?

6 A. Yes, ma'am, because we were together.

7 Q. Okay. And you all had named her, am I saying it right,
8 Kalena?

9 A. Kalana.

10 Q. Kalana.

11 A. Yes, ma'am.

12 Q. Okay: I swear on Kalana, if you told me all of that
13 before we dated I would have stopped talking to you and I wish
14 you did, piece of shit. Is that what you said to her?

15 A. I may have because I found out things that were very
16 hurtful about her.

17 Q. Take a look at it.

18 A. Yes, ma'am, I said that.

19 Q. Okay. And at that time that was the mother of your
20 child, she was seven months pregnant?

21 A. Yes, ma'am.

22 Q. And then she said: I wish you did. And you said:
23 Should have told me then, dumb fuck. Isn't that what you told
24 her?

25 Q. Yes, ma'am, because I found out things that were hurtful

1 about her, and it bothered me.

2 Q. Is that what you said to her?

3 A. Yes, ma'am.

4 Q. And at the time was she seven months pregnant?

5 A. Yes, ma'am.

6 Q. And this was over a disagreement about going out to eat?

7 A. No. That was about things I found out about her that
8 hurt me.

9 Q. Okay. And now you're bringing it back up now, kind of
10 all of this coming out at once, right?

11 A. What was your question?

12 Q. These things that you're calling her, dumb fuck, piece
13 of shit, is that into reference to the disagreement about going
14 out to eat?

15 A. No. It was about things from the past, and arguments
16 between me and Remi were a day-to-day thing, sadly.

17 Q. So now all these things were coming out, and you were
18 feeling hurt about things that had happened in the past; is
19 that right?

20 A. It was an ongoing issue with Remi, yes, ma'am.

21 Q. And then you keep on kind of talking to her, right?

22 A. Yes, ma'am.

23 Q. And she finally tells you: I'm not coming home.

24 A. She may have said that.

25 Q. Let's take a look at it.

1 A. This was because I told her Ally could not stay over
2 there anymore. Ally was supposed to stay with me with her kid.

3 Q. Did she tell you that I'm not coming home?

4 A. Yes. Because I told her that Ally could not come
5 either. She said I'm not coming home if they can't come home
6 with her.

7 Q. So now she told you, I'm not coming home. Right?

8 A. That's what she said in that moment.

9 Q. Okay. And that means she don't want to see you,
10 correct?

11 A. Incorrect, because she asked me to come to dinner with
12 her family. I was invited over there.

13 Q. At this time am I right in these messages, you told her,
14 I'm not coming? Right?

15 A. I did or she did?

16 Q. You told her you were not coming to Andrew's.

17 A. That was earlier that day. That was for the dinner, not
18 later on that night.

19 Q. I understand that, but you did tell her, I'm not going
20 over there?

21 A. Earlier that day.

22 Q. Okay. And then now she has told you, I'm not coming
23 home?

24 A. That was because Ally was supposed to stay with us and I
25 told her that she could not.

1 Q. I understand that, but did she tell you she was not
2 coming home?

3 A. If they didn't come, she said that, yes, ma'am.

4 Q. And you then said: I'm going to tell Ally what's going
5 on. I'll go ahead and text Ally what's going on. Do you
6 remember that?

7 A. Yeah. To tell her that she could no longer stay.

8 Q. So now you've texted Michelle, you've texted Remi, and
9 now you've texted the cousin, Ally, correct?

10 A. I don't recall texting Ally.

11 Q. Okay. I've got it, I'll show it to you, don't worry
12 about it, I've got it. And you did text her.

13 A. Okay.

14 Q. Then you said: Remember what you started all of this
15 for. Do you remember that, that is about 4:00?

16 A. Yeah, I may have said that, yes, ma'am.

17 Q. And then you wrote her in all capital letters: Now, you
18 fucking begged me not to embarrass you to your family.

19 "Begged," is that what you told her?

20 A. Yes. I was going to tell her family the things I found
21 out about her, yes, ma'am.

22 Q. And then you told her: You're dead.

23 A. Can I see that?

24 Q. You sure can.

25 A. You cut off the part where I said: You're deaf, after.

1 Can I see the other part?

2 Q. You sure can.

3 A. Yes, ma'am. So basically, I accidentally sent "dead,"
4 but I meant to send "deaf," because that's why the star is
5 beside it. Me and her Facetimed prior to that and I said
6 something and she didn't hear me, but you handed over one
7 paper.

8 Q. Okay. So let me ask you something. You said, you're
9 dead on this page, right?

10 A. I accidentally said that. That's why I corrected myself
11 right after.

12 Q. When you corrected yourself on this first text what does
13 it say?

14 A. I accidentally said it again, and that's why right there
15 it says "deaf." We Facetimed prior to this and you can pull
16 that Facetime, as well.

17 Q. Okay. So two times you told her you're dead, and then
18 you said, oh, I meant deaf, d-e-a-f, right?

19 A. We Facetimed prior to that.

20 Q. And then right after that you said: Get your ass home
21 since you want to be a smarty pants. Each 30 minutes you're
22 not here I'm ripping four of your dad's pics.

23 A. I probably said it, yes, ma'am.

24 Q. Countdown starts now. You told her that?

25 A. Yes, ma'am.

1 Q. After the first 30 minutes I'm ripping 15. You said
2 that?

3 A. If it's in there I said it.

4 Q. So you've got 30 minutes, then you tell her you've got
5 28 minutes, and then you say you've got 27 minutes, so then
6 you're counting down, correct?

7 A. If it says that, yes, ma'am.

8 Q. Now, also, after all this, so you say, I'm not going to
9 Andrew's. Right?

10 A. Earlier that day I did.

11 Q. And then she says: I'm not coming home.

12 A. Only if Ally can come. She wasn't saying she wasn't
13 coming home at all, Ms. Livesay.

14 Q. Okay. Then why did you say, get your ass home in 30
15 minutes?

16 A. What do you mean? For her to get her stuff.

17 Q. But you did tell her to get her ass home in 30 minutes,
18 correct?

19 A. To get her stuff, yes.

20 Q. And then you started counting down, correct?

21 A. Yes, to get her stuff.

22 Q. And did she come home?

23 A. No, ma'am.

24 Q. Okay. And at the time was she was driving a Mercedes?

25 A. I believe so.

1 Q. So she had a car, right?

2 A. Yes, ma'am.

3 Q. She could have come home if she wanted to, correct?

4 A. Yes, ma'am.

5 Q. And she did not come home, correct?

6 A. Yes, ma'am.

7 Q. So she didn't need you to bring anything. She had a
8 vehicle. She could have gone and gotten this stuff if she
9 wanted?

10 A. Yes, ma'am.

11 Q. And when you told her about that countdown she didn't
12 show up, correct?

13 A. No, ma'am.

14 Q. And I mean, I don't know what you took from that, but I
15 mean, I take from that she didn't want to see you. What did
16 you take from it?

17 A. If she didn't want to see me she would have never
18 invited me to dinner.

19 Q. After there was a mix up she did invite you to dinner
20 and then there was an argument, correct?

21 A. Yes, ma'am.

22 Q. And then these dinner plans were off, right?

23 A. No, ma'am. I chose not to go over there.

24 Q. Okay. Well, either way they were off, right?

25 A. They weren't off. I still was always invited that day

1 to go to dinner.

2 Q. Okay. So when she told you, I'm not coming home and
3 you've called her a dumb fuck, you took that as she still
4 wanted you around?

5 A. She offered to pay gas money, yes, ma'am.

6 Q. But that was before the altercation, right?

7 A. There was no altercation, it was an argument.

8 Q. Was there an argument between you and her?

9 A. Yes, ma'am.

10 Q. And after that at some point she quit taking your calls?

11 A. Yes, ma'am.

12 Q. And you took from that that she says, I don't want to go
13 home, I'm not coming home, she quits taking your calls and you
14 take from that that she wants to see you?

15 A. She never said I don't want to see you.

16 Q. And you don't think calling her 200 times and her not
17 answering, that was the message, I don't want to see you?

18 A. Yes, ma'am. I shouldn't have called that many times,
19 and I'm here to admit that.

20 Q. Your phone number -- again her phone number -- you had
21 her in your phone as "Baby?"

22 A. I believe so.

23 Q. If you don't mind, do you know what you're looking at
24 here?

25 A. Outgoing calls to "Baby," which would have been

1 Remington Hargrove?

2 A. Yes, ma'am.

3 Q. And so those are your phone calls to Remi, correct?

4 A. Yes, ma'am.

5 Q. And in fact, some of them are from star 67, correct?

6 A. Yes, ma'am.

7 Q. And did you know that there's 200 calls, you called her
8 200 times?

9 A. That's what it says.

10 Q. And did you know the majority of those phone calls are
11 from star 67? Take a look.

12 A. Yes, ma'am.

13 Q. Okay. So you know the majority of the calls you were
14 calling from a blocked number?

15 A. I thought she blocked me, but she actually turned her
16 phone off.

17 Q. So you thought she blocked you so you took from that to
18 dial star 67?

19 A. Yes, ma'am.

20 Q. Persistence. And at some point that night you
21 downloaded a Text Plus App, didn't you, so you could text her
22 from that app?

23 A. I may have, I don't recall.

24 Q. I mean, that's a pretty big thing. You may have. You
25 may have tried to call her, she blocked you. Then you tried

1 star 67, that didn't work, and then you're sitting around
2 putting an app on your phone to hide the number, correct?

3 A. This was three years ago.

4 Q. I'm sorry?

5 A. This was three years ago.

6 Q. It didn't make much of an impression on you?

7 A. What was your question?

8 Q. It happened two years ago and you don't remember
9 everything. Did it not make an impression on you, what
10 happened?

11 A. What happened with what?

12 Q. This night?

13 A. Which part of the night?

14 Q. The night when you were downloading that app. You say
15 you may remember or you may not; is that right?

16 A. I don't remember, it was almost three years ago.

17 Q. So you may not have remembered the details of what
18 happened when you shot the victim, correct?

19 A. That's incorrect. I remember every detail of that.

20 Q. Okay. So now, that, you do remember?

21 A. Yes, ma'am, because that's something serious.

22 Q. Okay. And do you remember the fact that when she
23 wouldn't take your calls, wouldn't take the star 67 calls,
24 wouldn't take the Facebook calls, wouldn't take the Text Plus
25 calls, that you got in your car and you drove to Maddington

1 Place, correct?

2 A. Yes, ma'am.

3 Q. Okay. Good, good. I'm glad we're on the same page.

4 And you drove over there, I mean, you know we got your phone,
5 right? That's no secret. We got all your messages, we got
6 your locations. So you know you got over there after 9:00?

7 A. If that's what it says. Once again, this was three
8 years ago.

9 Q. But if that's what it says, you were over there after
10 9:00, correct?

11 A. If that's what it says, yes, ma'am.

12 Q. And you sat there and waited for them about 45 minutes?

13 A. I don't recall, once again, because it was three years
14 ago, but if that's what it says, yes, ma'am.

15 Q. And when you went over there nobody invited you?

16 A. Oh, Remi did.

17 Q. She told you to come over there?

18 A. She begged me to come over there, and she said she would
19 pay gas money.

20 Q. That was earlier.

21 A. Earlier, yeah, and I was never not invited.

22 Q. Things had changed since then, right?

23 A. No, I was never not invited, no, ma'am.

24 Q. Let's see, take a look. I saw the gas money comment, as
25 well, and it was early on, it was before I believe you called

1 her a dumb fuck and a piece of shit. Let me confirm. But you
2 would agree if it was before then clearly things had changed,
3 clearly things had gone from her offering you gas money to not
4 picking up the phone, would you agree with that?

5 A. No. Because for you to not be invited someone has to
6 say you're not invited.

7 Q. You're in luck, I found it. What time does it say, I'll
8 send you gas money?

9 A. Almost 3:00, 2:38.

10 Q. 2:37, right? You can say almost 3:00, we got it right
11 there --

12 A. 2:37.

13 Q. Okay, good, good. So at 2:37, that's when she offered
14 you gas money, right?

15 A. Yes, ma'am.

16 Q. And after that is when you told her I'm not coming,
17 right?

18 A. In that moment I was not coming because plans did
19 change.

20 Q. Did you tell her after that that you were not coming?

21 A. If that's what it says, yes, ma'am.

22 Q. And after that, was that when you called her a piece of
23 shit?

24 A. If that's what it says, yes, ma'am.

25 Q. And after that you called her a dumb fuck?

1 MR. MARTIN: Judge, again, I'm going to object. This
2 is repetitive, and again, I want to at this point re-enter my
3 objection to all of this line of questioning as it's, again,
4 repetitive in nature and so I object under rules 401, 402, 403
5 and 404 on the record.

6 THE COURT: Thank you for the objection. I still
7 think it's proper. She's on cross-examination. She has a lot
8 of leeway that on direct does not. I will let counsel decide
9 when the repetitiveness gets to be too much, but right now I
10 think it's proper.

11 MS. LIVESAY: Thank you, Judge.

12 Q. So at 2:37 she did offer you gas money, correct?

13 A. Yes, ma'am.

14 Q. Okay, good, good, good. Now, look at these phone calls.
15 That was at 2:37, so let's check out, here we go, 2:25, 3:35,
16 3:36, all of those, did they require you at that time to dial
17 star 67, or were you just calling her number?

18 A. At that moment it looks like I was just calling her
19 number.

20 Q. Okay, good, good, good. So at that time you're not
21 having to call from star 67, right?

22 A. No, ma'am.

23 Q. And at some point something changes, correct, because
24 you do start calling from star 67?

25 A. Yes, ma'am, and it looks like she answered.

1 Q. And how long did you all talk?

2 A. It looks like 18 seconds.

3 Q. How about the next one?

4 A. A couple of seconds.

5 Q. How about the next one?

6 A. She stopped answering.

7 Q. Okay. And you were calling from star 67?

8 A. And she was also answering, yes, ma'am.

9 Q. So clearly, something changed from when she was offering
10 you gas money to when you were having to block your number to
11 try to get to her, correct?

12 A. My invitation did not change.

13 Q. You think your invitation did not change when you're
14 having to call her from a blocked number from Facebook and from
15 a text app, you think nothing has changed?

16 A. No, because it was my choice not to go over there.

17 Q. So you think after all that you were welcome to come
18 over there?

19 A. This was an every day thing with me and Remi, we always
20 argued.

21 Q. Okay. And after she told you, I'm not coming home, that
22 told you she wanted to see you? Is that what it told you?

23 A. Once again, this was an ongoing issue with me and Remi.

24 Q. Yes, or no? Is that what it told you?

25 A. No, ma'am.

1 Q. Okay. Good, glad we could agree on that. Now, clearly
2 when you went over there, and I can show you the calls, because
3 I want to be fair to you. I want you to have the same thing
4 that I have and your attorney has. Okay? When you go over
5 there it's about 9:00, right? Would you agree with me if
6 that's what the phone says then that's when you went over
7 there?

8 A. Yes, ma'am.

9 Q. Now, I'm looking at your phone records from 8:35, 8:42,
10 8:43, 8:52, 8:55, 9:12. By 9:12 you're there. I want you to
11 take a look at these records. Tell me every phone call you
12 made on the way over there and when you got there was from a
13 blocked number?

14 A. Yes, ma'am, and she did answer a couple of those calls.

15 Q. But it was from a blocked number, right?

16 A. She was also answering those calls, yes, ma'am.

17 Q. Did she know who was calling if the number's blocked?

18 A. Yes, ma'am, because we talked for 10 seconds, she knew
19 it was me.

20 Q. She knew that was you?

21 Q. Because it was an ongoing issue. She always blocked me
22 and we always argued, it was an ongoing issue.

23 Q. You don't have to say that again. She knew it was you?

24 A. Yes, ma'am, because she answered.

25 Q. Well, if she knew it was you why did you have to put

1 star 67 and block your number?

2 A. Because she blocked my number and I called from that,
3 and she was still answering the phone calls.

4 Q. Okay. So she blocked your number and you took from that
5 that she wanted to talk to you?

6 A. She wouldn't have answered if she didn't want to talk to
7 me.

8 Q. What does star 67 do?

9 A. Blocks the number.

10 Q. Okay. So when you dial star 67 it blocks the number so
11 you don't know who's calling, correct?

12 A. It says private number, but once again, this was an
13 ongoing issue with me and Remi, we always did this.

14 Q. Here is the main question. When you dial star 67, okay,
15 and you called her from star 67, did it pop up, Anijah is
16 calling?

17 A. No, ma'am, but once again, this was an ongoing issue
18 with me and Remi. She knew it was me calling, and she will
19 testify to that.

20 Q. Okay. So you had done this before?

21 A. Me and her have argued before, yes, a lot of times.

22 Q. And so you took from all of this, star 67, all of that,
23 that she wanted to see you?

24 A. I was still not -- on any of those calls that she
25 answered she never said don't come over.

1 Q. So let's look at these calls again from 8 -- these are
2 the ones leading up to when you were -- I want to be fair to
3 you, okay? So 8:38, let's see, 8:35, okay, 9:12, and the Court
4 needs to know, you know, the fact finder. So these are the
5 first calls that you just looked at, right?

