

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

**APPEAL FROM CHARLESTON COUNTY
Court of General Sessions**

Kristi L. Harrington Circuit Court Judge

Opinion No. 2013-UP-294 (S.C. Ct. App. filed June 26, 2013)

State of South Carolina,

Respondent,

v.

Jason Thomas Husted,

Petitioner.

**APPENDIX TO THE
PETITION FOR A WRIT OF CERTIORARI**

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington, Circuit Court Judge

Case No. 2010180066

State of South Carolina..... Respondent,

v.

Jason Thomas Husted..... Appellant.

RECORD ON APPEAL

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NCM20090603539

WITNESSES

David Vargen

Charleston City Police Department

AGENCY CASE NUMBER

0911186

ARREST WARRANT NUMBER

K606072

DATE OF ARREST

June 13, 2009

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury

Date:

MAY 10 2010

VERDICT

Foreperson of Petit Jury

Date:

INDICT.DOT

DOCKET NO. 2010GS1002968

The State of South Carolina

County of Charleston

COURT OF GENERAL SESSIONS

May Term 2010

THE STATE

vs.

JASON THOMAS HUSTED

DOB: 1974-08-22

W/M

Indictment for

Assault On A Police Officer While Resisting
Arrest

FILED

6/2/2010 5:22:08 PM

JULIE J. ARMSTRONG

CLERK OF COURT

ATTEST: A TRUE COPY

JULIE J. ARMSTRONG (SEAL)

CLERK, C.P., G.S. & F.C.

By

DEPUTY CLERK

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

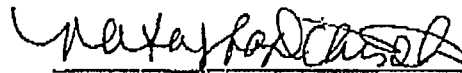
INDICTMENT

At a Court of General Sessions, convened on May 10, 2010 the Grand Jurors of Charleston County present upon their oath:

Assault On A Police Officer While Resisting Arrest

That in Charleston County, South Carolina, on or about June 13, 2009, the Defendant, JASON THOMAS HUSTED, knowingly and willfully did assault, beat, or wound Officer DeVasto and Officer Ferguson, law enforcement officers of this State, while resisting the efforts of the officers to make a lawful arrest of the defendant, when he knew or reasonably should have known that Officer DeVasto and Officer Ferguson, were law enforcement officers, in violation of Section 16-9-320(b), of the South Carolina Code of Laws (1976) as amended.

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



NATASHA CHISOLM
ASSISTANT SOLICITOR

ATTEST: A TRUE COPY
JULIE J. ARMSTRONG (SEAL)
CLERK, C.P., G.S. & F.C.

By 
DEPUTY CLERK

DANIEL M. RICCIO,

Having Been First Duly Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. FINCH:

Q. If you would tell us your occupation, please.

A. Current occupation is the director of livability, which is code enforcement for the City of Charleston. I retired from the Charleston Police Department in May of this year.

Q. And the police department you worked for previously?

A. Charleston Police Department.

Q. And how long had you been employed with the Charleston Police Department?

A. Twenty-three years and two months.

Q. And during that time, did you receive any special training as an officer?

A. Yes.

Extensive training in investigators with narcotics and vice; also detective investigation schools; tactile schools with the SWAT team; many training courses with the academy that's required by the academy to maintain our certification.

Q. And over the course of those twenty-two years,

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December 8, 2010

1 did you receive any special awards, commendations, or
2 recognitions?

3 A. Yes, sir.

4 Several officer of the year awards, several
5 officer of the month. Quite a few commendations for many
6 cases I was involved in throughout the years.

7 Q. And I want to take you back to the night of June
8 13th, 2009. Were you employed by the Charleston Police
9 Department --

10 A. Yes.

11 Q. -- at that time?

12 A. Yes, I was.

13 Q. And what was your position with the Charleston
14 Police Department on that night?

15 A. I was a lieutenant assigned to the command duty
16 position, which is the watch commander, if you will, over
17 the entire city in the absence of the chief. My shift was
18 from 10:00 at night until 8:00 in the morning, graveyard
19 shift so my duties were to respond to officers' requests
20 for advice.

21 Or if there were significant of events that
22 occurred throughout the night, robberies, things like
23 that, I would have to go to every scene and then advise
24 the chief of the activities that were going on in the
25 field.

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December 8, 2010

1 Q. And were you -- excuse me. Did you respond to a
2 call at the Back Nine Pub on that evening?

3 A. Yes, I did.

4 Q. And what time in the morning was that call?

5 A. It was after 2:00 in the morning, about 2:20 in
6 the morning, on June the 13th.

7 Q. And do you know the address of the Back Nine
8 Pub?

9 A. No, I don't.

10 It's Ashley River Road, but I don't know the
11 numerical.

12 Q. In Charleston County?

13 A. In Charleston County, South Carolina.

14 Q. Are you familiar with that area of town? If not
15 the exact address, you're familiar with the area of town?

16 A. Oh, yeah. Very familiar with that area.

17 Q. And what can you tell the jury about that
18 location of town, generally?

19 A. Generally, it's -- this particular bar,
20 establishment, is located down Highway 61. It is going
21 north on 61, probably less than a half a mile from Dogwood
22 Road. That's I guess one of the main landmarks. It is
23 located in a little strip-mall type atmosphere, and there
24 is a storage facility that kind of occupies the rear of
25 this strip-mall building.