6 A. Yes, ma'am.

7 Q. And you're dialing star 67, correct?

8 MR. MARTIN: I object again just because it's
9 repetitive in nature over and over and repetitive.

10 THE COURT: Okay. You're noted on the record for
11 that.

12 MS. LIVESAY: I'm just asking --

13 THE COURT: Do you want to say anything to him?

14 MS. LIVESAY: No, sir.

15 Q. So you all talk for 18 seconds, what time is that?

16 A. 8:38.

17 Q. How about the next phone call?

18 A. 8:37.

19 Q. How long did you talk?

20 A. Eighteen minutes -- I mean, 18 seconds on both of the
21 phone calls.

22 Q. How about after that? 8:37, so was there a call at
23 8:38?

24 A. Yes.

25 Q. And how long did you talk?

1 A. Eighteen seconds.

2 Q. How about after that call?

3 A. It was 8:39 at 15 seconds, answered. 8:40, six seconds,
4 answered.

5 Q. So let me make sure we're looking at the same paperwork.

6 A. We are.

7 Q. So you talked to her at 8:38 for 18 seconds?

8 A. Yes, ma'am.

9 Q. You turned right around 8:39, the very next minute,
10 right, fifteen seconds, correct?

11 A. Okay.

12 Q. 8:40, six seconds, correct?

13 A. If that's what it says, yes, ma'am.

14 Q. Tell the Court, is that what it says?

15 A. Yes, ma'am.

16 Q. 8:40, you're still in the same minute and you're dialing
17 back before a minute's rolled over, how long did you all talk?

18 A. Right here?

19 Q. Yes.

20 A. She did not answer.

21 Q. How many seconds is it?

22 A. No, none, she did not answer.

23 Q. Okay, good. And that said 8:40. Okay, now, we're still
24 in 8:40 and you've called again. How long did you talk that
25 time?

1 A. She did not answer.

2 Q. And you called again, 8:41, how many seconds did you
3 talk?

4 A. Your finger's covering it.

5 Q. Sure.

6 A. We talked for five seconds.

7 Q. Five seconds. Did it sound like she wants to talk to
8 you?

9 A. She still answered.

10 Q. But it was from star 67?

11 A. I'm pretty sure she knows it's me because we've talked
12 before that.

13 Q. So at 8:41 you talk for five seconds, and then you turn
14 around and call her again the very next minute, correct, 8:42?
15 Okay? How long did you talk?

16 A. She did not answer that phone call.

17 Q. Okay. And a minute hadn't even rolled around. Still
18 8:42 you called again, correct?

19 A. Yes, ma'am.

20 Q. And how long is the duration?

21 A. Two seconds.

22 Q. Two seconds. Alright, so then we left off at 8:42. You
23 call again at 8:43, correct, the very next minute?

24 A. Yes, ma'am.

25 Q. And how long is the duration?

1 A. A second.

2 Q. How long?

3 A. One second.

4 Q. Okay. Just long enough to hang the phone back down?

5 A. Yes, ma'am.

6 Q. Okay, good. And then you call again, same minute, a
7 minute hadn't even rolled, still 8:43, you call right back,
8 correct?

9 A. Yes, ma'am.

10 Q. And how long is the duration on that?

11 A. Zero seconds.

12 Q. Okay, good. And then 8:44, the very next minute, you
13 call again?

14 A. Yes, ma'am.

15 Q. What it is the duration?

16 A. Zero seconds.

17 Q. And so you dial 8:44, 8:46, how long is the duration?

18 A. 8:44, you skipped over that one. It says answered again
19 18 seconds, but the one after that is zero seconds.

20 Q. Okay. Well, I don't want to skip anything.

21 A. You skipped the one where it said 18 seconds, right
22 there.

23 Q. Okay, good, at 8:44?

24 A. Yes, ma'am, you did.

25 Q. And then right after that call do you turn around and

1 call her back?

2 A. Yes, ma'am.

3 Q. And these, again, are all from star 67?

4 A. Yes, ma'am.

5 Q. And how long is that call?

6 A. Zero seconds.

7 Q. And then you call her again, the very next minute, 8:47.

8 How long is that call?

9 A. Four seconds.

10 Q. And we haven't even turned over a minute, you call again

11 8:47, how long is that?

12 A. Zero seconds.

13 Q. How about at 8:48, you called again?

14 A. Zero seconds.

15 Q. How about at 8:40 -- oh, we're still 8:48, you called

16 three times. How about at 8:48, let's see, 8:48, 47 seconds,

17 how many times? How long is the duration?

18 A. No answer.

19 Q. Okay, no answer. And then how about 8:49?

20 A. No answer.

21 Q. How about at 8:50?

22 A. Three seconds.

23 Q. How about 8:52?

24 A. No answer.

25 Q. How about your call back again at 8:52, how long is that

1 one?

2 A. No answer.

3 Q. So you're calling her every minute, almost sometimes
4 more than one time within the same minute, correct?

5 A. I do love her, yes.

6 Q. And you would agree you called her a total of a couple
7 hundred times?

8 A. Yes, ma'am.

9 Q. And a majority of them are from star 67?

10 A. Yes, ma'am.

11 Q. Now, let's talk about -- so when you went over there, I
12 mean, you're calling every minute you got to be mad. When you
13 go over there are you mad?

14 A. No, ma'am.

15 Q. You're fine, you're just calling every minute? I mean,
16 what can you do when you're calling somebody every minute? Is
17 there anything else on your mind?

18 A. Well, I just wanted to talk to her and give her her
19 stuff.

20 Q. What?

21 A. I just wanted to talk to her and give her her stuff.

22 Q. So you're just dialing every minute?

23 A. Yes. That's what it says.

24 Q. And it's weird because you say that, but then didn't you
25 message Missy and say, she won't pick up, tell her I'm over

1 here?

2 A. Yes, ma'am.

3 Q. Okay. So clearly, she wasn't picking up your calls?

4 A. Yes, but after that, after Missy told her that she told
5 Remi I was there and Remi never said go home.

6 Q. She told you what?

7 A. She never said go home.

8 Q. Oh, I like that, I like that. So if she ain't saying,
9 no, then that means she wants you over there?

10 A. To give her her stuff, that's the only reason why I was
11 there was to give her her stuff.

12 Q. And she never said no?

13 A. At 9:30 she told me to drop her stuff off and leave.

14 Q. She never said no, so let me ask you something. You're
15 telling me that you took it, I mean, calling her every minute,
16 and sometimes twice within the same minute from a blocked
17 number and because she didn't pick up the phone and say, don't
18 come, or that's what you're alleging, you take that to mean
19 that she wants you over there; is that right?

20 A. She never said I couldn't come. Nobody never said I
21 wasn't allowed there.

22 Q. Who invited you to the condo?

23 A. Remington.

24 Q. Did you see that in any of the text messages?

25 A. Yes, ma'am.

1 Q. Where?

2 A. I'll pay for your gas money, and I was invited to the
3 dinner.

4 Q. That was to meet for dinner, correct?

5 A. No, it was just a period of invitation, they weren't at
6 dinner yet, it was to hang out.

7 Q. I'll give you that just to move this along. But there
8 was no doubt something changed after that, correct?

9 A. Yes. An argument ensued, but I was never not invited
10 over there.

11 Q. Now, let me ask you something, did you know that
12 Maddington Place is private?

13 A. Is Maddington Place and Cross Gate Villas the same?

14 Q. Yep, sure is. Did you know Cross Gate was private, that
15 road is private?

16 A. No, I did not.

17 Q. Did you know the parking lot is private?

18 A. No, I did not, I was invited over there by Remington.

19 Q. And you're taking it that you were invited by the fact
20 that you called her 200 times and the majority of them were
21 from a blocked number?

22 A. Once again, I was never not invited by anybody that was
23 there.

24 Q. I just wanted to be clear. Did you take it from the
25 fact that you called her 200 times, you admit the majority of

1 them are from a blocked number, you took that as that you were
2 invited?

3 A. I can't answer a question that -- I can't give you the
4 wrong answer, I was never not invited. Yes, I called her a
5 lot, this was an ongoing issue with me and Remi. I do regret
6 calling her that much and I do regret the names that I called
7 her. It was just hurtful things, I do regret her.

8 Q. So were you angry when you showed up?

9 A. No, ma'am.

10 Q. You're calling her every minute and you are happy?

11 A. It doesn't mean I'm mad because I was calling her.

12 Q. I'm not saying calling her, I'm saying you were calling
13 her every minute, sometimes multiple times within one minute.

14 A. That doesn't mean I'm mad.

15 Q. So you were happy?

16 A. No. I was upset that dinner plans changed.

17 Q. So you were upset?

18 A. Upset, not mad.

19 Q. When you went over there were you upset?

20 A. Once again, I was upset, not mad, when I went over
21 there, but eventually later on I calmed down because I did text
22 her, Baby, I just want to give you a kiss and give you your
23 stuff, and she said, okay, drop the stuff off and leave.

24 Q. You calmed down. Did you know once you got to
25 Maddington Place you sat in the parking lot and called her

1 every minute on the minute, did you know that?

2 A. If that's what the record says, yes, ma'am.

3 Q. Do you want to look at the record?

4 A. You've already showed me.

5 Q. Okay. So you would agree that's what it says?

6 A. If that's what the record says, yes, ma'am.

7 Q. So you weren't mad, but you sat in the parking lot and
8 called her every minute on the minute?

9 A. I was not mad, once again.

10 Q. But you were upset?

11 A. That dinner plans changed, and once again, this was an
12 ongoing issue with Remi. It was nothing new.

13 Q. Okay. Let me ask you something. Remington had a car?

14 A. Yes.

15 Q. Okay. She had money?

16 A. Yes.

17 Q. She was going to give you gas money, right?

18 A. Yes, ma'am.

19 Q. Then why did you have to go over there, right? If she
20 wanted this stuff she could have gone and gotten it?

21 A. Well, our relationship had issues. I thought it would
22 be better just to drop it off with her and her family and her
23 mom begged me not to throw the stuff out, once again.

24 Q. Was Remington's car working?

25 A. Yes, ma'am.

1 Q. So she could have driven back to that apartment and got
2 whatever she needed?

3 A. She did not. She could have, but she didn't.

4 Q. That's right. But she could have?

5 A. Yes, ma'am.

6 Q. And in fact, she told you she was not coming back to
7 that apartment?

8 A. Well, that was only if Ally wasn't coming. She said,
9 "either:" Well, I'm not coming either. If Ally wasn't coming,
10 she wasn't coming, that's what she was trying to say.

11 Q. So you know what she's trying to say?

12 A. Remi would have been back. She also called me multiple
13 times in jail.

14 Q. She called you multiple times?

15 A. Yeah, and we were together after this, yes.

16 Q. Yes, after this. How about this night? Did she call
17 you multiple times this night?

18 A. Most of the calls were to her, but she was answering the
19 calls.

20 Q. But you would agree with me that she didn't call you? I
21 can show it to you, you can go through it.

22 A. You can show me. She could have called me, she could
23 have not.

24 Q. Hey, look, maybe she did. Two things. First of all,
25 you would admit that the majority of the calls were from you to

1 her, correct?

2 A. Yeah, I'll admit that, yes, ma'am.

3 Q. And you just said that she called you at the jail?

4 A. Video chat.

5 Q. Okay. She called you, you didn't call her?

6 A. How could I call? Yeah, we both called -- yeah, I
7 called her through the phone in jail, but she made visitation
8 rights through video chat because it was during COVID and we
9 couldn't see each other. She made a lot of those to show me
10 the baby stuff and to talk to me, yes.

11 Q. So, but you called her from the jail, correct?

12 A. She answered. You know when you call in the jail you
13 have to say your name. She knew it was me, yes, ma'am.

14 Q. But did you know you can't call people at the jail?

15 A. I can't call people?

16 Q. Nobody can call somebody at the jail, only the inmate
17 can call out, did you know that?

18 A. That's -- I did say I called and she answered.

19 Q. Okay. You said earlier that she called you at the jail,
20 so I just want to make sure.

21 A. Yeah, she made video chats from the jail, yes, ma'am.

22 Q. Okay. So you show up to Maddington Place, correct?

23 A. Yes.

24 Q. You sit there and wait because you're there before they
25 even get there, right?

1 A. Yes.

2 Q. And you were parked right so you can see them as soon as
3 they come in. Show the judge where you parked?

4 A. I actually, I wasn't parked facing that way, Judge. I
5 was like this, because like I said during my testimony, I had
6 to back out to leave so I couldn't see anybody. That's not
7 correct, Ms. Livesay, I was like this (indicating) because I
8 had to back out of the parking lot.

9 Q. So let me ask you something. You just happened to back
10 out at the same time that they got there?

11 A. Yes, ma'am.

12 Q. That is -- that's magic.

13 THE COURT: And you were showing him, what number is
14 that exhibit?

15 MS. LIVESAY: Number 32.

16 THE COURT: Thank you.

17 Q. But you would agree, where you're parked is right where
18 people drive in? Show him where you were parked.

19 A. This way, but I had to to back out so I could not see
20 any cars at all.

21 Q. How do people drive in to Maddington Place?

22 A. Through here.

23 Q. So right where people drive in is where you were parked?

24 A. Yes, but once again, I was facing this way so I couldn't
25 see any cars.

1 Q. And you had sat out there 40 minutes, right?

2 A. If that's what the record says, yes, ma'am.

3 Q. And then after 40 minutes you just happened to back out
4 at the same time Remington and Emily get there, correct?

5 A. Yes, ma'am, and Emily was actually -- they actually had
6 Emily's car, I'd never seen that car before.

7 Q. Okay. So it just happens?

8 A. Sadly it happened, I wish it didn't because this
9 wouldn't have happened if she wasn't there.

10 Q. And when you passed her would it have happened if you
11 didn't go over to Maddington Place?

12 A. Would this have happened if I didn't go over there? No,
13 ma'am, and I also wouldn't --

14 MR. MARTIN: Object. I object to that question.

15 THE COURT: The basis?

16 MR. MARTIN: The basis is that's a matter for the
17 Court to determine how this would have happened or not
18 happened. If Mike Pennington hadn't been over there this
19 wouldn't have happened. If he hadn't gone, if he hadn't been
20 born this wouldn't have happened. It's an irrelevant question,
21 it's argumentative, and it is moving into the Court's province
22 to make a decision.

23 MS. LIVESAY: He answered it would not have happened.

24 THE DEFENDANT: I had more to say, though.

25 THE COURT: They are now talking with me, okay, just

1 sit tight.

2 MS. LIVESAY: My argument is it's a follow-up
3 question. He's trying to say that it would not have happened
4 if these young ladies had not come in during that time frame
5 and the cars would not have past. So let's figure out, really,
6 the details of what would have kept this from happening. Those
7 two young ladies --

8 THE COURT: We're dealing with his objection. Okay?

9 MS. LIVESAY: Sure.

10 THE COURT: I think the question is proper. I note
11 your objection. He is correct, though, in the theoretical
12 basis of how you're asking the question, so make it relevant.
13 Keep some guardrails on it so we don't get into the realm of
14 what he's arguing.

15 MS. LIVESAY: Sure.

16 Q. Mr. Yarnell, we can agree that you just said it would
17 not have happened, correct, if those two women would not have
18 come back through Maddington Place using that road?

19 A. Incorrect. I didn't finish my answer.

20 Q. Okay. Go ahead.

21 A. So as I was backing out they pulled in and my sole
22 purpose was to drop Remi's clothes off and she was finally
23 there to drop her clothes off.

24 Q. So it would not have happened if they had not come home?

25 A. And it also would not have happened if Mike Pennington

1 did not come over there for me, as well.

2 Q. Let me ask you this since you're talking about if it
3 would or wouldn't happen. Would it have happened if you never
4 went over to Maddington Place?

5 MR. MARTIN: Again, Judge, I just got to object to
6 these. All of -- the relevance to that issue, and let me state
7 this for the record. First of all, she keeps referring to that
8 as private property. Well, somebody owns it, but it is not
9 Michael Pennington, any of the Hargroves, even the people that
10 live there. That's a public parking lot, and we'll get into
11 that later, but having said that, the idea of, this wouldn't
12 have happened, bleeds over into another subsection of this
13 statute, which I don't think is relevant, but it bleeds over
14 into another subsection of, did he have a right to be there, or
15 proximate cause of how this occurred, and I don't think -- I
16 think all of those are questions for the Court to determine
17 because the issue of, the issue of what we're doing here has to
18 do with, again, that it wouldn't have happened if, can go to a
19 a thousand different questions. One of them was, if he hadn't
20 have been born, if he had gotten in a wreck on the way there,
21 there, if Mr. Pennington hadn't have been there, if Mr.
22 Pennington had gone into the apartment when he got there.
23 That's not the relevant question, and I object on the basis of
24 relevance and because of the fact that it's going on and on and
25 on in a repetitive nature to all the material not relevant to

1 your determination, and for that reason I object.

2 THE COURT: Okay. Briefly, do you have any response
3 to what he said?

4 MS. LIVESAY: Sure, Your Honor. The defendant is who
5 brought up that it would not have happened if these people had
6 not shown back up, if Michael Pennington hadn't done this. I
7 don't think it's fair that I can't cross-examine him on that
8 answer. I mean, that's what cross-examination is for, vetting
9 these answers.

10 THE COURT: Okay. Do you have anything else material
11 that you want to say to me on his objection so I can rule?

12 MS. LIVESAY: Yes. I think the material thing I have
13 to say is what makes it relevant is he answered and gave his
14 understanding of why it wouldn't have happened.

15 THE COURT: Okay. I think the question is proper.
16 You've noted it for the record. Alright. Now, what I need for
17 you to do, though, is be mindful of his objection. If we had a
18 jury here I would not allow continuing arguments the way that
19 I'm doing here. I've been accused of being unfair already,
20 I've been accused of being rude, so I'm trying to be patient
21 with everybody, but I need you to understand that your
22 objections need to be stated, give me a response to the
23 objection, you get an opportunity to then say anything contrary
24 to what the State might say, but I think the line of
25 questioning is proper. Keep some guardrails on it because I

1 think he is correct, too, in his argument on the relevancy
2 because it can take us down a rabbit hole to where we are here
3 for the rest of the week or the rest of the day just on that
4 type of question that you're asking.

5 MS. LIVESAY: I understand.

6 THE COURT: Now, understand my rule. You get to
7 argue what my rule is to me, you can remind me what my rule is.
8 I think I understand it, but you can keep reminding me and
9 arguing it to me, I think I got it, but you're more than
10 welcome to argue that at some point. You don't have to do it
11 with every objection that's made. Okay.

12 BY MS. LIVESAY:

13 Q. Mr. Yarnell, you just said it would not have happened if
14 Emily and Remi hadn't done this and Michael Pennington hadn't
15 done that. Would it have happened if you never went over to
16 Maddington Place?

17 A. I never said Emily and Remi did anything. I said we
18 pulled at the same time.

19 Q. Okay. But you did say this would not have happened if
20 Michael Pennington hadn't done this or that; is that correct?

21 A. Yes.

22 Q. Would it have happened if you never went over to
23 Maddington Place?

24 A. I was invited.

25 Q. Would it have happened if you never went over to

1 Maddington Place?

2 A. No, ma'am.

3 Q. Now, let me give you this, too. I'm going to mark them
4 in a minute because there's a little disagreement, so you can
5 take a look at that. Now, what was said when you and Emily
6 passed? You're in one car and Emily and Remi is in the other
7 car. What is said?

8 A. I believe I said, are you blocking me in, because I
9 believed she was blocking me in, Emily.

10 Q. Why did you think she was blocking you in?

11 A. Because a random car I didn't know was in the way of the
12 road when I was trying to leave.

13 Q. Were you able to back up?

14 A. I hit the curb and I had to do a three-point turn.

15 Q. I'm sorry?

16 A. I hit the curb and I had to do a three-point turn.

17 Q. Okay. Were you able to leave then?

18 A. Yes.

19 Q. Okay. So they didn't have you blocked in to the point
20 you couldn't leave?

21 A. Well, once again, I thought they were because they were
22 in the middle of the road just sitting there and I hit a
23 three-point -- I hit the curb and did a three-point turn.

24 Q. But you were able to leave?

25 A. Yes.

1 Q. Okay. At that time why were you leaving then?

2 A. Because I felt like I was just there too long and I had
3 to work in the morning.

4 Q. So you had waited as long as you were gonna wait and so
5 then you were gonna leave?

6 A. Yes, ma'am.

7 Q. Because you would have been probably waiting there, you
8 know, 45 minutes?

9 A. Yes, ma'am.

10 Q. And so then you were going to leave and you were able to
11 leave, right, you drove out?

12 A. Yes, ma'am. I did not leave because I was there to drop
13 her stuff off and she was finally there.

14 Q. Okay. So you didn't leave? You didn't drive out, you
15 didn't drive past Remi and Emily?

16 A. Yeah. I did leave and I came back to drop her stuff
17 off.

18 Q. Okay. So let me ask you something. When you were
19 passing them why didn't you just get out then and say, look,
20 here's your stuff, take it, I'm leaving, I'm out, I gotta go to
21 work? Why didn't you drop it off to her then?

22 A. Because there was a car trailing behind them in the
23 middle of the road. That would have meant I had to stop in the
24 middle of the road and that car would've been waiting on me to
25 give Remi her stuff.

1 Q. But you did stop to say, are you fucking blocking me in?

2 A. I don't recall saying, are you fucking blocking me in?

3 I recall saying, are you blocking me in?

4 Q. And what did they say?

5 A. Remi said, no, I'm not.

6 Q. Why would you think they were blocking you in?

7 A. Because it seemed like they were blocking me in. From
8 my perception it seemed like she was blocking me in because I
9 hit a curb.

10 Q. And at that time did she cuss at you or say anything
11 ugly?

12 A. No, ma'am.

13 Q. And she just said, I'm not blocking you in?

14 A. (No audible response.)

15 Q. And then she rolled on in to the parking lot?

16 THE COURT: You need to give a verbal response.

17 MS. LIVESAY: Yes.

18 A. Yes, ma'am.

19 Q. So all she said to you was, I'm not blocking you in?

20 A. Yes, ma'am.

21 Q. And then you passed and went on out away from the
22 parking lot?

23 A. Yes, ma'am.

24 Q. And they went into the parking lot?

25 A. If that's what they did, I'm not sure what they did.

1 Q. And then where did you turn around?

2 A. I ended up leaving out of the parking lot and then
3 turning back around.

4 Q. So I'm showing Defendant's Exhibit 32. Where did you
5 turn around?

6 A. Somewhere around the area, I don't recall.

7 Q. Around what area?

8 A. Up there, like, I don't recall, somewhere that area. I
9 circled you back around.

10 Q. So it was nowhere along on the map that you turned
11 around?

12 A. I'm not sure. I was only there a couple of times. I
13 didn't know the neighborhood that well.

14 Q. Okay. So you're not sure where you turned around?

15 A. Once again, this was three years ago, so I turned around
16 somewhere near that exit, yes, ma'am, and then came back
17 around.

18 Q. And when you passed Remi did she say, hey, I want my
19 stuff?

20 A. We talked ten minutes prior to that at 9:30 and she said
21 drop the stuff off and leave.

22 Q. When you passed her and she said I'm not blocking you
23 in, okay?

24 A. Uh-huh.

25 Q. At that time did she say, hey, I want my stuff?

1 A. It was a two-second conversation. Like, I pulled off
2 right after she said, I'm not blocking you in. It wasn't like
3 a prolonged conversation.

4 Q. And then you turned around, right?

5 A. (No audible response.)

6 Q. You come back?

7 A. Uh-huh.

8 THE COURT: Make verbal responses.

9 A. Yes, ma'am.

10 THE COURT: Thank you.

11 Q. And when you come back where is Remington?

12 A. Upstairs.

13 Q. Okay. So by the time you go turn around, Remington has
14 already parked the car and gone up to the condo and shut the
15 door?

16 A. If that's what she did, yes, yes, ma'am.

17 Q. Did you see her out there?

18 A. No, ma'am.

19 Q. And you testified when defense was asking you that she
20 was upstairs in the condo?

21 A. Yes, ma'am.

22 Q. So by the time you turn around she's not out there,
23 right?

24 A. No, ma'am.

25 Q. So why didn't you just leave, go ahead and leave?

1 A. I was there to drop her stuff off. She said, drop it
2 off and leave, and she was finally there so I was going to give
3 her her stuff.

4 Q. Why didn't you park the car and take her stuff upstairs
5 to her?

6 A. I was not going to go upstairs. I was there to drop her
7 stuff off. I was going to ask them if she was going to get her
8 stuff and I would give it to them and leave.

9 Q. So why weren't you going to go upstairs?

10 A. There was no need for me to go upstairs.

11 Q. So when you saw that -- she just saw you, right?

12 A. Yes, ma'am.

13 Q. And she parks her car and goes on upstairs, correct?

14 A. Yes, ma'am.

15 Q. And she could have waited for you, right?

16 A. Yes, ma'am.

17 Q. But she didn't?

18 A. I believe she thought I left.

19 Q. Okay. Let's not get into that, what she thought,
20 because we really don't know. Are you a mind reader?

21 A. No, ma'am.

22 Q. So you don't know what she was thinking?

23 A. No, ma'am.

24 Q. But you know when you drove back old girl had gone up
25 stairs to the condo, correct?

1 A. Yes, ma'am.

2 Q. You knew she was not out there waiting for you in the
3 parking lot, correct?

4 A. Yes, ma'am.

5 Q. And you knew you were not going upstairs?

6 A. Yes, ma'am.

7 Q. So what else is there to do but leave?

8 A. Give her her stuff because she said drop her stuff off
9 and leave.

10 Q. So when you roll up to the family, okay, right?

11 A. Yes, ma'am.

12 Q. So you approach them, you drive up to talk -- who's all
13 out there?

14 A. Michael, Darrin and Emily.

15 Q. But not Remington?

16 A. No, ma'am.

17 Q. Why didn't you then park, get out of the car, and tell
18 Emily, hey, here's her stuff, take it up to her, she can have
19 it or not have it?

20 A. Well, I did try that.

21 Q. You parked the car?

22 A. I didn't park the car, I stopped in the middle of the
23 roadway and I did try to give her her stuff.

24 Q. Did you ever get out of the car?

25 A. Of course I wasn't getting out of the car.

1 Q. You did not get out of the car?

2 A. No, ma'am, because Michael Pennington started getting
3 aggressive with me.

4 Q. Okay. Okay. And so you rolled up and what happens?

5 A. I asked everybody out there the general question, was
6 Remi going to get her stuff or not?

7 Q. And what did they say?

8 A. Michael responded by saying, get the fuck out of the car
9 so I can fuck you up.

10 Q. Just out of nowhere?

11 A. Yes, ma'am.

12 Q. Just out of nowhere?

13 A. Yes, ma'am.

14 Q. And then what happened?

15 A. He started approaching my car.

16 Q. He started punching your car?

17 A. He started approaching. He was drinking a beer and put
18 the beer down and started approaching my car.

19 Q. And what did you do?

20 A. I locked my door.

21 Q. And then what happened?

22 A. He forcibly tried to enter my vehicle by pulling the
23 door handle. I rolled the window up a little bit, he grabbed
24 the window and I started backing up.

25 Q. And then what happened?

1 A. He started punching me through my vehicle and I grabbed
2 for my firearm in my center console.

3 Q. He punched you through the vehicle?

4 A. Yes, ma'am.

5 Q. But your window was rolled up?

6 A. Not all the way.

7 Q. But most of the way?

8 A. No, ma'am, because he was able to reach his arm in there
9 and punch me.

10 Q. Okay. And then what happened?

11 A. When I got my gun out of my center console he said, if
12 you pull a gun out you better use it and he reached in for the
13 gun, and I fired one shot in his general direction to get him
14 off of me.

15 Q. Okay. So his arm was in the car when you shot him?

16 A. Yes, ma'am, he was reaching for my gun.

17 Q. Let me ask you something. At some point did he take his
18 belt off and wrap it around his hands?

19 A. I never 100 percent said he had a belt. I said it
20 looked like he was wrapping something around his hands.

21 Q. So you didn't tell Missy, Michelle and Remington that he
22 took his belt off, wrapped it around his hand, and then punched
23 you?

24 A. I never said it was 100 percent a belt. I said it
25 looked like he was wrapping something around his hand.

1 Q. But you know now that he wasn't, right?

2 A. It was super dark and I could barely see anything.

3 Q. But you would agree you know now that he had nothing
4 wrapped around his hand, correct?

5 A. Yes, ma'am, but from my perception that's what I saw.

6 Q. Your perception?

7 A. Yes, ma'am.

8 Q. But again, you know now nothing was wrapped around his
9 hand, right?

10 A. I know now, yes, ma'am.

11 Q. And you know he was unarmed, correct?

12 A. In the moment I did not know that.

13 Q. Did you see a gun?

14 A. I didn't look inside his pocket. He could have had a
15 gun or knife in his pocket.

16 Q. Did you see a gun in his hands?

17 A. No, ma'am.

18 Q. Did you see a knife in his hands?

19 A. No, ma'am.

20 Q. Did you see any kind of weapon in his hands?

21 A. Well, I really couldn't see his hands fully because he
22 was trying to enter my vehicle.

23 Q. So could you see a weapon in his hands or not?

24 A. At a point in time, I could not because, once again, he
25 was trying to enter into my vehicle. I couldn't see what he

1 was doing with his hands.

2 Q. How about the hand that was in the car?

3 A. Yeah. He was punching me with that hand. I didn't know
4 if he was reaching in his other hand for a gun or a knife.

5 Q. So ultimately, did you see a weapon in his hands?

6 MR. MARTIN: Objection. And I'm gonna do that again,
7 and I know what you're gonna rule, but she's asked that five
8 times and it's repetitive and improper in a court of law, and I
9 know you don't want to cut her off because you want to be fair
10 --

11 MS. LIVESAY: I'm just trying to get an answer,
12 Judge.

13 THE COURT: I'm going to let you ask the question.
14 You have asked it several times.

15 MS. LIVESAY: I agree. Let me ask it one more time
16 to see if I can get a yes or no answer.

17 Q. You did not see a gun in Michael Pennington's hands?

18 A. Once again, he was trying to enter my vehicle in one
19 hand, punching with the other, at a point in time he could have
20 reached in his pocket for a gun or knife. I had no clue what
21 he had on him that night.

22 Q. Okay. We're on a time crunch. Yes or no? Did you see
23 a gun in Michael Pennington's hands?

24 A. Ms. Livesay, you're trying to get me to answer a
25 question that I do not want to answer because I do not know

1 what he had on him that night.

2 Q. I'm not asking you what he had on him, I'm asking you
3 what you saw.

4 A. What I saw?

5 THE COURT: I object. She's badgering the witness.
6 He's answered the question several times. He's explained it
7 several times. She needs to to quit badgering him and I object
8 to her being allowed to do that.

9 THE COURT: He has been asked, he has answered. You
10 may ask him one more time.

11 MS. LIVESAY: Okay.

12 Q. Mr. Yarnell, just yes or no?

13 A. I can't answer that in a yes or no format because I did
14 not know what Michael Pennington had in his pocket.

15 Q. I'm not asking you about what was in his pockets, just
16 yes or no. With your two eyes, okay, that night sitting in
17 Maddington Place, Michael Pennington, the victim, did you see a
18 gun in his hands? I'm not asking you about his pockets. Did
19 you see a gun in his hands?

20 MR. MARTIN: And I object again, and I hate to do
21 this.

22 THE COURT: Let him answer the question. Your
23 objection is noted. I'm going to assume it's the same
24 objection that you've continuously raised.

25 MR. MARTIN: Well, yes, sir. Yes, sir.

1 THE COURT: Answer that question, sir, if you can.

2 A. From my perspective he could have had a gun or a knife
3 in his pocket as he was attacking me. I did not see a gun
4 until --

5 Q. That's all I wanted to know, you did not see a gun.

6 A. -- but he was trying to attack me.

7 Q. Look, we can move on. You did not see a gun. That's
8 all I wanted. So you say that the window was not mostly up
9 when he was hitting you; is that right?

10 A. You can't punch somebody through a window if the window
11 is up, Ms. Livesay.

12 Q. I agree. I want to show you this picture. This is
13 State's Exhibit 23. I want you to look up there with the judge
14 so we can look together, Mr. Yarnell. Is that your car?

15 A. Yes, ma'am.

16 Q. Is that the window?

17 A. Yes, ma'am.

18 Q. Is that the bullet hole through the window?

19 A. Yes, ma'am.

20 Q. So you would agree you shot through that window and hit
21 Michael Pennington?

22 A. Well, the window was not like that when the shooting
23 occurred. When I backed out of the parking lot I did roll my
24 window up.

25 Q. How far did you roll it up?

1 A. A lot, I don't recall.

2 Q. A lot?

3 A. I don't recall.

4 Q. Okay. Well, tell this judge, if the window was rolled
5 down why did you have to shoot through the window? If the
6 majority of the window is rolled down why in the world would
7 you shoot through the window?

8 A. Well, he was attacking me, and I was trying to roll my
9 window up at the same time. I couldn't get a good shot of him,
10 I just shot out of fear for my life. I didn't -- I wasn't
11 thinking about the window at all, Ms. Livesay.

12 Q. I understand. But you would agree you shot through the
13 window?

14 A. Because he was attacking me through the window, Ms.
15 Livesay.

16 Q. I understand. And you would agree, if the window was
17 mostly down you wouldn't have had to have shot through the
18 window, correct?

19 A. Ms. Livesay, at the point of the shooting the window was
20 down because he was reaching in there for my gun.

21 Q. How far was it down?

22 A. I can't give you an exact answer, I don't know, I don't
23 recall.

24 Q. So you don't really know, maybe it was up this high,
25 correct, if you don't know?

1 A. No, ma'am, that's incorrect, because I did roll it up as
2 I left the scene.

3 Q. You are telling me this window is blown out and you were
4 able to roll it up?

5 A. Yes, ma'am.

6 Q. So but you would agree you had to shoot through the
7 window?

8 A. Because he was attacking me through the window, Ms.
9 Livesay, reaching for my firearm.

10 Q. Because your window was rolled up?

11 A. Not all the way, no, ma'am.

12 Q. But most of the way?

13 A. I don't recall.

14 Q. But you see, you see where the bullet hole is, right?

15 A. Yeah, I see.

16 Q. So if it was mostly down would you agree that this
17 bullet hole then would have been further down here, right?

18 A. Still, where's that? It still looks like there's enough
19 room for somebody to attack you and reach for your gun.

20 Q. So you think there's enough room to be attacked through
21 here?

22 A. Well, that wasn't like that. That's when I left, Ms.
23 Livesay. You keep making it seem like it was then. That's not
24 how it was, I rolled it up after I left the scene, Ms. Livesay.