MIA PERRON, CVR-CM

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1 Q. And so specifically any other landmarks close to
2 the Back Nine Pub?

3 A. It's just before Shadowmoss, Parsonage Road. If
4 you're coming down Magwood and you make a left on 61, it's
5 less than a mile on the left-hand side.

6 Q. And you've been to this location before?

7 A. Several times, yes.

8 Q. What was the nature of the call this night, June
9 13th, 2009?

10 A. It was a dispatch call for the uniform patrol
11 division team four to respond to a fight in progress in
12 the parking lot, the front parking lot, with many
13 individuals involved.

14 Q. And when you -- were you the first officer to
15 arrive?

16 A. I was the first on the scene.

17 I happened to be in that area of Highway 61
18 patrolling. Again, my duties were throughout the entire
19 city go -- I could go from downtown, James Island, to West
20 Ashley. I just happened to be in West Ashley, coming from
21 Shadowmoss or the gardens, and I was less than ten seconds
22 from the bar when the call went out.

23 Q. So from the time of the call until the time of
24 your arrival, about how much time has elapsed?

25 A. Less than five seconds.

MIA PERRON, CVR-CM

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1 Q. Okay. And what was the scene when you arrived?
2 If you could describe the scene.

3 A. When I arrived, I was driving -- the command
4 duty officer drives a -- just to let you know, a black
5 Tahoe. It's an unmarked vehicle. And as I pulled into
6 the first parking lot -- and you can picture that there
7 are vehicles where the parking lot -- or the strip mall
8 is. You can have vehicles parking in front and across the
9 parking lot of this side. So it was like parallel with
10 the building.

11 When I rolled up, I first I observed probably
12 twenty or thirty people in the parking lot. You know, a
13 lot of screaming going on. When I exited my vehicle, I
14 did have time to put the blue lights on there hidden in
15 the front windshield. Put the blue lights on.

16 And as I was exiting my vehicle, I noticed a
17 non-related codefendant holding a .45 caliber handgun and
18 walking or -- kind of hurriedly to his truck.

19 Q. And about how far was he from his truck when you
20 arrived? You saw --

21 A. He was opening the door, pulling the door open,
22 with a gun in his right hand.

23 Q. So a door length away from you?

24 A. Right.

25 Q. And when you arrived and saw this individual,

1 what happened next after you turned on your blue lights?

2 A. I immediately drew my weapon. I ordered the
3 individual to drop his weapon. He placed it inside the
4 console of the vehicle. I talked to him out -- to the
5 parking lot to the ground, and was able to handcuff him
6 without any other incident.

7 All along, the other people, patrons, were still
8 conjugating outside the front of the bar.

9 Q. Was the fight still going on at this time?

10 A. There was -- I didn't see any physical
11 altercation at that point.

12 Q. Were there already other officers on the scene?

13 A. No, there were not.

14 Q. Did you call any other officers?

15 A. I called for backup.

16 I said I had a party with a gun, I need backup,
17 and then that's when backup started to come.

18 Q. And to your recollection, who were some of the
19 officers who responded?

20 A. First on the scene were Officers Devasto and
21 Ferguson. They were first to back me up. And I'm trying
22 to remember. There was one more officer that came shortly
23 after that.

24 Q. And after you had the gentleman who had the
25 firearm detained, what was your next course of action?

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1 A. While I was detaining him, Devasto -- Officers
2 Devasto and Ferguson, they were riding together. It was
3 called a double-day night, or a double day, which we have
4 two shifts working at the same time. So they were doubled
5 up in one car.

6 When they pulled up, I saw them approaching the
7 front where all the individuals were hanging -- or
8 standing. They -- I didn't hear exactly what took place
9 but they immediately ran to the side of the building of
10 the strip mall and into the back into the darkness.
11 There's a path there and a wooded area, and they just --
12 they took off running after from what I found out later
13 was an individual who was fleeing from them.

14 Q. And when you saw Officers Ferguson and Devasto
15 run around the corner, what did you do?

16 A. When the third officer came on the scene, the
17 third backup officer, I said, take my prisoner, secure him
18 in your vehicle. I had no way to secure him anyway with
19 my vehicle. When he took the prisoner, I immediately --

20 I knew they were by themselves. I didn't know
21 exactly how many people were back there or suspects or
22 potential suspects, but I knew they were fairly
23 inexperienced officers so I was kind of concerned for
24 their safety, so I took -- I ran to the rear of the
25 building to check on them.

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1 Q. When you got around to the rear of the building,
2 what did you see?

3 A. By the time I rounded the corner I saw Devasto,
4 Officer Devasto, and Ferguson escorting the defendant, who
5 was hiding in the woods with another defendant -- they
6 both were covered in blood. The defendant was being
7 escorted through the pathway and at that point that's
8 where I kind of came in contact with the two officers and
9 the main defendant -- yeah, the defendant.

10 Q. And at this point in time had you developed a
11 complete understanding of the scene?

12 A. No. Absolutely not.

13 It was chaotic. I didn't know if the person
14 with the gun was involved with this assault. Obviously
15 I'm thinking, you know, the guy's bleeding, he's got a
16 gun, so you're thinking that they're involved. But we
17 didn't really know what was going on at the time. We had
18 to investigate further to figure out who exactly was
19 involved in the fight.