25 Q. So the window was down when you shot him?

1 A. It was further down than that because he was able to
2 reach in the car for the gun, yes, ma'am.

3 Q. So this part of the window, where was it when the
4 shooting happened?

5 A. I don't recall. In that moment I wasn't thinking about
6 that. I was thinking about defending my life.

7 Q. So you don't know how far the window was down or up when
8 the shooting happened?

9 A. No, ma'am, because he was attacking me.

10 Q. So the window could have been up?

11 A. No, ma'am, the window was not up because he reached in
12 the car, Ms. Livesay.

13 Q. But you would agree you had to shoot through the window?

14 A. Because he was attacking through the window, Ms.
15 Livesay.

16 Q. Okay. Let me ask you this. Was your car running?

17 A. I had my foot on the brake because he was attacking me.
18 I didn't want to injure myself or injure anybody that could've
19 been behind me.

20 Q. Was the car running?

21 A. Yes, ma'am.

22 Q. Were the doors locked?

23 A. Yes, ma'am.

24 Q. And you did not see a weapon in his hand?

25 A. Well, I couldn't see what he was doing with his hands as

1 he was attacking me.

2 Q. I know, but we've agreed you, you've already said you
3 didn't see a weapon in his hands?

4 A. No. But I didn't see what he was doing with his hands
5 as he was attacking me trying to force into my vehicle, no,
6 ma'am.

7 A. I understand. And you could have drove forward,
8 correct?

9 A. No, ma'am, because if I drove forward I would have hit
10 the condos that was in front of me.

11 Q. You didn't have any room at all to drive forward?

12 A. Why would I drive forward if I would have hit the
13 condos, Ms. Livesay? If I would have went forward if I would
14 have hit the condos I wouldn't have been able to leave the
15 condo.

16 Q. Could you have backed up?

17 A. I did try to back up, he did not let me back up. He
18 kept attacking.

19 Q. Why didn't you just drag him?

20 A. Why didn't I just drag him?

21 Q. Yeah.

22 A. He was attacking me and reaching for my firearm.

23 Q. Why didn't you just hit the back and move back and drag
24 him?

25 A. I didn't want to injure myself or anybody that could

1 have been behind me.

2 Q. But you agree you were in the car --

3 A. Yes, ma'am.

4 Q. -- and the car was running?

5 A. Yes, ma'am.

6 Q. And the window was up enough where you had to shoot
7 through the window?

8 A. What was your question? I couldn't hear you, what was
9 your question?

10 Q. The window was up far enough you had to shoot through
11 the window?

12 A. I don't recall where the window was, once again, Ms.
13 Livesay.

14 Q. But you would agree that you had to shoot through the
15 window?

16 A. I would agree I shot through the window because he was
17 attacking me through the window reaching for firearm, yes,
18 ma'am.

19 Q. And would you agree that a car is a deadly weapon, as
20 well?

21 A. Yes, ma'am.

22 Q. So you were in a car and you had a gun, so really you
23 were in possession of two deadly weapons, correct?

24 A. I wasn't in possession of two deadly weapons?

25 Q. Yeah, you were in a car and you had a firearm?

1 A. If that's what you say.

2 Q. Would you agree you could kill somebody with a car?

3 A. Yes, ma'am.

4 Q. Okay, good. Good, good, good. And you agree that the
5 car was running, it was operable, when he stuck his hand in
6 there you could have backed up?

7 A. Well, I was trying to back up when he was sticking his
8 hands in the car, yes, ma'am.

9 Q. Well, what kept you from backing up?

10 A. He did.

11 Q. He did? He kept you from backing up?

12 A. Yes, ma'am, because he was attacking me.

13 Q. So he's strong enough to hold the car there?

14 A. Well, when you're getting hit in the face and you're
15 trying to back up it's hard to back up because I was getting
16 hit in the face, so it's hard -- and someone's reaching for
17 your gun, it's hard to back up, yes, ma'am.

18 Q. Is it harder to back up or is it harder to get a gun out
19 of your console and rack it and shoot somebody?

20 A. Well, I never racked the firearm. I don't recall
21 racking the firearm.

22 Q. Did you know that there was an unfired bullet in the
23 passenger seat?

24 A. I did go to the gun range and my car was messy.

25 Q. Do what now?

1 A. There was also an unfired bullet in the backseat too --

2 Q. That's right.

3 A. -- which means the car was messy, I went to the gun
4 range.

5 Q. Which means what?

6 A. I went to the gun range and my car was messy. There was
7 a lot of stuff in my car.

8 Q. There was a lot of stuff in your car, but you would
9 agree one of those unfired bullets was in the passenger seat?

10 A. There was also one behind me, as well, which indicates
11 that my car was just messy, yes, ma'am.

12 Q. And let me ask you, what happens when you rack a loaded
13 gun?

14 A. The bullet goes flying.

15 Q. The bullet pops out?

16 A. Yes, ma'am.

17 Q. Sometimes it pops out to the right, sometimes it pops
18 out back to the right?

19 A. It could go wherever.

20 Q. Okay. And you would agree that during this time you say
21 you're being attacked you were able to open the middle console,
22 pull the gun out, and turn around and shoot Michael Pennington?

23 A. Well, it all happened fast. It wasn't like a slow
24 movement. It all happened fast.

25 Q. Right, but you were able to open the middle console,

- 1 right?
- 2 A. Yes.
- 3 Q. The gun was there?
- 4 A. Yes.
- 5 Q. Already loaded?
- 6 A. Yes.
- 7 Q. One already in the chamber?
- 8 A. From my knowledge, yes.
- 9 Q. Well, you either --
- 10 A. Yes, yes.
- 11 Q. And and you get it and you're able to turn and shoot
- 12 Michael Pennington?
- 13 A. After he reached for the firearm, yes.
- 14 Q. And then you left?
- 15 A. Yes, ma'am.
- 16 Q. You called 911?
- 17 A. No, ma'am.
- 18 Q. Why not?
- 19 A. Because I wanted to see my mom first.
- 20 Q. Why?
- 21 A. Why? I was scared. Someone much older than me just
- 22 attacked me and reached for my firearm, so, yes, I was scared,
- 23 yes, ma'am.
- 24 Q. So you called Missy, right?
- 25 A. I believe so.

1 Q. You called Michelle?

2 A. I believe so, yes.

3 Q. You called your mom?

4 A. Yes, ma'am.

5 Q. But you never called 911?

6 A. No, ma'am.

7 Q. And that day would you agree you all start arguing
8 about, I don't know, 2:30? That's what it looks like on the
9 messages?

10 A. Are we going back into the messages?

11 Q. Yes.

12 A. I guess if that's what it says, yes, ma'am.

13 Q. And you finally -- nobody -- does Michael ever come to
14 to your house?

15 A. I didn't know him that well.

16 Q. Did he ever come to your house that day from 2:00 until
17 he was sitting at Maddington Place?

18 A. No, ma'am.

19 Q. Did Remington ever go over there?

20 A. She was there earlier that morning.

21 Q. How about after 2:30?

22 A. No, ma'am.

23 Q. How about Jennifer Tassone, did she go over there?

24 A. I didn't really know her well, so no, ma'am.

25 Q. How about Ally?

1 A. She was planning to come over there.

2 Q. Did she?

3 A. No, ma'am, because plans changed.

4 Q. Did any of the people that were in the parking lot, did
5 any of those people ever go to your house that afternoon?

6 A. No, ma'am.

7 Q. So Mr. Martin asked you if Michael Pennington had any
8 legal interest in your car. Do you remember that?

9 A. Yes, ma'am.

10 Q. Did you have any legal interest in Maddington Place?

11 MR. MARTIN: Objection. Again, that's not relevant
12 to this to inquiry. I know she's on cross and she can ask it,
13 but I want the record to reflect because it's an important
14 issue, that I object to that line of questioning.

15 THE COURT: It's noted for the record. You can go
16 ahead and ask the question.

17 Q. Did you have any legal interest in Maddington Place?

18 A. I was there to drop off clothes to Remington Hargrove.

19 Q. I understand. Let me ask you again. Did you have any
20 legal interest in Maddington Place?

21 A. I already stayed at her apartment so --

22 Q. I'm sorry?

23 A. I already stayed at her apartment so I didn't need
24 another apartment.

25 Q. So you did not have any legal interest in Maddington

1 Place?

2 A. No, ma'am.

3 Q. Okay, good, good, that's all I'm asking. And did you
4 have a condo over there?

5 A. No, ma'am.

6 Q. Did your mom have a condo over there?

7 A. No, ma'am.

8 Q. How big was Michael Pennington?

9 A. What do you mean how big he was, I don't know.

10 Q. You don't know how big he was?

11 A. No, ma'am, I don't know his height or weight.

12 Q. Was he a great big strong bulky guy?

13 A. I'm not sure.

14 Q. You're not sure? You don't know if he was fat or
15 skinny?

16 A. No, he was not fat, no, ma'am.

17 Q. Not fat. Okay, good. And is he a tall guy, like
18 Shaquille O'Neal?

19 A. He was close to my height.

20 Q. Close to your height. Stand up. That way we know how
21 tall. And would you say he's fatter than you or about the same
22 size, or maybe thinner?

23 A. Either around the same size or thinner.

24 Q. Okay. So you and him are about the same size?

25 A. Yes, ma'am.

1 Q. So he wasn't some big muscular bodybuilder guy?

2 A. No, ma'am.

3 Q. And do you remember what he was wearing that night?

4 A. I don't fully recall. I believe a gray shirt. I don't
5 recall anything else.

6 Q. And had you ever had any problems with Michael before?

7 A. No, ma'am.

8 Q. Have you ever had any problems with Emily Cerio before?

9 A. No, ma'am.

10 Q. How about Jennifer Tassone?

11 A. No, ma'am.

12 Q. How about Darrin Card?

13 A. No, ma'am.

14 Q. So there have never been any kind of problems with these
15 folks before?

16 A. No, ma'am.

17 Q. Did any of those folks call you 200 times?

18 A. Well, I didn't keep in contact with any of those people
19 other than Remi --

20 Q. I understand.

21 A. -- so they wouldn't have had a reason to call me.

22 Q. I understand. Did they call you 200 times that day?

23 A. No, ma'am.

24 Q. Did Remington Hargrove call you 200 times that day?

25 A. No, ma'am.

1 Q. Did any of those folks come to your house that day?

2 A. No, ma'am.

3 MS. LIVESAY: No further questions, Your Honor.

4 MR. MARTIN: Just a couple, Judge.

5 THE COURT: Redirect limited to what she went into.

6 Does anybody need a break?

7 MR. MARTIN: Judge, this won't take long.

8 THE COURT: Okay. I will hold you to your word.

9 (Defense Exhibit No. 46 was marked for identification.)

10 **REDIRECT EXAMINATION**

11 BY MR. MARTIN:

12 Q. Anijah, there were text messages sent back and forth, as
13 it has been discussed, right?

14 A. Yes, sir.

15 Q. And you got to their apartment complex and you parked in
16 the parking lot, right?

17 A. Yes, sir.

18 Q. Now, do you recall, and I'm looking at Defendant's
19 Exhibit Number 46 which is another copy of text messages, some
20 of which you were asked about earlier. You and I looked at
21 this together, and do you recall a text message at 9:17 that
22 says: I'm at Andrew's, come outside?

23 A. Yes, sir.

24 Q. And if you would, stand up.

25 MS. LIVESAY: Can I get a copy of what he's showing,

1 Judge?

2 THE COURT: Does it have an exhibit number to it or
3 something?

4 MR. MARTIN: 46, it's marked for identification as
5 46.

6 MS. LIVESAY: Has it been marked?

7 MR. HELMS: For identification.

8 MR. MARTIN: For identification.

9 MS. LIVESAY: Okay. Can I get a look? Okay.

10 BY MR. MARTIN:

11 Q. Alright. And again, was there a text where you said at
12 9:17: I'm at Andrew's, come outside?

13 A. Yes, sir.

14 Q. And then one at 9:18 that says: I got your pics --

15 MS. LIVESAY: Your Honor, just for the record --

16 A. Yes, sir.

17 MS. LIVESAY: -- this is outside of my cross, but
18 I'll just cover it and recross since it's additional.

19 THE COURT: Alright, I don't think it's an
20 additional, but I will allow him to ask the question because
21 you went into a lot of text messages that were sent between the
22 parties, so I'm going to let him go into it. Okay?

23 MR. MARTIN: And this is subject to my
24 cross-examination.

25 THE COURT: Yes.

1 Q. And then, again, at 9:18 that you said: I just want to
2 give them to you and give you a kiss and then go home, Baby?

3 A. Yes, sir.

4 Q. Is that correct?

5 A. Yes, sir.

6 Q. And then at 9:18 again: I got to work so hurry?

7 A. Yes, sir.

8 Q. And then after that you -- well, it was after that that
9 you spoke with her by telephone which had been testified to
10 before?

11 A. Yes, sir.

12 Q. Right? And were still at the apartment complex?

13 A. Yes, sir.

14 Q. And after that conversation it was your understanding
15 that she told you and wanted you to stay there, give her her
16 pictures when she got there, and then go home?

17 A. Yes, sir.

18 Q. She didn't say leave them on the doorstep or give them
19 --

20 MR. HELMS: Judge, Mr. Martin is testifying. Can he
21 ask a question of his witness?

22 THE COURT: Do you want to ask a question for him?

23 MR. MARTIN: Yes.

24 Q. Did she tell you to leave them somewhere and go before
25 she got there?

1 A. No, sir. She just said just drop the stuff off and
2 leave, so I assumed that she wanted me to give her stuff or
3 somebody her stuff then leave, that's what I planned on doing.

4 MR. MARTIN: That's all the questions I have, Judge.

5 **RECROSS-EXAMINATION**

6 BY MS. LIVESAY:

7 Q. Mr. Yarnell, I'm going to show you State's Exhibit
8 Number 46. Okay? I want you to stand up here so the judge can
9 look with us, if you don't mind so we can be on the same page.
10 Now, you see this stuff here? This is talking about the party
11 that the message is coming from.

12 A. Can I see?

13 Q. Sure, take a look.

14 A. Yes, ma'am.

15 Q. And that's from the Text Plus App, right?

16 A. Yes, ma'am.

17 Q. Okay. This is not your phone number, right?

18 A. No, ma'am, but it's from the Text Plus App.

19 Q. So it's not your phone number, it's not star 67, and
20 it's not Facebook?

21 A. No, ma'am, but it's to Remi.

22 Q. I understand.

23 A. Nobody else would be in Cross Gate Villas to say I'll
24 give you your stuff.

25 Q. Tell the judge then who it shows it's from?

1 A. It's from the Text Plus App that I used that day but
2 it's still me because I was asking to drop her stuff off and I
3 was there to give her a kiss.

4 Q. If you don't mind, tell the judge what number it came
5 from.

6 A. So, Judge, it's the text plus app, so it had letters and
7 numbers and there's not an official number because I did use a
8 text app to text her, yes, Judge, but it is me texting it to
9 her.

10 Q. So and if you don't mind, tell the judge what time you
11 were using this to text plus app.

12 A. It says 9:17.

13 Q. And so you were already at Cross Gate?

14 A. Yes, ma'am.

15 Q. So by this time you have exhausted your phone number,
16 blocked number and Facebook, and now have gone to this Text
17 Plus App?

18 A. Yeah, because I believed she had blocked me, but she
19 didn't, her phone was off. She never blocked me.

20 Q. I'm down with you. So Mr. Martin asked you about the
21 messages in this conversation, so what are the messages?

22 A. These messages?

23 Q. Yeah.

24 A. That I had her stuff and I just wanted to give her a
25 kiss and go home because I had to work in the morning so hurry.

1 Q. Okay. And if you don't mind, the conversation was back
2 and forth, so tell the judge what she said back.

3 A. She didn't respond but she later on called me saying
4 that she wanted me to drop it off.

5 Q. Is the phone call up there?

6 A. The phone call is in the other papers that you have,
7 yes, ma'am.

8 Q. So she never responds back?

9 A. Yeah, she called me later, like ten minutes after that.

10 Q. Did she respond to these text messages?

11 A. No, ma'am, she did respond to those, but she called me
12 ten minutes after.

13 Q. So you would agree that there is nothing in writing
14 either to your phone number, to your blocked phone number, to
15 Facebook, or to Text Plus where she's saying come on over?
16 There is absolutely nothing in writing?

17 A. There is a phone call and your witness said to come
18 there and drop the stuff off and leave.

19 Q. I understand. Mr. Yarnell, we're just tight on time,
20 just yes or no.

21 A. You want me to answer a question that's incorrect. I
22 cannot answer an incorrect question.

23 Q. Okay. Did she write you back, either to your phone
24 number, to your blocked number, to your Facebook page, to Text
25 Plus, is there anything in writing where she says come on?