20 Q. And did you hear the defendant say anything at
21 this time?

22 A. When I approached the defendant -- I'm not
23 trying to be comical or anything -- but he was
24 intoxicated. And the first thing he said to me -- I'm in
25 uniform but I drive an unmarked -- he said, don't taze me,

1 bro, don't taze me, bro. I said, look, I'm not going to
2 taze you. And I backed off and let the two officers
3 escort him into the parking lot.

4 Q. Well, when you first arrived in the back there,
5 you saw officers Ferguson and Devasto?

6 A. Uh-huh.

7 Q. Tell us about that interaction, what you saw and
8 what was going on between those officers and the
9 defendant.

10 A. At first it seemed like he was being
11 cooperative. He was being led out of the wood line and
12 down the path into the open parking lot area, the back
13 parking lot. And as soon as he pulled -- or as he walked
14 into the parking lot, he broke loose from them and started
15 to run back towards the rear of the bar, the Back Nine
16 Bar.

17 Q. And what happened after that?

18 A. My focus was on the second individual, who was
19 bleeding from the face.

20 Officers Devasto and Ferguson attempted to grab
21 the individual, tell him to stop, we need to talk to you.

22 Q. And when you say the individual, are you
23 speaking of --

24 A. The defendant.

25 Q. -- the defendant?

1 A. Stop, we need to talk to you.

2 He was very belligerent, very intoxicated, not
3 cooperative. And they were trying to put hands on him to
4 say, hey, stop, we've got to talk about this, find out
5 what's going on.

6 Q. And did -- were they able to detain him?

7 A. They tried.

8 Officer Ferguson, who was on the defendant's
9 left side, placed one handcuff on the individual. I
10 remained -- as a cover officer, I felt that they could
11 handle this one guy at that point. But when she placed
12 the handcuff on the defendant's left hand and tried to get
13 the other handcuff on -- and if you figure the -- if you
14 can picture the handcuff, obviously it rotates, the little
15 spiral rotates. That was open like a hook. That's when
16 he started swinging his left hand with the open handcuff.
17 That's when I stepped in and said, you know, something's
18 got -- we've to detain him and arrest him.

19 Q. What moves did you take to detain him at that
20 point?

21 A. While they were holding him, I deployed pepper
22 spray. I removed my pepper spray container. I sprayed a
23 few sprays into the defendant's face. It didn't work. I
24 tried to get him to the ground. He was still -- he was
25 actually -- the two officers were basically like rag

1 dolls, if you will. He was just -- they were flailing in
2 all directions. I deployed a second round of pepper
3 spray. It didn't work. At that point he was on the
4 ground and he made a comment that he was trained in the
5 military to get out of situations like this. Because as
6 far as I can remember, I probably made a comment -- I
7 can't remember exactly.

8 But when someone does not comply with one string
9 -- or one spray of pepper spray, they're pretty -- it's
10 pretty uncommon. Usually they comply after one spray of
11 pepper spray. It took at least three sprays to finally
12 get him on the ground and to stop fighting.

13 Q. Can you tell us why you decided to deploy the
14 pepper spray into the face of the defendant? What about
15 the encounter rose it to that level?

16 A. Well, my concern was the injury -- him injuring
17 the officers with the -- essentially a sharp weapon. I
18 was concerned that they still did not have total physical
19 control over him. I felt that if I employed pepper spray,
20 it would subdue him enough or, you know, disorient him
21 enough, to get him to comply with the rest of our
22 commands.

23 Q. And during the struggle with that open hook-like
24 handcuff, were you able to see the motion of that
25 handcuff?

1 A. Absolutely.

2 MR. CONDON: Your Honor, object. He's leading
3 the witness.

4 THE COURT: Rephrase your question, Mr. Finch.

5 Q. [Mr. Finch] What did you observe about that
6 open handcuff --

7 A. The handcuff --

8 Q. -- while it was placed on the defendant?

9 A. It was one was secured to the left wrist and the
10 other handcuff was open as the sharp projector --
11 projectile part of it exposed and swinging. Potential
12 weapon.

13 Q. Did you see that handcuff strike anyone?

14 A. I can't say that I actually saw a physical
15 contact.

16 It was pretty chaotic. You're trying to take
17 care of -- do quite a few tasks in a few seconds. There
18 was no doubt in my mind that potentially someone was
19 getting hit. My concern was getting him detained.

20 Q. If I could just step back. Part of your duties
21 and responsibilities are to take control of the scene?

22 A. Yes.

23 Q. And do you interview and discuss that with
24 officers afterwards or do you -- in the reporting process
25 do you speak to the individually-involved officers after

MJA FERRON, CVR-CM

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1 the fact

2 A. Quite a few times we do speak.

3 On this occasion I don't -- by the time we had
4 him subdued, pepper sprayed, it's our policy to call EMS.
5 I called EMS to get him treatment immediately and took him
6 to the front of the bar. So as far as that was concerned,
7 the street supervisor basically took over and advised them
8 on the proper charges.

9 Q. Just a couple more questions.

10 Had you been -- had you had any calls to the
11 Back Nine Pub previously to this incident?

12 MR. CONDON: Objection. I don't see the
13 relevancy.

14 THE COURT: Counsel approach.

15 [Whereupon, an off-the-record bench conference
16 is held]

17 THE COURT: Sustained.

18 MR. FINCH: No further questions.

19 THE COURT: Mr. Condon, your witness.

20 MR. CONDON: Thank you, Your Honor.

21 CROSS-EXAMINATION

22 BY MR. CONDON:

23 Q. Lieutenant Riccio, you're at the livability
24 court right now; right?

25 A. Yes, sir.

MR. PERRON, CVR-CM

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1 Q. And that's a completely different culture from
2 the police?