1 A. She called. She did not write, but she I called.

2 Q. There we go. That's all I wanted to know.

3 A. We talked on the phone.

4 Q. So we've got nothing in writing to any of those four
5 platforms that you were using?

6 A. She did call and say -- we talked on the phone and she
7 said drop the stuff off and leave.

8 Q. But there's nothing in writing, right? Correct?
9 Nothing in writing?

10 A. No, ma'am, in a phone call.

11 Q. So we're going, again, on what your perception of the
12 phone call is, right?

13 A. Oh, no, she 100 percent said drop the stuff off and
14 leave.

15 Q. That's your perception of the conversation, right?

16 A. That's my 100 percent perception of the phone call, yes,
17 ma'am.

18 Q. Right? And your perception was after 200 phone calls
19 and her not responding that she wanted you over there, that was
20 your perception, correct?

21 A. She answered some of those phone calls, and she did
22 answer that phone call and said stay drop your stuff off and
23 leave -- drop the stuff off and leave, yes, ma'am.

24 Q. But that's your perception, that she wanted you over
25 there after you reaching out on four different platforms?

1 A. She did say drop the stuff off and leave. She didn't
2 say go home.

3 MS. LIVESAY: One second, Your Honor. No further
4 questions.

5 MR. MARTIN: Nothing further, Judge.

6 THE COURT: Thank you, sir. You may step down.
7 Watch your step as you're stepping down.

8 THE DEFENDANT: Thank you.

9 THE COURT: We're going to take a short recess, come
10 back in about 15 minutes or so.

11 (Recess taken.)

12 THE COURT: According to the notes that I have, the
13 defendant has either four or five more witnesses on the list.

14 MR. MARTIN: Judge, I'm not calling anymore
15 witnesses. There are some more on the list, I think they are
16 unnecessary, repetitive, or whatever the word may be, so I'm
17 not going to call anymore witnesses.

18 THE COURT: Is the State ready? I mean, I'm trying
19 to get a feel of when we're going to take a lunch break. I had
20 down you all have five witnesses. Are you all going to be
21 ready after lunch?

22 MR. HELMS: Yes, sir, we are planning to call five
23 witnesses. We do have a motion at this time or whenever the
24 Court is inclined to hear it. If Mr. Martin has, indeed,
25 rested, we'd like to make a motion at this time.

1 THE COURT: Okay. I've got it's 12:30. Do you want
2 to do the motion now or do you want to do it after lunch
3 because if we do your motion now we're probably going to be
4 pushing into the 1:00 range.

5 MR. HELMS: Yes, sir.

6 THE COURT: And all of these people need to have
7 lunch, as well.

8 MR. HELMS: Let's have lunch, Judge.

9 THE COURT: Okay.

10 MR. HELMS: Let's have lunch.

11 THE COURT: Alright. We'll have lunch and we'll come
12 back, according to my watch, according to that clock it's
13 12:30. Let's try to come back maybe about a quarter till 2:00.

14 MR. HELMS: Yes, sir.

15 MR. MARTIN: Judge, what is the motion you got so I
16 can be thinking about it?

17 THE COURT: Well, you all can talk about that. You
18 all need to talk.

19 MR. HELMS: We'll talk about it.

20 THE COURT: Okay. We'll come back. Thank you.

21 (Recess taken.)

22 THE COURT: We'll go back on the record. Yes, sir?

23 MR. HELMS: Thank you, Your Honor. The first thing
24 I'd like to address with the Court, Judge, this has taken a
25 long time, I think we all know that it's taken longer than we

1 anticipated, any of us. In an effort to try to expedite this
2 thing a little further and maybe cut down on some of the
3 witnesses, Judge, we've handed the defense earlier, and they
4 didn't get to keep the copy because I'm holding it here, I
5 think, but we showed them earlier a letter from Horry County
6 Government, Your Honor, specifically road management, showing
7 that the area in question is, in fact, a privately owned
8 property. Judge, and we have a letter from Mr. Hamilton Horry
9 County Government stating just that in no uncertain terms.
10 He's here, and we'll call him, but if the Court's willing to
11 take judicial notice, that is the private property, that's one
12 less witness we'll have to call.

13 MR. MARTIN: In the spirit of moving forward, I would
14 stipulate to the admission of the letter. It is private
15 property, but it's a public place.

16 THE COURT: Okay. Alright.

17 MR. HELMS: So Your Honor, at this time what I'm
18 going to do -- should I get this marked, Your Honor? Thank
19 you, ma'am. And Your Honor, I'm handing up now to the Court
20 what's been marked as State's Exhibit 53 and just asking the
21 Court for judicial notice.

22 (State's Exhibit No. 53 was marked for identification.)

23 THE COURT: Alright State's 53, yes, sir.

24 MR. HELMS: Thank you, Judge.

25 THE COURT: Are you going to have a motion?

1 MS. LIVESAY: We do, Your Honor.

2 THE COURT: Yes, ma'am?

3 MS. LIVESAY: We're making a motion, basically, that
4 is the equivalent of a directed verdict motion. If the rules
5 were reversed, clearly, the defense has the burden
6 preponderance of the evidence to prove the Stand Your Ground.
7 The State makes this motion that it be dismissed. He has not
8 proven by a preponderance of the evidence that the defendant
9 had the right to stand his ground. As you see from the
10 document we just entered into evidence, Cross Gate is a private
11 road leading into those condominiums. The condominiums are
12 private. The parking space in there is private. All of that
13 is private property. The defendant road over there uninvited
14 to private property to somebody else's home. The victim
15 clearly had a right to be there. I do not believe Stand Your
16 Ground was meant to protect the person that is going over to
17 someone's home, they're uninvited, they're at a private
18 residence. The condos are private, the road going in is
19 private, the parking lot's private, and to go over there
20 hunting down his girlfriend and then claim Stand Your Ground.
21 I do not believe he is entitled to Stand Your Ground and I
22 don't believe that he has proven that he's entitled to it.

23 THE COURT: Let me ask you this.

24 MS. LIVESAY: Sure.

25 THE COURT: And I do this with all motions. You said

1 this is going to be analogous to a directed verdict motion.
2 What standard of review do I apply to your motion? I'm looking
3 for the analysis of the evidence, I'm looking for what standard
4 of review.

5 MS. LIVESAY: I'm assuming it would be the same
6 standard as -- it's only preponderance of the evidence for the
7 defense so my understanding would be in viewing this motion the
8 Court would have to decide whether or not Mr. Martin has met
9 preponderance of the evidence because this is a motion to
10 dismiss.

11 THE COURT: Okay. I appreciate that. That's not a
12 standard of review answer, though. Standard of review in a
13 directed verdict motion requires this Court to view the
14 evidence in a light that is most favorable to the nonmoving
15 party.

16 MS. LIVESAY: That's correct.

17 THE COURT: So that's what I'm asking.

18 MS. LIVESAY: Yes.

19 THE COURT: And the standard of review in the
20 directed verdict motion requires me to look at the evidence
21 that has been presented, not weighing the evidence, nor looking
22 at the evidence and saying do I believe it or not, but look at
23 the existence of the evidence.

24 MS. LIVESAY: That's right.

25 THE COURT: So if you're going to make an argument,

1 so I'm going to understand what your position is, because my
2 understanding if it's analogous to a directed verdict motion I
3 have to apply that same standard of review.

4 MS. LIVESAY: Sure. Yes, sir, Your Honor. And they
5 are the nonmoving party.

6 THE COURT: Correct, because you're standing, you're
7 making the motion, you are the moving party.

8 MS. LIVESAY: Yes, that's correct.

9 THE COURT: So I have to look at the evidence in a
10 light that is most favorable to the other side as part of your
11 motion.

12 MS. LIVESAY: That's correct.

13 THE COURT: And I have to then examine, take what you
14 say that the facts show and take a look at the evidence and
15 look into determining whether or not evidence exists that says,
16 no, I can't dismiss the case because there is some evidence
17 that supports the position that they have presented.

18 MS. LIVESAY: That's correct.

19 THE COURT: Okay.

20 MS. LIVESAY: And the State, again, doesn't believe
21 there is any evidence, because the defendant road over to the
22 victim's house, so the State's motion is there is no evidence
23 that he is somewhere where he has a right to be, that he is
24 somewhere where he has a right to stand his ground. Just
25 because he's in his car does not give, that is not enough.

1 That doesn't give him unfettered immunity as to Stand Your
2 Ground. He used that car in part of a crime so there is no
3 evidence that he was somewhere where he had the right to be.

4 THE COURT: What was the crime that he used the car?

5 MS. LIVESAY: The crime he was committing was to
6 unlawful use of telephone when he was calling the 200 times.
7 He was trespassing on private property. Nobody invited him
8 over there and he was clearly stalking Remington Hargrove.

9 THE COURT: Let me ask this question sincerely. Is
10 he charged with any of those offenses outside of what we're
11 doing here?

12 MS. LIVESAY: No, sir, and the State's contention is
13 he doesn't have to be charged with those events. That's part
14 of the res gestae of the case. Just like if in any other
15 murder, we've tried cases where a --

16 THE COURT: Get back to the evidence. Argue your
17 motion.

18 MS. LIVESAY: I understand. In this case we've
19 charged according, just like we have any other case, just for
20 purposes of the record, I've tried cases where domestic
21 violence, the defendant went over to the young lady's house, of
22 course he killed her, we didn't charge him at that time with
23 trespassing, we only tried him for the murder. The fact that
24 he was over there unwelcome was just part of the res gestae.
25 Now, so we don't believe that he has presented enough. There

1 is no evidence that he had a right to be at Maddington Place,
2 so that's number one. So we don't believe he has put anything
3 forth that he has a right to be there. Now, second, he has to
4 show that as to part B that he was not using the occupied
5 vehicle to further an unlawful activity. Again, the State's
6 position is he has not been able to prove that. There is no
7 evidence that he went over there and he was not using the car
8 to stalk down Remington Hargrove. There is no evidence that he
9 wasn't using the car to harass Remington Hargrove, and in fact,
10 his own testimony was that he regretted that. He regretted
11 calling her 200 times and that he was over there looking for
12 her. Clearly, from the messages, he said: You better come
13 home, I'm giving you 30 minutes, 30, 29, 28. When she would
14 not come home is when he went over there. So there's no
15 evidence that he had a right to be there and there's no
16 evidence that he was not using the car to further an unlawful
17 activity, zero. There is nothing to show that he was over
18 there for a lawful purpose. Now, as to whether or not this
19 defendant brought on the difficulty, Darrin Card and Emily
20 Cerio both testified that the defendant showed up, Michael
21 Pennington had not been out of the way, there had been no
22 argument and there had been no altercation with anybody, in
23 fact, Michael Pennington was over there spending time with
24 friends and family. There was no altercation until Anijah, the
25 defendant, drove up and pulled a loaded weapon on Michael

1 Pennington. Now, what are we saying there? We're saying that
2 the defendant road up uninvited, unlawfully there and pulled a
3 gun on a person that was lawfully there and invited there and
4 had the right to be there. When he pulled the gun is when the
5 altercation began. There is no evidence that he was not at
6 fault. By his own testimony, Michael Pennington would be alive
7 if he had not gone over there that night. Now, the second
8 thing is, was he in reasonable fear? The evidence is he is
9 not, and there has been no evidence presented that he was in
10 reasonable fear. The evidence was that he was in a moving car,
11 the car was locked, a portion of the window was up and the car
12 was running. He, by his own testimony, did not see a weapon by
13 Michael Pennington or anybody else, so he never saw the victim
14 with a weapon. There's no testimony that the victim ever
15 threatened he had a weapon. So the question is is there
16 evidence that he had reasonable fear? He had no injuries. The
17 lady from the jail came up and said he never even required a
18 Band-Aid. He never required Neosporin. No injuries were
19 treated, none. So this idea that he -- there's no evidence he
20 had a reasonable belief to be in fear of an unarmed man outside
21 of his locked car, and there's no evidence on the car that
22 shows Michael ever aggressively came towards the car. There's
23 no cracks in the windshield. The injury to the car door is
24 outward, not inward. There's no dents in the car, no other
25 window is cracked. So there is nothing to show that he was

1 aggressive towards the car. Now, would a reasonable person
2 believe -- is there any evidence that a reasonable person would
3 have reacted this way? The State says, no. There is no
4 evidence in place that a reasonable person would have been in
5 fear for their life when they are in a car, the window is
6 rolled up and the victim is unarmed. There is no evidence that
7 a reasonable person in the defendant's spot would have fear of
8 great bodily injury. He didn't suffer great bodily injury. He
9 didn't even suffer injuries that would arise to an assault and
10 battery third, so no, the reasonable person would not be in
11 fear in that incident. The records that I've shown Mr.
12 Yarnell, who he did not want to read off, those records show
13 when he went back to Dr. Green's office after he left the jail
14 no additional brackets were broken, nothing was wrong, he
15 received the same care he received prior to the incident. So
16 the State's argument is there is no evidence that a reasonable
17 person would be in fear when, in fact, you're in a car, the
18 doors are locked, the window is up, and you have suffered no
19 injuries, no injuries were treated, no blood was drawn, not
20 even a busted lip. So I do not believe a reasonable person
21 would be in fear when, in fact, the victim was unarmed and he
22 suffered no injuries. So the State's motion is there has been
23 no evidence that he was somewhere he had a right to be. He
24 wasn't invited, he had no legal right in the condos, and he was
25 trespassing, and so he was not somewhere he had a right to be.

1 The defense's big argument is that he was in his car, but
2 again, there's been no evidence presented that he was over
3 there for a lawful purpose.

4 THE COURT: Thank you, ma'am. Yes, sir?

5 MR. MARTIN: Well, Judge, first of all, I know of no
6 basis for a motion for a directed verdict in a Stand Your
7 Ground Hearing. So my first objection would be that there is
8 not such an animal and that you don't have the authority to
9 grant a directed verdict, though, they can rest at any time,
10 and obviously, what's in the record is what you would have. So
11 Judge, I'm prepared -- I mean, she made, again, as I see it, a
12 full argument that we're not entitled to a Stand Your Ground,
13 and I'm prepared to make that argue against that now if you
14 want me to. Clearly, what some of what Ms. Livesay said is
15 just patently incorrect. There is evidence in the record.

16 THE COURT: Let me ask you, what is the standard --
17 okay, I'm not going to say that I disagree or agree with you on
18 that first position. I've looked at the rules, I don't see a
19 basis for it, but I'm going to entertain the motion, okay,
20 because as she said, she's making a record. Let's say the
21 motion moves forward. What is the standard of review then that
22 I apply to a directed verdict motion made by the State at this
23 juncture?

24 MR. MARTIN: Well, I don't know what it is because I
25 don't believe there is such a thing so if there is a motion in

1 a Stand Your Ground Hearing then I don't know what to tell you
2 it would be. I guess the closest analysis, or analogous, as
3 what you stated, if it's a directed verdict regarding a
4 criminal case then you would view the evidence most favorable
5 to the defendant in granting on denying to motion. I think if
6 there's -- or if that's not answered, but if you view the
7 evidence and if there's any evidence upon which the defendant
8 could prevail then you shouldn't grant any sort of directed
9 verdict.

10 THE COURT: Okay. Alright. I mean, my intent is to,
11 if I do address the substance of the motion, my intent is to,
12 similar to the State has brought a directed verdict motion, to
13 apply the same standards that I would apply in a directed
14 verdict motion, and my understanding is that requires the Court
15 to look at the evidence in a light most favorable to the
16 nonmoving party, in this particular case it would be to the
17 defendant, and then I have to look at that evidence and
18 determine whether or not the evidence exists in the record,
19 without weighing the evidence, without saying which one I
20 believe is true or not true, but simply look for the existence
21 of the evidence.

22 MR. MARTIN: I would agree with that.

23 THE COURT: Okay.

24 MR. MARTIN: And again, Judge, I guess if the
25 motion's going forward then I will make my argument that we are

1 entitled to a Stand Your Ground finding in this particular
2 case. Judge, if you go back to the beginning, the legislature,
3 one thing, Judge, I want to find here to read to you while
4 we're talking, but the legislature, codified the Castle
5 Doctrine at 16-11-420 reads: As is the intent of the General
6 Assembly to codify the common law Castle Doctrine which
7 recognizes that a person in his castle, that recognizes that a
8 person's home is his castle and extend that doctrine to an
9 occupied vehicle and the person's place of business. So
10 clearly, the Castle Doctrine is at play, and an occupied
11 vehicle is considered the same as your home. Now, the first
12 couple things that I would say to the Court is, Ms. Livesay
13 says that he, Mr. Pennington, quote, went to the victim's
14 residence. That's not true, that's not true. This property,
15 like most property, is privately owned by the homeowner's
16 association over there, no individual. It's like a Wal-Mart.
17 Wal-Mart owns the property, but the place is public, and I've
18 got case law to hand up to you, State versus Williams, to be
19 exact: 305 South Carolina 280, which, in the State of South
20 Carolina, I think, probably, establishes that fact. Judge, and
21 this will get a little detailed, but we might as well argue it
22 now, I guess. Alston Wilkes home, Alston Wilkes home somewhere
23 in the State of South Carolina, police go into a common area
24 there and arrest somebody for disorderly conduct and his
25 defense was I'm in a public place, disorderly conduct in a

1 public place, it wasn't public, it was owned by the Alston
2 Wilkes Society and it was a center in the home. It was like,
3 as that case says, a hotel lobby. Well, that's private
4 property, but it's a public place. A place in which the
5 general public, this is out of the case itself, and I'll hand
6 this case up to you, Judge.