3 A. In 2002 I was a sworn officer in charge of the
4 livability court, the only officer that was assigned to
5 the livability court. The livability court deals with
6 quality of life issues like barking dogs and overgrown
7 lots, the minor little things. So for six years I was a
8 police officer but at this time, right now, I'm not. I'm
9 a civilian.

10 Q. Okay. You were an officer at the livability --
11 livability court in 2002?

12 A. From 2002 until 2007.

13 And then when I was promoted to lieutenant, I
14 was transferred actually to Command Daniel Island, a team
15 on Daniel Island.

16 Q. And in the cases that you have, I'm sure they
17 have a lot of different types of resolutions in those
18 cases -- in those cases?

19 A. Absolutely.

20 Q. Now, on the -- on the night of June the 13th,
21 2009, you arrived at the Back Nine Pub; right?

22 A. Yes, sir.

23 Q. Now, you're in the front; correct?

24 A. Yes, sir.

25 I'm at the -- if you're facing the building --

1 Q. Right.

2 A. -- there's two entrances, a parking lot -- or
3 one parking entrance and the second parking entrance. I
4 was traveling south on 61 and I drove into the actual
5 second driveway to approach the bar.

6 Q. So when you say south, are you going -- are you
7 going towards the city?

8 A. Towards the city.

9 Q. And when you say entrance, what you're talking
10 about is really driveways into the --

11 A. Driveway into the parking lot.

12 Q. -- parking lot?

13 And we're talking about a small strip mall,
14 strip stores?

15 A. Right.

16 Q. Okay. And attached or right there next to it is
17 a storage place. I think it's called Ashley Self Storage?

18 A. That's correct.

19 Q. Okay. And they have storage units in the back?

20 A. Correct.

21 Q. Now, do you know whether they have cameras there
22 on the -- at the Ashley Self Storage?

23 A. I didn't at the time. I found out later that
24 there were cameras.

25 Q. Okay. But you never went back and yourself

1 personally got a video of any -- of any security tape or
2 anything like that that --

3 A. Absolutely not. I would not be able to do that.
4 A detective would have to do that.

5 Q. But no detective ever did that or anything like
6 that?

7 A. I don't know if they would have any reason to.

8 Q. Now, when you arrived, you're saying that there
9 were people out front.

10 A. Correct.

11 Q. And you saw a gentleman -- I think that
12 gentlemen was like Mr. Gass, Robert Gass. Is that the
13 gentleman's name?

14 A. That is correct.

15 Q. Okay. Now, when you went to the back and you
16 saw Officer Ferguson and Devasto there, the individual
17 that first walked out was the defendant, Jason Husted?

18 A. Yes. He was being escorted out.

19 Q. Okay. And the officers merely wanted to talk to
20 him; isn't that true?

21 A. That is true.

22 Q. And it's my -- isn't it true that he walked past
23 the officers and they asked him to stop? Isn't that true?

24 A. In the rear, or in the front?

25 Q. In the rear.

1 A. In the rear. I would not say he passed in front
2 of them. He was being escorted. Basically, they were --
3 the path was very small between the wooded area and the
4 big fence so they were basically kind of following him,
5 trying to, you know, kind of holding onto him. And he was
6 the first out of that little path as I walked up.

7 Q. And when you walked up, he is now in the parking
8 lot of that -- of that back of the bar?

9 A. Correct.

10 Q. Okay. And he continues to walk?

11 A. He basically darted away, not walked, and that's
12 when the officer said, hey, hey, hold up, and went to grab
13 him and stop him because he had blood on him, as well.

14 Q. But the officers merely wanted to talk to him;
15 isn't that true?

16 A. Sure.

17 Q. That's it?

18 A. We had to figure what's going on, who's all
19 involved.

20 Q. Right. And you're just trying to do an
21 investigative stop?

22 A. Investigative stop.

23 Q. Would you have, after the incident, gone around
24 and taken witness statements and found out who was in the
25 fight or who was involved in the fight?

1 A. No, I did not.

2 Q. Do you know if any officer did that?

3 A. No.

4 I do not have any knowledge of anybody
5 interviewing. Normally on an arrest like this, it's kind
6 of open and shut. It's our testimony, and they write the
7 reports. There's really no need to -- once the arrest is
8 made, the case is basically over.

9 Q. But wouldn't it have been important to find out
10 who was involved in the fight?

11 A. All I know that was important was the safety
12 of those two officers, and that's all I was concerned
13 about, and the safety of me. When a guy's holding a .45
14 caliber --

15 Q. Well, we're not talking --

16 A. I'm just saying --

17 Q. Okay. That's why --

18 A. I just wanted to set the scene. It was chaos.

19 Q. But that's --

20 A. So our goal is safety of ourselves and the
21 people that were potentially innocent bystanders.

22 Q. Okay. But isn't it true that that's Robert Gass
23 in front of the bar and you've already detained him?
24 Isn't that true?

25 A. Absolutely. That is true.

MIA PERRON, CVR-CM

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1 Q. Okay. And then you went to the back of the bar
2 to do an investigative stop?