7 MS. LIVESAY: What's the statute?

8 THE COURT: 280 SC 305.

9 MR. MARTIN: I said it backwards, 280 South Carolina
10 305. But it's got the definition which talks about a place to
11 which the general public has a right to resort, not necessarily
12 a place devoted solely for the use of the public, but a place
13 which is in point, in fact, public rather than private, a place
14 visited by many persons and usually accessible to neighbors and
15 neighborhoods, any place so situated that can be seen by any
16 considerable numbers of person if they look at that, also a
17 place in which the public has an interest as affecting the
18 safety, health, morals and welfare of the community, a place
19 exposed the public, and on and on. And then they go on in this
20 case to say, beyond debate, the lobby of a hotel, where rooms
21 are rented to guests is a public place. So I've got a list of
22 these cases, Judge, that I'll hand up to you, but clearly, this
23 is a public place. In the case of State versus Glenn, which
24 again, I've got a copy of that, and I'll hand up to you. It
25 states there, State versus Glenn, 429 South Carolina 108. It

1 says: We recognized in Jones the irrationality of foreclosing
2 immunity based on the location of the incident provoking in use
3 of self defense. We find that the legislature intended the
4 protection of the subsection to apply to incidents provided
5 other requirements are met without geographical restriction.
6 So Judge, first of all, from a mile-high perspective, to say
7 this is a private place, not a public place, or it's a place in
8 which the defendant is not entitled to defend himself and if he
9 is entitled to defend himself he is entitled to invoke the
10 Stand Your Ground protection from that, is frankly absurd. I
11 mean, no matter how many times Ms. Livesay calls it a private
12 residence, it's not. No matter how many times she said he had
13 no right to be there, he did. If he had no right to be there
14 then neither did Michael Pennington, Darrin Card, Emily Cerio
15 or Jennifer Tassone. That's a public place. If any of them
16 had exposed themselves indecently they would be subject to be
17 arrested for public indecent exposure. It's just, you know,
18 private road is not the point. Private property can be a
19 public place, and so I've got case law to hand up to you that
20 you can take. As a matter of fact, Judge, let me hand you --
21 Judge, these cases which I'm handing up to you that I think are
22 relevant throughout my argument here today, but initially in
23 addressing that public/private place business, that is my
24 argument on that. And so Judge, you know, she said in her memo
25 to you that -- first of all, let me back up and say, it's my

1 understanding that the Court in its recent rulings in the last
2 couple of years have made a couple of things clear in
3 connection with these Stand Your Ground Hearings, and number
4 one is the judge is a fact finder. Number two, that just
5 because there is conflicting evidence doesn't mean that the
6 Stand Your Ground cannot be heard, and thirdly, just because
7 the victim does not have a weapon does not mean that the
8 defendant is not entitled to a Stand Your Ground ruling in his
9 favor, and I've handed you up cases of State versus McCarty,
10 State versus Glenn, which stands with that proposition. In
11 fact, one of those cases, and it may have be Glenn, but one of
12 those cases had to do with a defendant who was trespassing at
13 an apartment complex because there was an order that he not be
14 there, and he was there, he was involved in the incident, and
15 the Supreme Court said that was not a reason to not allow him
16 to apply for Stand Your Ground. And in this case Mr. Yarnell
17 is not a trespasser. That place is not marked with no
18 trespassing signs. He's not a trespasser. He has just as much
19 right there as any of the other four people in that parking
20 lot. Had he gone up into the residence, that would have been
21 another thing, but he was not in the residence, he was not in
22 the curtilage of a residence, he was in a parking lot. If you
23 were to rule the way they want you to then you couldn't defend
24 yourself in the Wal-Mart parking lot, you couldn't defend
25 yourself in the Conway Medical Center parking lot, and that

1 would be an absurdity as to what the General Assembly wanted to
2 to occur. Now, they kept saying, well, he weren't invited,
3 that's not relevant, Judge. None of the people there had the
4 right to invite or disinvite him to that location, they didn't
5 own it, they weren't at home, it wasn't their residence, it
6 wasn't their driveway. They can't invite or disinvite. Now,
7 whether he should have gone or not, somebody may second guess
8 whether that was smart, but he was not a trespasser. He had as
9 much right to be there as they did, and when he did he had the
10 right to defend himself, the Courts are clear on that. They
11 are not going to -- since the General Assembly said we're going
12 to codify the Castle Doctrine and say that people have a right
13 to defend themselves upon unwarranted aggression, the case is
14 routinely have approach -- well, we're not going to take that
15 right that the legislature says they want people to have to
16 protect themselves and allow them to stand your ground for some
17 Mickey Mouse reason. Like, they were playing Poker, so he
18 shouldn't have been playing Poker so he can't defend himself,
19 one of the cases goes into that. I handed you up the case of
20 State versus Lee, which is an old South Carolina case that
21 said, that was before Stand Your Ground, that said, you know,
22 you can claim self defense even if you are playing Poker, which
23 is illegal, and then State versus Glenn adopted that case for
24 reasoning in saying that a guy who they said was on the no
25 trespass list from an apartment could still defend himself. So

1 I think that's crystal clear. And then, that's Ms. Livesay's
2 brief, dwelled on that, you can't use deadly force, if he has
3 the right -- let's see, it says: The presumption provided in
4 Subsection A does not apply, and our argument is he is entitled
5 under the presumption under Subsection A because he's in an
6 occupied vehicle, and she argues: The presumption doesn't
7 apply if the person against whom the deadly force is used has a
8 right to be in or is a lawful residence of the dwelling, "of
9 the dwelling," they weren't in a dwelling, the "residence,"
10 they weren't in the residence, or "occupied vehicle." Well, he
11 wasn't an owner of an occupied vehicle that is in question, so
12 that doesn't apply. Then it says, three: Who uses the deadly
13 force to use a deadly force to engage in an unlawful activity
14 or is using the dwelling, residence or occupied vehicle to
15 further an unlawful activity. And she says that he's making
16 too many phone calls, he's violating the telephone statute
17 connection with that. Again, Judge, that doesn't apply. He's
18 not using the vehicle to make unlawful telephonic
19 communications, he could make those with or without the vehicle
20 from his home or in the car or not. He's not using it to
21 stalk. There's no evidence to stalk and this case doesn't
22 arise to that level stalk or the elements of stalking, or as
23 you pointed out, they could have charged him with that. So
24 what he's doing, Judge, what he's doing, and the reason we
25 think he's entitled to the presumption is that he is in a place

1 where he has a right to be, and no matter whether Ms. Livesay
2 wants to characterize it that he is hunting Remi down or
3 stalking Remi doesn't make that the facts, and so we think that
4 he is entitled to that presumption, and even if you were to
5 find that he weren't entitled to the presumption it doesn't
6 mean that he's not entitled to a Stand Your Ground argument
7 under Subsection C, but Judge, you don't need to go there in
8 this particular case. Ms. Livesay touched on the fact that
9 there is no evidence in the record of different things. Well,
10 for example, that he was in reasonable fear. Well, there is
11 evidence in the record because he said that he was in fear and
12 the context around it makes it reasonable. Judge, the General
13 Assembly went through the trouble to extend the Castle Doctrine
14 to my car, to my car, and it says that in fear, it is presumed
15 that I am in fear if you are trying to break into or unlawfully
16 remove me from my car, so again, this is a perfect example of
17 that. You know, he was in a parking lot that's a public place,
18 and frankly, where he had a right to be. Now, they would
19 argue, well, he just shouldn't have been there. Well, some
20 people say maybe it weren't smart for him to be there at that
21 time, but that's not what the law is centered upon. First of
22 all, Judge, he had no idea there was a welcoming party waiting
23 on him in the form of Mr. Pennington and Mr. Card, and to
24 extrapolate a little bit, they had a case of beer sitting out
25 there. They weren't scared of him or they would have gone

1 upstairs if they thought he was outside, they were waiting on
2 him, sadly to say. This is a tragic case. You know, Mr.
3 Pennington lost his life, and that is tragic, it's tragic from
4 every sense of the word. I don't know the young man, but I'm
5 sure he was a fine young man in his own right. Anijah Yarnell,
6 he's here with his life hanging life hanging in the balance,
7 and he's a fine young man. This is just a tragedy all the way
8 around, but it would compound the tragedy not to extend to him
9 the constitutional rights that the state legislature went
10 through the trouble to codify in passing the law, and there is
11 evidence in the record, Judge, as to who brought on the
12 difficulty, that's one of the questions that you have to
13 determine, and in this instance there is evidence in the
14 record, and we believe evidence that establishes by a
15 preponderance of the evidence that Mr. Pennington brought on
16 the difficulty. There is testimony in the record from Anijah's
17 testimony, first of all --

18 THE COURT: But we're not at that stage where I can
19 view the evidence by the preponderance of the evidence,
20 preponderance of that.

21 MR. MARTIN: And maybe you're right, I wasn't sure
22 what stage we were at so maybe I'm going into things I
23 shouldn't, but she went into these things so I'm just not sure
24 what the perimeters of my argument should be, and I'm willing
25 to --

1 THE COURT: Well, she phrased her -- I perceived her
2 argument as phrasing it under the standard of there was no
3 evidence, there is no evidence, there is no evidence, and in
4 order to be successful at a directed verdict motion stage she
5 has to meet that standard. She has to argue and meet the
6 standard that the elements that she articulated to me had no
7 evidence. You have to articulate to me and convince me that
8 there is some evidence in the record, there is evidence in the
9 record that supports this element, there is evidence. And that
10 standard that you have to convince me, at least the one I'm
11 going to apply for purposes of this motion, that standard is
12 not the standard of preponderance of the evidence, that
13 standard is the existence of evidence.

14 MR. MARTIN: Right, right, I get that, Judge, and I'm
15 confusing it, too, and I apologize for that --

16 THE COURT: That's alright. I just don't want us to
17 get into where we spend all rest of the day, which if it takes
18 it it takes it, on this motion when the standard that I'm going
19 to apply, and I understand your position is that this motion is
20 not proper, but that if this motion is proper the standard that
21 I'm going to apply is going to be analogous to the directed
22 verdict motion standard which the State has borrowed from a
23 regular criminal trial that the defense would make at the end
24 of the State's case.

25 MR. MARTIN: That having been said, Judge, then I

1 would argue there is evidence in the record on every critical
2 issue upon which our motion as to the presumption we're
3 entitled to, as to the self defense, as to the issue of
4 bringing on the difficulty, as to fear, as to reasonable fear,
5 that retreat is not necessary in this particular case, but
6 there is evidence of that, it was entered into the record
7 through Anijah Yarnell, Missy Cannon, Darrin Card, Emily Cerio,
8 the pathologist that testified about the proximity of the
9 decedent to the gun at the time he was shot, the defendant's
10 fingerprints on the car, the what is the bruising entered into
11 the record of the right arm of the defendant having abrasions
12 and scratches, there's blood on the driveway in the center of
13 the driveway which evidences the fact that the decedent went to
14 the car where Mr. Yarnell was, so without belaboring it, Judge,
15 I would say all of that there is abundant evidence in the
16 record on all of the relevance motions that she made, and with
17 that I will preserve the rest of my argument until the
18 conclusion of the case in the event you don't grant their
19 motion.

20 THE COURT: Thank you, sir. Any reply?

21 MS. LIVESAY: Yes, sir, Your Honor. Just very
22 briefly. First of all, there is no evidence that Maddington
23 Place is open to the public, none. I appreciate what Mr.
24 Martin is saying, that it is open to the public, but him saying
25 that doesn't make it evidence in the case. He has the burden

1 to prove that that is open to the public. A Wal-Mart, the case
2 that he gave you is Alston Wilkes Society Home. I just looked
3 it up. It has hours open to the public. Wal-Mart has hours
4 open to the public. These are all locations that avail
5 themselves and invite people in from the public. Not one
6 witness, not one witness has been called to prove that
7 Maddington Place has availed itself to the public, and I know
8 that because if you are in Maddington Place it requires either
9 a sticker on your car or if you're a guest, a thing that hangs
10 from your mirror.

11 THE COURT: Let's keep it based on the record that's
12 here and not what you know.

13 MS. LIVESAY: I will. Yes. And it was also
14 stipulated that it was privately owned. Now, Mr. Martin wants
15 to say because it's a condominium that somehow those people
16 have availed themselves to live in a Wal-Mart or to live in an
17 Alston Wilkes Society. That's not true. The reason people pay
18 HOA fees is because they want it kept private. That location
19 has not availed itself to the public. There's not one witness,
20 one, that has proven that Maddington Place is open to the
21 public, not Darrin Card, not Emily Cerio, not one witness has
22 proved that it is open to the public, and the burden is on Mr.
23 Martin to prove that that place is open the public and
24 therefore open to Anijah Yarnell. That has not been proven and
25 if he can't prove that Mr. Yarnell had the right to be there he

1 did can cannot under any circumstances be entitled to Stand
2 Your Ground, and he has not proven by one witness, there's not
3 one fact that that place is open to the public. The only
4 evidence in this record is that the county, and Mr. Martin
5 stipulated to it, is that the road that goes in is private and
6 Maddington Place is private. Nobody has said, well, they keep
7 hours, everybody from the public is available to come in from
8 eight to five, or Wal-Mart 24 hours, or Exxon between eight and
9 five. Yes, those are also privately owned but they are
10 locations that avail themselves and invite people in from the
11 public. This is a condominium, it is a completely different
12 set of circumstances. Now, so there's no evidence, not one,
13 the only evidence is that it's private. Who has been called,
14 the State's question, is to say that this place is available
15 and open to the public? Nobody has said that, nobody. So he
16 cannot have stand your ground when he cannot prove that the
17 defendant has the right to be there. Now, what he wants to say
18 is, oh, well, this Mickey Mouse idea, we're just gonna give it
19 on a technicality, you know, proximate cause. The things he
20 was talking about regarding the gambling case, the Court came
21 down and said, look, it is unreasonable to believe because a
22 man is gambling he shouldn't have the right to stand his ground
23 if he is attacked. Yes, he's committing an unlawful act of
24 gambling, but that unlawful act is not the proximate cause of
25 the altercation. That is not what we have here, and that has

1 not been proven. What's been proven by the defendant's own
2 words are that if I had not had gone over there Michael
3 Pennington would be alive. So him going over there and
4 trespassing and harassing this young lady is the proximate
5 cause of why Michael Pennington is not with us today. This is
6 not a case where somebody's sitting around gambling or sitting
7 in a bar after it closes and there's some little technicality,
8 no. This is something where the defendant going over there,
9 uninvited, no right to be there, is the reason why that young
10 man is not with his family today, and there has been no
11 evidence to the contrary. It was the defendant's own words
12 that him being over there, if he had not been, if he had not
13 been, this would have never happened. By his own words, him
14 being over there trespassing on private property, looking this
15 young lady to harass that young man would be alive, so he is
16 the proximate cause, and nobody has said anything different.
17 Nobody has alleged that if Mr. -- the defendant had not gone
18 over there that Michael Pennington would still be laying where
19 he is today, nobody has alleged that, there has been no
20 evidence of that. Now, he contends on the occupied vehicle,
21 that is his big thing, that the statute has extended it to the
22 occupied vehicle exception, that is in A, but the legislature
23 also wrote Section B. It didn't stop there, and what it says
24 is just because you're in a vehicle I'm not going to give you
25 the right to run over to some woman's house and harass her and

1 because you're in your car nobody can do anything about it. In
2 fact, they anticipated that, they anticipated it, and said,
3 look, you can be in your car, but when you start using it to
4 stalk people down and harass them, then, no, we're not gonna
5 allow you immunity, you are now acting in the wrong. There's
6 been no evidence, none, that he was over there for a lawful
7 purpose and that he was not over there to harass that young
8 lady, all the evidence is to the contrary. There is not one
9 shred of evidence that he had the right to be over there and
10 that he was over there for a lawful purpose.

11 Now, as to the reasonableness, of course, again, we
12 believe there is no evidence, but right off on square one he
13 cannot meet the elements of Stand Your Ground when he has
14 presented zero evidence, zero, not preponderance of the
15 evidence, zero evidence that that boy had the right to be over
16 there and that this place all of the sudden now is public, and
17 he's saying that because he knows if he cannot prove that the
18 boy had the right to be over there that he does not meet Stand
19 Your Ground, so he's now arguing, well, hey, yeah, it's private
20 but it's really open to everybody. Well, nobody has said that.
21 So the State contends that he has not met the burden. There is
22 no evidence even as to element one that he had the right to be
23 there.

24 THE COURT: Do you have something new?

25 MR. MARTIN: I want to point out to the Court two

1 things.

2 THE COURT: Quickly.

3 MR. MARTIN: There is evidence in the record and I
4 rely on that. Secondly, as to this being a public place, there
5 is evidence in the record on that by the mere fact Mr.
6 Pennington, Mr. Card, that Anijah had been there on more than
7 one occasion, that these people were there, that they were in
8 the parking lot, that it is a parking lot adjacent to an
9 apartment complex, and with that we would rest for the record,
10 Your Honor.