3 A. I went to the back of the bar to make sure those
4 officers were okay.

5 Q. And the back of the bar -- isn't it true that
6 you were just going to make an investigative stop? Isn't
7 that true?

8 A. Yeah. We wanted to find out what was going on.

9 Q. Okay. So you would never have ascertained who
10 was in the fight?

11 A. We ascertained the fact that there were three
12 individuals involved totally: one with the gun; your
13 defendant; and another defendant who was with your
14 defendant. And when that was done, the crowd started
15 dissipating. We determined that we felt very comfortable
16 that we had everybody that was involved with this fight.

17 Q. Well, wouldn't it make sense to interview people
18 to see who was involved in the fight? I mean, isn't that
19 basic police work?

20 A. Basic police work is if someone's committing --

21 Q. That would -- yeah, I understand that.

22 A. -- in front of you --

23 Q. We understand. But you're just doing an
24 investigative stop of Jason Husted. That's all you're
25 doing; right?

MIA FERRON, CVA:CM

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1 A. We want to find out who's involved in a fight.
2 When you see blood on people, you know that they're
3 probably involved in a fight. At that point --

4 Q. Did anybody -- anybody ever tell you that Jason
5 Husted was involved in the altercation? Anybody at that
6 scene that night tell you that Jason Husted was involved
7 in a fight?

8 A. I don't remember. I -- they -- you've got to
9 understand. there's a lot of yelling and a lot of
10 screaming and I don't particularly remember that -- all I
11 know is he had blood on him, the other guy had blood on
12 him, and they were fighting, and they were fighting us --
13 he was fighting us, so at that point my concern was to get
14 him under arrest before he did bodily harm to my officers
15 or myself.

16 Q. Okay. Now, he's just -- I've got to understand
17 this, now. He's merely walking away?

18 A. He's darting and resisting. He's not complying
19 to verbal commands. He's --

20 Q. And you're doing an investigative stop?

21 A. Absolutely.

22 It turns from an investigative stop when he
23 starts fighting the police to assault on police. That's a
24 crime in our presence. So at that point, we didn't need
25 to know who was involved in the fight. We knew that he

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1 was an agitated person, an intoxicated person, that wanted
2 to hurt somebody.

3 MR. CONDON: Mark this as Defendant's Exhibit
4 Number 1, Your Honor.

5 THE COURT: I'm sorry?

6 MR. CONDON: I just want to mark this as --

7 THE COURT: You may approach.

8 [Whereupon, Defendant's Exhibit Number 1 is
9 marked by the court reporter]

10 Q. [Mr. Condon] Let me show you --

11 MR. CONDON: May I approach the witness, Your
12 Honor?

13 THE COURT: You may.

14 MR. CONDON: Thank you.

15 Q. [Mr. Condon] Show you what's marked as
16 Defendant's Exhibit Number 1. Do you recognize it?

17 A. This is Charleston Police Department incident
18 and investigation report.

19 Q. Do you recognize it?

20 A. I recognize it as an official incident report
21 that's used by the patrol officers.

22 Q. Okay. And it's dated June 13th of 2009?

23 A. That's correct.

24 Q. And the case number is 0911186?

25 A. That is correct.

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1 Q. And there is a narrative on page 2 of that
2 exhibit?

3 A. Yes.

4 Q. Are you familiar with that document?

5 A. Yes, I am.

6 Q. In that narrative doesn't it say that several
7 witnesses stated that three offenders had been engaged in
8 a heated physical altercation in the parking lot of the
9 bar? In the middle of that -- of that document. I'm
10 sorry. Middle of the paragraph.

11 A. Middle of the paragraph?

12 Q. That's right.

13 A. Repeat it, please.

14 Q. Several witnesses stated that three offenders
15 had been engaged in a heated physical altercation --

16 A. Yes.

17 Q. -- in the parking lot of the bar.

18 A. Yes. I see it.

19 Q. Do you know of anybody, any of those witnesses,
20 that stated that?

21 A. No, I do not.

22 Q. Would you have participated in drafting that
23 narrative?

24 A. Absolutely not.

25 Q. Absolutely not?

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1 A. No.

2 All I -- all I contributed to was letting the
3 officer know -- the officer that worked the report, I did
4 explain to him about the encounter with the individual
5 with the gun and supplied him with that information. And
6 Officers Devasto and Ferguson provided the information on
7 their defendants.

8 Q. Now, and Officer Ferguson would have drafted up
9 a -- her own little narrative of what happened?

10 A. Not necessarily.

11 Our reports are now computerized. We have
12 laptops in the patrol vehicles. Usually, in that
13 situation one officer -- when you have multiples involved,
14 one officer gets picked to basically write the narrative
15 whether he witnessed every single thing or not, because
16 he's basing it on what the witness -- police officers --
17 the incident that the police offices witnessed.

18 Q. Would you have reviewed any notes that Officer
19 Ferguson would have generated with regard to this
20 incident?

21 A. At the time of the incident?

22 Q. At the time or subsequent.

23 A. This report here?

24 Q. Or this incident. Yeah, this report here.

25 A. Well, I did explain to them that they had to

1 file a use-of-force, which is our policy if we use any
2 force on anybody. It's not here. But the use-of-force
3 statements, I made sure that they did one and I did one.

4 Q. So those statements would have been produced by
5 you, as well as Officer Ferguson and Devasto?

6 A. Absolutely.

7 Anybody who has effected any arrest use -- me,
8 especially, with the pepper spray, that's our policy to
9 write a use-of-force statement to give reason why I had to
10 deploy pepper spray.

11 Q. Did you ever produce those reports to the
12 prosecutor?

13 A. I did not.

14 MR. CONDON: Your Honor, I just need to mark an
15 exhibit.

16 THE COURT: You may.

17 [Whereupon, Defendant's Exhibit Number 2 is
18 marked by the court reporter]

19 MR. CONDON: May I approach the witness, Your
20 Honor?

21 THE COURT: You may.

22 MR. FINCH: Objection, Your Honor. I don't know
23 what this document is.

24 MR. CONDON: Oh. I'm sorry. I'm sorry.

25 THE COURT: All right. Thank you.

1 [Whereupon, Mr. Condon proffers documents to
2 Mr. Finch]

3 [Whereupon, Mr. Finch review documents]

4 Q. [Mr. Condon] Are you familiar with that?

5 A. Yes. That's a supplemental case report.

6 Q. And that would have been filled out by Officer
7 Ferguson?

8 A. Yes. And on this particular one, yes.

9 Q. And you're familiar with it?

10 A. As of now I am.

11 Q. What do you mean? You mean this morning or --

12 A. Well, this morning and now. Not until today.

13 Q. Today is the first time you saw it?

14 A. Absolutely.

15 MR. CONDON: Bear with me, Your Honor. I'm
16 sorry.

17 [Whereupon, Mr. Condon reviews documents]

18 Q. [Mr. Condon] Would you have had any input into
19 drafting the arrest warrant in this case?

20 A. Arrest warrant?

21 Q. Right.

22 A. No, I did not.

23 Q. You wouldn't have had any input at all?

24 A. Only what was in the incident report written by
25 the officer. They usually write the warrants based on

1 that because it basically spells out the same on a warrant
2 as the report.

3 Q. And the warrant in this case -- are you familiar
4 with the warrant in this case?

5 A. Never seen the warrant.

6 Q. You never have?

7 A. No, sir.

8 Q. At all?

9 A. At all.

10 You have to understand, my role with the police
11 department at the time, I was the supervisor over the
12 supervisors -- street supervisor and all patrol division.
13 Once I went -- and if there was any advice needed or
14 whatever, my role was over. I had no need to go back and
15 look at warrants or reports. The supervisor basically
16 picks up the responsibility from there, their street
17 supervisor.

18 Q. But, I mean, in this case you were actually
19 involved. I mean, you're not just a supervisor.

20 A. Absolutely.

21 Q. So you would never have seen the arrest warrant
22 in this case?

23 A. Only when I go to court I would have to see it.

24 Q. Have you seen it yet?

25 A. No, I have not.

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1 MR. FINCH: Objection. Asked and answered.

2 THE COURT: Sustained. Move on, Mr. Condon.

3 MR. CONDON: Bear with me, Your Honor.

4 [Whereupon, Mr. Condon reviews documents]

5 Q. [Mr. Condon] Would it be fair to say, like the
6 report that Officer Ferguson generated, that would have
7 been generated -- you've got it right there. I think it's
8 the --

9 A. The supplemental?

10 Q. Right, the supplemental.

11 A. Yes.

12 Q. It would have been generated on June the 13th,
13 2009, at 7:25?

14 A. Yes. That is correct.

15 Q. Now, and so that would have been generated just
16 hours after the incident?

17 A. That is correct.

18 Q. Okay. And the -- and, obviously, Officer
19 Ferguson is a new officer?

20 A. Right.

21 Q. And she -- how long -- how long out of the
22 academy was she?

23 A. She was out of -- I'm not exactly sure of the
24 time. I knew she was on the street cut loose basically
25 out of training for about five months.

1 Q. Now, you're instructed in the -- at the academy
2 to -- after an incident to record down what is important;
3 isn't that true?

4 A. That is true.

5 Q. And to put what's important in the report that
6 they generate, obviously?

7 A. Correct.

8 Q. And do it as soon thereafter after the event?

9 A. That is correct.

10 Q. And so they would have almost like a duty to put
11 down what's important in a report as soon thereafter?

12 A. That is correct.

13 MR. FINCH: Objection. Relevance.

14 THE COURT: Overruled.

15 MR. CONDON: Your Honor, I would move
16 Defendant's Exhibit Number 2 into evidence based on
17 the fact that --

18 THE COURT: Hold on one second.

19 MR. CONDON: I'm sorry.

20 THE COURT: Any objection?

21 MR. FINCH: There's an objection. He didn't
22 write the report and --

23 THE COURT: Do you have an objection?

24 MR. FINCH: Objection.

25 THE COURT: Please approach.

1 [Whereupon, an off-the-record bench conference
2 is held]

3 Q. [Mr. Condon] Lieutenant Riccio, Exhibit Number
4 2, that's --

5 A. Uh-huh.

6 Q. -- that's a document that's part of the police
7 record with regard to this case?

8 A. That is correct.

9 Q. Okay. And is it a record kept in the normal
10 course of business at the police department?

11 A. Normal course of business?

12 Q. In the normal course of business that y'all
13 would keep records with regard to incidences?

14 A. That is correct.

15 Q. And it would have been a report generated by one
16 of your officers, Officer Ferguson; isn't that true?

17 A. Yes. In this case, yes.

18 Q. Okay. And that -- and that you're familiar
19 with Officer Ferguson?

20 A. Yes, I am.

21 Q. And that you would have generated a report
22 with regard to this incident shortly thereafter?

23 A. That is correct. When she was able to
24 complete --

25 MS. CHISOLM: Objection, Your Honor.

1 THE COURT: All right. Whose witness is this,
2 first of all.

3 All right. Thank you.

4 MR. FINCH: Objection is based on speculation.
5 He's asking the witness speculate as to the actions,
6 state of mind, of the author of this report.