11 MR. HELMS: That's all we have, Your Honor. That's
12 what we would submit to the Court, Your Honor.

13 THE COURT: Okay.

14 MR. HELMS: If the Court is not so inclined as to
15 grant our motion we're prepared to move forward with witnesses.

16 THE COURT: Thank you all very much for the
17 arguments. I've glanced at the rules of criminal procedure. I
18 do not see that this type of motion at a Stand Your Ground has
19 ever been recognized, but so I agree with you on that one, I'm
20 gonna go ahead and hear the motion anyway. I am not gonna
21 grant the motion, and again, I'm not grant the motion because
22 of the standard of review that I have to apply. I do not have
23 a choice at a directed verdict motions to engage in weighing of
24 the evidence, and I did not hear testimony that supports every
25 one of the elements that the defense has to meet, if through

1 nobody else's testimony, the testimony of the defendant. I
2 know that you did a thorough job cross-examining him on
3 everything that he talked about, but at a directed verdict
4 motion I have to look at the evidence in a light most favorably
5 to that side of the courtroom. I cannot look in deciding a
6 directed verdict motion that, oh, gosh, I think they were
7 better on that issue, or I think they're more strong on that
8 issue. Directed verdict motions do not allow me to do that.
9 Directed verdict motions, I have to look at the evidence in a
10 light that's most favorably to that side of the courtroom, and
11 when I do that I also cannot say, well, I sort of don't believe
12 that, or I question whether he's telling me the truth. I
13 cannot at a directed verdict motion say that I do not believe
14 something when whatever is said could be true in a case, so I
15 look at the evidence through that lens at a directed verdict
16 motion, and when I do I believe that every element that has to
17 be established by the defense at a Stand Your Ground Motion has
18 been established, including this idea of private property that
19 the State has raised. I think counsel raised that there is
20 evidence to which this Court can conclude that this was not a
21 private property from the stand point that it excluded people,
22 and that there is evidence that the defendant had been over
23 there before, it came from his mouth. Again, I am not in a
24 position where I can say that I believe him or not believe him,
25 I have through the existence of the testimony, so I'm going to

1 deny the motion at this stage based upon the standard of review
2 that I've articulated and that I believe applies to this motion
3 if such a motion does exist at all. That would be my ruling.

4 MR. HELMS: I understand, Your Honor. Thank you.

5 THE COURT: Thank you very much.

6 MR. MARTIN: Thank you, Your Honor.

7 THE COURT: Is the State ready to proceed with their
8 first witness?

9 MR. HELMS: We are.

10 THE COURT: Do you know who it is?

11 MR. HELMS: Yes, sir. I forget her last name. Her
12 first name is Darla, Your Honor, and she is the HOA manager for
13 the property.

14 **Darla Benoit being first duly sworn, testified as**
15 **follows:**

16 THE CLERK: Please state your name and spell it for
17 the record.

18 THE WITNESS: Darla Benoit, B-e-n-o-i-t.

19 **DIRECT EXAMINATION**

20 BY MS. LIVESAY:

21 Q. Ms. Benoit, where are you currently employed?

22 A. RealManage.

23 Q. And what do you do?

24 A. Homeowner association management.

25 Q. Okay, perfect. And are you familiar with Maddington

1 Place?

2 A. Yes.

3 Q. Were you the property manager in Maddington Place in May
4 of 2020?

5 A. Yes.

6 Q. And if you don't mind, tell this Court, this is just for
7 the judge, there's no jury here so he's the one we talk to, is
8 it private property?

9 A. Yes.

10 Q. And does it require a sticker on your car in order to
11 park there?

12 A. Yes.

13 Q. And if you were a guest what do you have in your car?

14 A. A name tag.

15 Q. And tell this Court, if you don't have these things will
16 you get towed?

17 A. Yes.

18 Q. Oh, good. So it's not open to the public?

19 A. No.

20 Q. Okay. So if I come up in there and I park and I don't
21 have the sticker and I don't have the tag, at some point that
22 car is getting towed, correct?

23 A. Correct.

24 Q. So it is clearly not intended to be open to the public?

25 A. That is correct.

1 Q. And if you try to make it open to the public you're
2 gonna be down at Squeaky's paying him to get your car out?

3 A. Quality Towing, you would be at Quality Towing getting
4 your car out, yes.

5 Q. Quality Towing, okay, I like Quality Towing. Wait, the
6 police probably normally use Squeaky's. I'm gonna show you --

7 MS. LIVESAY: Can you mark this for me? Thank you,
8 ma'am. The same map, Maddington Place with the road
9 highlighted.

10 (St6ate's Exhibit No. 54 was marked for
11 identification.)

12 MR. MARTIN: No objection, Judge.

13 THE COURT: Without objection, it's number?

14 MS. LIVESAY: 54.

15 BY MS. LIVESAY:

16 Q. Ms. Darla, this to map, I am terrible with a map. Do
17 you know this is 17?

18 A. Uh-huh.

19 Q. And this is Cross Gate?

20 A. Yes.

21 Q. And you know these condos are Maddington Place?

22 A. These condos are Maddington Place, correct.(indicating.)

23 Q. So if you don't mind, can you stand up because we need
24 to show the judge?

25 A. Yes.

1 Q. Thank you, ma'am, I appreciate you.

2 A. These condos right here are Maddington Place, these
3 first five.

4 Q. Now, this road coming in, is this Cross Gate?

5 A. No.

6 Q. What is it?

7 A. I believe that's, the name of that is called Deerfield
8 Trail or Deerfield something, I'm not exactly the name of that
9 road. This is Cross Gate, right here (indicating.)

10 Q. And are those private?

11 A. Yes, they are all privately owned.

12 Q. And how about the parking lot in Maddington Place?

13 A. That's the private parking, yes.

14 Q. Okay. So you all even got the road going in there,
15 that's right.

16 A. Well, we don't own it, it is owned by someone else, but
17 it is private, yes, privately owned.

18 Q. So this isn't for through traffic, this is private and
19 it's for the residents in here?

20 A. Yes.

21 Q. Okay. and this Deerfield Plantation, that's kind of the
22 overall community?

23 A. Yes.

24 Q. I understand. I understand. And tell this Court,
25 because the question is, is it open and available to the

1 public? Are there signs that say open to the public?

2 A. No.

3 Q. Are there signs that say, no trespassing?

4 A. Yes.

5 Q. Okay. Good, good. And tell this Court what that means.

6 Does no trespassing mean that it's open to the public?

7 A. No.

8 Q. Okay. So it's for the people that live there and their
9 guests?

10 A. Correct.

11 Q. And there are signs out there if you roll up to let you
12 know this is not open the public?

13 A. That is correct.

14 Q. Took an extra step?

15 A. Private property, yes.

16 Q. You got it, you got it. And you got to have a sticker
17 on your car or something hanging from the car?

18 A. Correct.

19 Q. Okay, good. Good, good, good. Let me show you
20 something.

21 MS. LIVESAY: One second, Your Honor.

22 Q. I cannot put my hand on this picture, but you are
23 telling this Court that in 2020 there were signs up saying
24 private property?

25 A. Yes.

1 Q. No trespassing?

2 A. No trespassing.

3 Q. And let me ask you this, is there one that told you if
4 you don't have this sticker and you don't live here you're
5 gonna towed?

6 A. Yes. It says all that.

7 Q. Does anything about those signs indicate to you that
8 it's open to the public?

9 A. No.

10 Q. Okay. Good, good. Now, let me ask you this. Let's say
11 somebody visited two years ago. Okay?

12 A. Okay.

13 Q. And then they show up again uninvited and nobody wants
14 them over there then. They ain't got no kind of tag on their
15 car, they don't have the thing hanging from the car. How do
16 you get the thing hanging for guests?

17 A. The owners have them or -- they are provided to the
18 owners.

19 Q. Okay. So if the owner wants you there then they'll give
20 you one of those tags?

21 A. Correct.

22 Q. Okay. So let's say I was over there two years ago, just
23 trying to figure out the rules, and I'm invited in, I got me a
24 hanging tag, right?

25 A. Uh-huh.

1 Q. Let's say I don't get along with the owner anymore, I
2 show back up, I ain't got no sticker, I ain't got no tag,
3 nobody wants me over there, is there an exception for that?

4 A. No.

5 Q. So that car would get towed?

6 A. That car would get towed.

7 Q. Okay. So just because the person was over there a time
8 before don't mean they're entitled to be there every time if
9 they are not an owner and if they are not an invitee?

10 A. Correct.

11 Q. Good, good.

12 (State's Exhibit No. 55 was marked for
13 identification.)

14 MR. MARTIN: No objection to that.

15 Q. Do you know what this is, State's Exhibit 55?

16 A. Yes. That is the sign that was on the property.

17 MR. MARTIN: Excuse me. If you would, and maybe you
18 did, verify as to when that picture was taken?

19 MS. LIVESAY: Sure.

20 BY MS. LIVESAY:

21 Q. When was the picture taken?

22 A. That picture, that is actually the picture of the sign
23 that was there at the time. We have since replaced that sign
24 prior to us no longer managing the property which was April 1st
25 of this year. There's a new sign there now that's more

1 specific, but that sign was there at the time of that --

2 Q. So this was here in 2020?

3 A. I think that that picture was taken, I believe it was in
4 to July, because I think that's when we replaced the sign was
5 in July of 2020.

6 Q. Okay. So this was definitely here in May 2020?

7 A. Yeah. It may have even been sooner but I don't know for
8 sure exactly, but, yeah, it was been there the whole time. And
9 that's why it got replaced because of, it was coming apart,
10 like it had been there so long it was coming apart so we
11 replaced it and then we just changed some of the wordings so
12 that that it was more specific, but that was all, yeah.

13 Q. To be more specific than private property for people?

14 A. Yeah. We wanted to put in more about boats and stuff
15 like that because there wasn't anything about boats so that was
16 the only change, really, it still says private property, but,
17 yeah.

18 Q. And in fact, it says no improper vehicles or trailers,
19 right?

20 A. Right. And now -- but it added boats and, I think,
21 motorcycles to it, too, so, yeah.

22 Q. Okay. If you don't mind, this is the sign for
23 Maddington Place. Show the judge. Is there any sign out there
24 indicating that this place is ever open to the general public?

25 A. No.

1 Q. Is it open to the general public?

2 A. No.

3 MS. LIVESAY: No further questions.

4 **CROSS-EXAMINATION**

5 BY MR. MARTIN:

6 Q. Ms. Benoit, is it?

7 A. Yes.

8 Q. And what are you out there at the property?

9 A. The community association manager.

10 Q. How long have you been?

11 A. How long -- for Maddington or just period?

12 Q. Let's just say for Maddington.

13 A. Since April of 2018.

14 Q. Okay. So this sign was up at the time is what you said?

15 A. Yes. It was up before I got there, yes.

16 Q. Okay. And this is, it says Maddington Place, private
17 property, no improper vehicles, trailers and violators will be
18 towed from this area, right?

19 A. Correct.

20 Q. Now, it doesn't say, no entry, does it?

21 A. No. That is at the entrance, of both entrances.

22 Q. Well, this is the one you brought so I'm asking about
23 this one.

24 A. Uh-huh.

25 Q. This doesn't say, no entry, does it?

1 A. No.

2 Q. And there is no gate on that entrance to the property?

3 A. No gate, no.

4 Q. And there's no fence around that property, is there?

5 A. No.

6 Q. And if I drive out there to drop off -- let's say a
7 FedEx truck drives in there to drop off a package, that's not
8 improper, is it?

9 A. No.

10 Q. And well, since there's no improper vehicles, it doesn't
11 define improper vehicles, does it?

12 A. Not on the sign.

13 Q. No trailers. It doesn't say, no trespassing, does it?

14 A. No.

15 Q. And I've been out there looking myself a couple of times
16 --

17 A. Uh-huh.

18 Q. -- drove in to that gate, road around, backed up, came
19 out, that wasn't wrong for me to to do that, was it?

20 A. To drive through there? No.

21 Q. And if I had driven up there that night and waited on
22 somebody that I thought was in the apartment or if I had driven
23 in to drop off some things that were sitting in the driveway or
24 one of the drives to see if somebody wanted to come get their
25 property and didn't park, that wouldn't be wrong, would it?

1 A. Well, it's private property. If you weren't invited
2 there then that's the whole, that's the premise of the rules is
3 that no one is supposed to be there unless you are invited and
4 you have an -- you're an owner or you're a guest of the owner.

5 Q. Alright. And I guess I wasn't a guest to the owner when
6 I drove in there.

7 A. Okay. But you weren't there long enough to get towed.

8 MS. LIVESAY: Your Honor --

9 THE COURT: Hang on one second. You have an
10 objection?

11 MS. LIVESAY: Yes, Your Honor.

12 THE COURT: What's your objection?

13 MS. LIVESAY: Asked and answered and irrelevant and
14 cause for speculation.

15 THE COURT: I'll let him go, he's on
16 cross-examination.

17 BY MR. MARTIN:

18 Q. Just to make this clear, and to be clear, it does say,
19 private property, but it does not say, do not enter, does it?

20 A. No.

21 Q. It simply says, no improper vehicles, or violators will
22 be towed, right?

23 A. Well, it says private property, right.

24 Q. Private property right across there?

25 A. Uh-huh.

1 Q. But you would agree with me that in spite of the fact
2 that it's private property it is utilized by the public from
3 time to time in addition to the owners, whether that's right or
4 wrong?

5 A. Like, for deliveries and things like that? I mean,
6 yeah, I mean I would --

7 Q. Deliveries.

8 A. I mean, other than that, then you --

9 Q. Where people may come in looking for a car, looking for
10 an apartment and then back out and leave.

11 A. To drive through, yes, but to park then they could be
12 subject to being towed, yes.

13 Q. But you don't have a no trespassing sign up, do you?

14 A. Not that I'm aware of.

15 Q. To make it clear about that, I think you told Ms.
16 Livesay here that there was, but I've looked over there, I
17 don't see a no trespassing sign, so, and there isn't one, is
18 there?

19 A. I don't believe there's a no trespassing.

20 Q. No security guard at the gate?

21 A. No.

22 Q. Do you have police officers, security guards present?

23 A. No.

24 Q. No?

25 A. No. We have maintenance that controls the parking lot.

1 Q. The police have the right to exercise jurisdiction over
2 the parking lot if they were asked to, don't they?

3 A. I don't know.

4 Q. Do you know anything about calling the police if there's
5 improper activity going out there? Do you all have a policy on
6 that?

7 A. If there was improper activity we would tell the owners
8 to call the police if the owners are seeing something.

9 Q. It's up to the owners to do that instead of the
10 homeowner's association?

11 A. It depends on the issue, but, yeah, we would usually
12 tell the owners, see something, say something, call somebody.

13 Q. The purpose of the sign that you've got out there, and
14 those signs is, frankly, is to control the parking, isn't it?

15 A. And to protect the owners, yes.

16 Q. And to protect the owners?

17 A. Yes.

18 MR. MARTIN: Judge, that's all I have for Ms. Benoit.

19 THE COURT: Any Redirect on what he went into?

20 MS. LIVESAY: Yes, sir.

21 **REDIRECT EXAMINATION**

22 BY MS. LIVESAY:

23 Q. Ms. Benoit, just a couple of questions. What does the
24 word "private" mean?

25 A. No trespassing.

1 Q. Right, right. So maybe that's why you don't put no
2 trespassing, right? "Private" means, no trespassing?

3 A. In my opinion.

4 MR. MARTIN: Objection.

5 THE COURT: And what's your objection?

6 MR. MARTIN: Well, this witness doesn't know in terms
7 of trespassing what the law of trespassing is.

8 THE COURT: Okay. Well, she's not a lawyer, but she
9 stated what it means to her.

10 MR. MARTIN: Okay.

11 BY MS. LIVESAY:

12 Q. And you're the property manager?

13 A. Yes.

14 Q. And so you're the one that kind of looks over the signs?

15 A. Yes.

16 Q. And so when you put this sign up and you say, "private,"
17 your intention is, no trespassing?

18 A. Correct.

19 Q. I understand, I understand. And why do you give people
20 the sticker to put on their car?

21 A. To protect the owners and keep out the bad guys.

22 Q. Okay. And to make sure if you're not an owner if your
23 vehicle is not there; is that correct?

24 A. Say that again.

25 Q. If you don't have a sticker and you don't have a tag

1 should you be parked in that parking lot?

2 A. No.

3 Q. So who has a right to be in Maddington Place parking
4 lot?

5 A. Owners and their guests.

6 Q. Gotcha. And so if you ain't an owner and if you ain't a
7 guest then you should not be there?

8 A. Correct.

9 Q. And in fact, if you are your car is going to be towed?

10 A. Yes.

11 Q. Now, is there anybody that regulates the parking lot?

12 A. Our maintenance regulates the parking lot, and so do we,
13 in management, yes.

14 Q. Okay. When you say, "regulates," you mean if they see a
15 car without that sticker they're calling to get it towed,
16 correct?

17 A. Correct.

18 Q. So not only do you say, private property, but you
19 enforce it --

20 A. Yes.

21 Q. -- to make sure it stays private?

22 A. Yes.

23 Q. Okay. Now, Mr. Martin says, well, how about FedEx, how
24 about the mailman? Clearly, there is some leeway there so the
25 owners can --

1 A. Well, they were really invited in because they ordered
2 something, so, to be --

3 Q. So then you're invited if I say, hey, deliver this
4 package to me?

5 A. Yeah.

6 Q. And of course, the police are if I call 911, right?

7 A. Yes.

8 Q. But anybody else without a tag or without a sticker
9 should not be in that parking lot?

10 A. That is correct.

11 MS. LIVESAY: No further questions.

12 THE COURT: Briefly, any new matters?

13 MR. MARTIN: Yes, I do, Judge.

14 THE COURT: Go ahead.

15 **RECROSS-EXAMINATION**

16 BY MR. MARTIN:

17 Q. In terms of having permission to be in there that she
18 was asking you about, if you are there as an invited guest, if
19 you go in and park you're supposed to have a parking tag in
20 your car?