7 THE COURT: Rephrase your question, Mr. Condon.

8 MR. CONDON: Yes, ma'am.

9 THE COURT: Sustained.

10 Q. [Mr. Condon] Is this a record, Exhibit Number
11 -- Defendant's Exhibit Number 2, kept in the normal course
12 of business by the City of Charleston Police Department?

13 A. Yes, it is.

14 Q. And it would have been generated by a person who
15 participated in the event -- just after that event
16 occurred?

17 A. Yes.

18 MR. CONDON: Your Honor, I would move
19 Defendant's Exhibit Number 2 into evidence.

20 MR. FINCH: Objection as to on the hearsay
21 grounds.

22 THE COURT: Counsel approach. Bring the
23 exhibit.

24 [Whereupon, an off-the-record bench conference
25 is held]

1 THE COURT: Mr. Condon, let's move on.

2 MR. CONDON: No further questions. No further
3 questions, Your Honor.

4 THE COURT: Thank you. Redirect?

5 MR. FINCH: Thank you, Your Honor.

6 REDIRECT EXAMINATION

7 BY MR. FINCH:

8 Q. Lieutenant Riccio, about how long did the
9 encounter last from the time that you arrived on the scene
10 until all the -- all of those arrested were secured?

11 MR. CONDON: Your Honor, I'm not sure it's a
12 basis for -- I didn't ask that kind of question or the
13 scope of --

14 THE COURT: Let's let him finish his question
15 before you object, Mr. Condon.

16 MR. CONDON: Yes, ma'am.

17 THE COURT: Thank you.

18 A. I'm sorry. Say it again, please. Rephrase.

19 Q. [Mr. Finch] How much time elapsed from when you
20 arrived at the scene until you made your way to the back
21 and saw the incident with the defendant?

22 A. Under five minutes.

23 At least five minutes for the entire process.
24 From getting out of the vehicle, arresting suspect one,
25 and assisting with the other two suspects, probably five

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1 minutes.

2 Q. When you arrived on the scene, were the two
3 suspects in the rear already in the rear?

4 A. When I -- yes.

5 They were -- I did not know they were even in
6 the rear. I was focusing on my -- my attention on the guy
7 with the gun and detaining him. I didn't know -- the only
8 thing that really clued me into it, because everybody was
9 still screaming, was the two officers running. They're
10 running back there for a reason. I've got to figure out
11 what -- you know, what's going on.

12 Q. Mr. Condon pointed out that when you arrived and
13 what you saw. Was that the entire experience with the two
14 officers and the defendant?

15 A. [No response]

16 Q. Did you observe the entire interaction between
17 the two officers, Devasto and Ferguson, with the
18 defendant?

19 A. Yes. In the rear.

20 Q. In the rear.

21 A. In the rear.

22 Q. Do you know if the defendant sustained any
23 injuries?

24 A. Well, EMS was called for the eyes. I don't know
25 if he had any other injuries. We had to get his eyes

1 flushed from the -- with the pepper spray.

2 MR. FINCH: No further questions.

3 THE COURT: Mr. Condon, recross?

4 MR. CONDON: Your Honor, may we approach for a
5 second?

6 THE COURT: You may.

7 [Whereupon, an off-the-record bench conference
8 is held]

9 MR. CONDON: Officer Riccio, I've just got a
10 couple of questions.

11 RECROSS-EXAMINATION

12 BY MR. CONDON:

13 Q. When you came up front, did anybody indicate to
14 you that you got the wrong guy?

15 A. I don't recall.

16 He was the right guy who was assaulting the
17 police. That's all I was concerned with. Whether he was
18 involved with the first fight, I don't know. I can't -- I
19 have no idea. But I know that he was involved with
20 assaulting the police officers and resisting arrest. That
21 I'm sure of.

22 Q. Do you have those documents with regard to use
23 of force?

24 A. I do not.

25 Q. Do you know where they are?

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1 A. Computer database with internal affairs,
2 probably.

3 Q. And you haven't turned those over to the
4 prosecutor?

5 A. I did not.

6 Actually, I don't even think I've seen them, to
7 be honest with you. I wrote it and that was it. I wrote
8 my portion of it and then that's -- that was it. We were
9 cleared of no excessive use of force.

10 Q. But you haven't produced those documents to the
11 prosecutor? Never showed --

12 A. Absolutely not, no.

13 Q. -- them to him?

14 A. No, sir.

15 MR. CONDON: Okay. No further questions, Your
16 Honor.

17 THE COURT: Lieutenant, you may step down.

18 THE WITNESS: Thank you.

19 THE COURT: You are free to remain with us but
20 you are also excused. Thank you.

21 THE WITNESS: Thank you very much. Just leave
22 these items up here?

23 THE COURT: Yes. If you'll just leave those
24 exhibits. Thank you.

25 [Whereupon, the witness is excused and exits the

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1 witness stand]

2 THE COURT: Ladies and gentlemen of the jury,
3 we've reached an appropriate time for us to take our
4 lunch break.

5 Do not begin your deliberations. Do not discuss
6 this case amongst yourselves.

7 Please be back in your jury room at 1:45. You
8 are excused.

9 Please rise for the jury.

10 [Whereupon, the jury exits the courtroom at
11 12:15 p..]