21 A. Correct.

22 Q. Right? You don't just drive in and park, you're
23 supposed to get a parking tag?

24 A. Right.

25 Q. Who would issue those?

1 A. Those are issued by our office and they are issued to
2 the owners, so every owner has them for their guests.

3 MS. LIVESAY: Objection. That was not on my
4 recross-examination and there's nothing new as to that
5 testimony.

6 THE COURT: I hear something new so I'm going to
7 allow it. Go ahead. You did ask about it.

8 BY MR. MARTIN:

9 Q. Say that again. Who would issue it?

10 A. The management company issues the parking passes and
11 they're issued to the owners and then the owners distribute
12 them to their guests.

13 Q. Okay. So if a guy drives up there, he's supposed to
14 have a parking -- to park and stay, he's supposed to have a
15 parking ticket?

16 A. Yes.

17 Q. He don't --

18 A. Yes.

19 Q. He don't drive up and get it that night?

20 A. No, that's correct.

21 Q. Do you know whether Michael Pennington had a parking
22 tag?

23 A. I have no idea who that is, no idea, I wouldn't know.

24 Q. How many parking tickets is each owner issued?

25 A. For their guests? Is that what you mean, for their

1 guests?

2 Q. Yes.

3 A. Well, it depends on how many guests they have,
4 because --

5 MS. LIVESAY: Your Honor, again, objection. She has
6 no record of whose car was out there --

7 THE COURT: What's your objection?

8 MS. LIVESAY: I'm sorry?

9 THE COURT: What's your objection?

10 MS. LIVESAY: My objection is the question regarding
11 Michael Pennington would be outside the scope of any question I
12 asked.

13 THE COURT: I would tend to agree, so I'll sustain
14 it.

15 MR. MARTIN: I understand, Judge, I understand.

16 BY MR. MARTIN:

17 Q. But, okay, the owners are issued how many did you say?

18 A. It depends because they're issued based on the number of
19 people on the lease, or whatever it is, so it depends on the
20 unit, the owner.

21 Q. The cars parked there without those, technically, have
22 been warned they could be towed no matter whose car it was?

23 A. Yes.

24 MR. MARTIN: That's all I have.

25 THE COURT: Thank you, ma'am, you may step down. Any

1 reason the witness cannot be excused?

2 MS. LIVESAY: No, sir, Your Honor.

3 THE COURT: Do you need her?

4 MR. MARTIN: No, sir, she can be excused.

5 THE COURT: Okay, ma'am, talk to the lawyers, but I
6 think you're free to go.

7 THE WITNESS: Thank you.

8 THE COURT: Yes, ma'am. Is that the witness?

9 MR. HELMS: Yes, sir, Leonard.

10 THE COURT: Leonard, just come right up here. Let
11 the Clerk of Court swear you in.

12 **Emmett Leonard Hall being first duly sworn, testified**
13 **as follows:**

14 THE CLERK: State your name for the record and spell
15 it, please.

16 THE COURT: Just speak into that microphone because
17 that lady down front has got to be able to hear you and I do
18 too and everybody else.

19 THE WITNESS: Okay.

20 THE COURT: Just give us your full name.

21 THE WITNESS: Emmett Leonard Hall, E-m-m-e-t-t,
22 H-a-l-l.

23 **DIRECT EXAMINATION**

24 BY MR. HELMS:

25 Q. Mr. Hall, when I met you you introduced yourself as

1 Leonard, I think?

2 A. Lenny.

3 Q. Leonard?

4 A. That's my middle name, yes.

5 Q. Yes, sir, fair enough. Where do you work and what do
6 you do?

7 A. Riteway Auto Glass, I install auto glass.

8 Q. How long have you done that?

9 A. About 30 years.

10 Q. Okay.

11 A. Not for Riteway, for myself, I've been doing glass for
12 30 years, I've been doing Riteway for 20 years.

13 Q. Did you have, or have you ever had an opportunity to do
14 any work for the county?

15 A. Yes.

16 Q. And we're here today about a case involving a white
17 sedan. Did you have an opportunity to do any work on a white
18 sedan Toyota?

19 A. Yes.

20 Q. I'll go ahead and show you what's already entered into
21 evidence, if I'm not mistaken. Has this been entered, 23?
22 It's marked as State's 23, Madam Reporter?

23 THE COURT REPORTER: Yes, sir.

24 THE COURT: Yes.

25 MR. HELMS: Thank you, ma'am.

1 BY MR. HELMS:

2 Q. I'm going to show you what's been marked as State's
3 Exhibit 23. I want you to take a look at that, Leonard.

4 A. Sure.

5 Q. Tell me if you recognize it?

6 A. I recognize the picture, but when I did the job that
7 glass wasn't in the door.

8 Q. Oh, okay, so you recognize the car?

9 A. I recognize, yes, this is the car, yeah.

10 Q. Okay. But you did work on that car?

11 A. Yes.

12 Q. Tell the Court about what kind of work you did?

13 A. I do auto glass and I change the, I replace the door
14 glass.

15 Q. You replaced that glass?

16 A. Yes. I put a door in this car.

17 Q. When you replaced this glass -- well, first of all,
18 about when did you do it?

19 A. It was this summer, I don't know the date, I really
20 don't.

21 Q. Why did you replace the glass?

22 A. It had been broken out. I had no idea why I replaced
23 it. They called me to replace the glass.

24 Q. And when you got the door was the glass in it?

25 A. No.

1 Q. So that glass had already been pushed out?

2 A. Yes.

3 Q. I want you to take a look at this and while you're
4 looking at that, tell me what you see in this picture with this
5 glass? First of all, what kind of glass is that? Can you tell
6 the Court what kind of glass that is?

7 A. It's a tempered piece of glass.

8 Q. And what does that mean?

9 A. That means when it breaks it breaks into a million
10 pieces.

11 Q. Is that why it seemed shattered?

12 A. Yes. The only thing holding it together is the window
13 tint.

14 Q. That's what I was going to ask you, why is it not
15 falling apart?

16 A. Window tint.

17 Q. Is tempered glass designed to break up?

18 A. Yes.

19 Q. Is that a safety thing?

20 A. Yes.

21 Q. Sometimes referred to as safety glass?

22 A. Yes.

23 Q. What makes a window go up and down, Leonard?

24 A. The regulator on the bottom of the door.

25 Q. Tell me how that works.

1 A. Well, it's connected to the button that's on your door,
2 or if you have a hand crank, which I think it was electric
3 windows --

4 Q. Yeah.

5 A. -- and when you push the button the regulator pulls the
6 window up and down.

7 Q. Alright. The regulator pulls the window up and down.
8 Does the window got to be in the track?

9 A. Yes.

10 Q. Is that window in that track?

11 A. No.

12 Q. Would that regulator pull that window up and down?

13 A. No.

14 Q. Okay. So that window as you see it right there will not
15 move?

16 A. No. Because once you push the button down it will
17 disconnect from the regulator, it will -- the glass will break
18 off.

19 Q. So as soon as that window was malled off the track like
20 it is in that picture was that window inoperable?

21 A. Yes.

22 MR. HELMS: Please answer any questions defense has.

23 **CROSS-EXAMINATION**

24 BY MR. MARTIN:

25 Q. Did you examine this particular, what did you call it,

1 regulator?

2 A. I didn't examine it. I had to unbolt the little pieces
3 of tempered glass, the tabs that are bolted to it to replace
4 the glass, yes.

5 Q. So your testimony is that, of course, when you saw it it
6 had no glass in it?

7 A. Yeah, the glass was out.

8 Q. And you're looking at the photograph, right?

9 A. Right.

10 Q. And you're saying that if a glass is in the condition of
11 this, as you see it in this photograph, that it won't roll up
12 or down?

13 A. Right.

14 Q. Did you see the glass or the car at the time the bullet
15 hole, the bullet was fired through it?

16 A. No. I didn't know that that was.

17 Q. You didn't know anything about that?

18 A. No, I didn't know.

19 Q. And is the fact that it's off the track what won't let
20 it go up or down?

21 A. Yeah, on this side, there, right here (indicating.)

22 Q. Where it's bowed out like that?

23 A. Yeah, yeah, it can't go down.

24 Q. Alright. And you don't know whether it was bowed out
25 like that when Mr. Yarnell in this case drove out of the

1 parking lot, you don't know whether that window was bowed out
2 like that or not, do you?

3 A. I can't say. I never saw the window.

4 Q. And if you've got a window that is shattered, for lack
5 of a better word, and you do move it up or down, that can cause
6 a bow out of this to nature, couldn't it?

7 A. No. There's a break off down in the bottom of the
8 regulator.

9 Q. Say that again, I couldn't hear you.

10 A. The glass will disconnect from the bottom on the
11 regulator, it will disconnect because it's tempered glass and
12 it's not together anymore. The only thing that held that
13 together was the window.

14 Q. And of course, again, you didn't examine this at the
15 time that it occurred?

16 A. The window?

17 Q. Yeah.

18 A. No, I wasn't there.

19 Q. And you don't know what position the window was in at
20 the time the shot was fired through it, do you?

21 A. I wasn't there, I wasn't there.

22 MR. MARTIN: That's all I have.

23 MR. HELMS: Just on what Mr. Martin just touched on,
24 Judge, and I know it's new because I forgot about it.

25

REDIRECT EXAMINATION

1

2 BY MR. HELMS:

3 Q. He just mentioned why the window wouldn't roll up. You
4 said something about the regulator. Where is the regulator?

5 A. Down inside the door.

6 Q. Did you have to replace this regulator?

7 A. Not the regulator, but the new glass bolts to the
8 regulator.

9 Q. Okay. So the glass became disconnected as soon as it
10 broke from the regulator?

11 A. If somebody went up and down with it it would
12 disconnect.

13 MR. HELMS: I understand. Thank you very much.

14 MR. HELMS: Nothing, further, Judge.

15 THE COURT: Thank you, sir. You may step down.
16 Watch your step as you're stepping down.

17 THE WITNESS: Thank you.

18 MR. HELMS: Can he be excused?

19 THE COURT: Any reason for him not to be excused?

20 MR. MARTIN: No, sir.

21 THE COURT: Thank you. You may be excused. Thank
22 you for coming.

23 MR. HELMS: Next witness, Your Honor, is Ms. Pam
24 Collins.

25 THE COURT: Ma'am, just come right up here, if you

1 will, and let the Clerk of Court swear you in.

2 **Pamela Collins being first duly sworn, testified as**
3 **follows:**

4 THE CLERK: State your name for the record and spell
5 it, please.

6 THE WITNESS: Pamela Collins, P-a-m-e-l-a,
7 C-o-l-l-i-n-s.

8 **DIRECT EXAMINATION**

9 BY MS. LIVESAY:

10 Q. Where are you currently employed?

11 A. Dr. Jack Green.

12 Q. And what are your job responsibilities?

13 A. Office manager.

14 Q. And as part of your duties do you keep up with the
15 medical records in that facility?

16 A. Yes.

17 Q. Are they kept in a way that can't be tampered with?

18 A. Yes.

19 Q. And do you recognize what I'm showing you now as State's
20 Exhibit 52?

21 A. Yes.

22 Q. And what are they?

23 A. It is his actual records for treatment, the period
24 4/12/19 through 1/7/21. This would be for adjustments, most
25 all visits.

1 Q. And the documents would happen when the patient comes
2 in?

3 A. Yes.

4 Q. And are those records for Anijah Yarnell?

5 A. Yes.

6 MS. LIVESAY: Your Honor, at this time the State
7 wishes to admit 52 into evidence.

8 THE COURT: Without objection?

9 MR. MARTIN: If she's the custodian of records I have
10 no objection to the records if they are the complete records of
11 this patient for his treatment period there.

12 THE COURT: Have you seen them?

13 MR. MARTIN: I don't know whether -- I've seen some,
14 but whether I've seen those or not, I don't know. Well, the
15 question I would have, these are two sheets to date from
16 November 23rd of '21 to 10/2020, as I read it, or maybe I'm
17 reading it wrong.

18 THE COURT: She testified to 1/7/21.

19 MR. MARTIN: My whole question, is this the complete
20 records for Mr. Yarnell or is this a portion of it?

21 THE WITNESS: That is a portion that I was
22 requesting.

23 MR. MARTIN: I would object to them if they aren't
24 the entire records of Mr. Yarnell.

25 THE COURT: Alright. I'm going to allow the records

1 in.

2 MS. LIVESAY: Thank you, Judge.

3 (State's Exhibit No. 52 was admitted into evidence.)

4 Q. And these records haven't been tampered with?

5 A. No.

6 Q. And the date frame, again, includes from 11/23/2020 to
7 10/20/20, correct?

8 A. Yes.

9 Q. Okay. So this would be any care that happened before
10 May of 2020 and the care directly after May of 2020?

11 A. Yes.

12 Q. Okay, wonderful. If you don't mind, tell this Court the
13 care that Anijah Yarnell got on 4/28/2020.

14 Q. Okay. So he was seen by technician number 12, which
15 when he came in the, his ligatures, which are the elastic
16 color, the elastics around the brackets on the front of the
17 teeth, those were changed. They did put him on elastics, like
18 a left clasp three, to wear full time. That's all that was
19 taken at that one.

20 Q. Okay.

21 A. On 7/28/20 he was seen --

22 Q. Was that the first visit after May 14th of 2020?

23 A. May -- 7/28/20 would be the first visit after May.

24 Q. And what happened?

25 A. He was changed ligs again, the same thing, left clasp

1 three elastics to wear them full time, and then they also put
2 him on a triangle elastics, as well.

3 Q. And that was what date?

4 A. 7/28/20.

5 Q. And so that was the care that he received most recent in
6 time after May 14th of 2020?

7 A. Yes.

8 Q. Does it say anything about fixing a bracket or fixing
9 any part of the brace?

10 A. No.

11 Q. And if that had been done would it have been documented
12 on the record?

13 A. Yes.

14 Q. And did he receive any kind of different care, any kind
15 of different treatment in July than what he had received in
16 April?

17 A. No.

18 MS. LIVESAY: No further questions.

19 MR. MARTIN: No questions, Judge.

20 THE COURT: Thank you, ma'am. You may step down.
21 You can leave that piece of paper right down here.

22 MR. HELMS: And Your Honor, we'd ask the same thing,
23 if she can be excused until trial, if such a date happens.

24 THE COURT: Any objection to the witness being
25 excused?

1 MR. MARTIN: No, Judge.

2 THE COURT: Thank you, ma'am. You may be excused, as
3 well.

4 MS. LIVESAY: Thank you, Ms. Pam. That's going to be
5 the State's presentation. We feel like we have met the
6 appropriate elements to show that it was a private residence,
7 that the glass that we see in that picture could not be rolled
8 up or down after the gunshot, and the fact that there was
9 absolutely no injuries to the defendant. He received the
10 same -- he received no care at J. Reuben Long, when he got out
11 of jail he received the same care in July that he received
12 prior to the incident.

13 THE COURT: Any response, anything in reply?

14 MR. MARTIN: Well, no evidence in reply, Judge.

15 THE COURT: Okay.

16 MR. MARTIN: I'm prepared to argue the issues and if
17 to that's her argument I'm prepared to reply to it.

18 THE COURT: Okay. Beyond the three issues that you
19 just recited, are you going to have any further arguments,
20 because I'm hearing from him, he's now going to argue the
21 larger issues?

22 MS. LIVESAY: No, sir. I think we'll reply to Mr.
23 Martin's argument and Motion for a Stand Your Ground.

24 THE COURT: Let's take a short recess.

25 MR. HELMS: Yes, Your Honor. Thank you.

1 (Recess taken.)

2 MR. MARTIN: If I may proceed, Judge?

3 THE COURT: Yes, sir.

4 MR. MARTIN: Judge, let me state again that we're
5 asking that the Court find that the defendant is entitled an
6 immunity from prosecution under Section 16-11-410 at sequence
7 of those sections of law addressing the Protections of Persons
8 and Property Act. I'll state again, Judge, that the General
9 Assembly, the basis of our argument is that the General
10 Assembly codified the Castle Doctrine and extended it to
11 occupied vehicles. This case involves an occupied vehicle.
12 That is a special category of protection that individuals are
13 entitled to, home, residence, occupied vehicle. So we're
14 asking for protection from immunity under 16-11-420. Excuse
15 me, Judge, 440(A) -- let me make sure I get that right. Well,
16 under Section 16-11-450(B) that says you're immune from
17 criminal prosecution and civil actions. I think that, Judge,
18 the Courts have been clear to judges, and I'm sure that you
19 know the law better than I do, but to be sure that I walk
20 myself through the idea of what we're doing it is that the
21 Court has to conduct this hearing, that they have to act as a
22 finder of fact, that they have to make a record, consider the
23 facts, act as finder of fact, apply a preponderance of the
24 evidence standard, which again, I know I don't have to tell you
25 what it is, but it is the slightest of standards. They have