12 THE COURT: Thank you. Be seated.

13 Anything before we break for lunch?

14 MS. CHISOLM: No, Your Honor.

15 MR. CONDON: No, ma'am.

16 THE COURT: All right. Thank you.

17 Actually, Mr. Husted --

18 MR. CONDON: Husted.

19 THE COURT: Husted. Mr. Husted, are you out on
20 bond?

21 MR. HUSTED: Yes, Your Honor.

22 THE COURT: And have you made arrangements with
23 the bonds person to secure his bond?

24 THE WITNESS: I -- excuse me. I'm on a personal
25 recognizance bond.

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1 THE COURT: You're on a PR bond?

2 Is that correct, Ms. Chisolm?

3 MS. CHISOLM: I believe so, Your Honor.

4 THE COURT: Is that correct, Mr. Condon?

5 MR. CONDON: Yes, ma'am.

6 THE COURT: All right. Then you will remain on
7 the same terms and conditions.

8 Mr. Husted, just want to remind you we've picked
9 a jury. We are proceeding with or without you. If
10 you decide not to return after lunch, we're still
11 going to continue with your trial.

12 Do you understand that, sir?

13 MR. HUSTED: Yes, Your Honor. I'll be here.

14 THE COURT: All right. Thank you.

15 MR. CONDON: What time to be back, Your Honor?

16 THE COURT: The jury will be back at 1:45 so you
17 need to plan accordingly, Mr. Condon. I begin
18 promptly.

19 MR. CONDON: Thank you.

20 THE COURT: Thank you. We are at ease.

21 [Whereupon, a recess is taken from 12:17 p.m. to
22 1:38 p.m.]

23 THE COURT: Anything before we bring in the
24 jury? From the State?

25 MS. CHISOLM: No, Your Honor.

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1 Judge, I just gave Mr. Condon the form that he
2 inquired of that last officer about, the use-of-force
3 form, so he's taking a look at that.

4 THE COURT: All right. Mr. Condon, anything
5 before we bring in the jury?

6 MR. CONDON: No, ma'am.

7 THE COURT: All right. Let's bring in the jury.

8 [Whereupon, the jury enters the courtroom at
9 1:40 p.m.]

10 THE BAILIFF: All present, Your Honor.

11 THE COURT: Thank you. Please be seated.

12 Call your next witness.

13 MS. CHISOLM: The State calls Terri Ann
14 Ferguson.

15 [Whereupon, Ms. Ferguson comes forward]

16 [Whereupon, Ms. Ferguson is duly sworn by the
17 clerk of court as follows: do you swear or affirm
18 that your testimony will be the truth, the whole
19 truth, and nothing but the truth, so help you God]

20 THE WITNESS: Yes, sir.

21 THE CLERK OF COURT: Be seated.

22 [Whereupon, the witness takes the witness stand]

23 THE CLERK OF COURT: Ma'am, if you will state
24 your full name and then spell your last name for the
25 record.

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1 THE WITNESS: Terri Ann Ferguson. F-E-R-G-U-S-
2 O-N.

3 MS. CHISOLM: May it please the Court.

4 THE COURT: Yes, ma'am.

5 MS. CHISOLM: Good afternoon, Ms. Ferguson. How
6 are you?

7 THE WITNESS: I'm fine, ma'am.

8 - - - - -

9 TERRI ANN FERGUSON,
10 Having Been First Duly Sworn,
11 was Examined and Testified as Follows:

12 DIRECT EXAMINATION

13 BY MS. CHISOLM:

14 Q. Would you please tell jury what is your
15 occupation.

16 A. Police officer.

17 Q. And which -- which department do you work for?

18 A. City of Charleston.

19 Q. And what is your position with the City of
20 Charleston?

21 A. Patrol officer.

22 Q. And how long have you been employed with the
23 Charleston Police Department?

24 A. Two and a half years.

25 Q. While you've been there, have you had any

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1 special recognition?

2 A. Yes.

3 I got PPO of the year, 2009, as probationary
4 police officer.

5 Q. What did they recognize you for?

6 A. Last year I got recognized for talking a
7 civilian out of committing suicide. And also I caught an
8 armed robber who tried to rob the McDonalds. I caught the
9 suspect before the call even came out on the radio.

10 Q. Let me take you back to June 13th, 2009.

11 A. Okay.

12 Q. Were you employed in your present capacity on
13 that date?

14 A. Yes, ma'am.

15 Q. Were you dispatched to 2457 Ashley River Road
16 that day?

17 A. Yes, ma'am.

18 Q. And are you familiar with that area of town?

19 A. Yes, ma'am.

20 Q. Can you tell the jury about the location?

21 A. There's a bar in the area. There are a lot of
22 calls for that area for like disorderly conduct or public
23 drunk --

24 MR. CONDON: Objection, Your Honor. I don't see
25 the relevance of that.

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1 THE COURT: I'm going to allow it. She's giving
2 a description of the area.

3 MR. CONDON: Thank you.

4 Q. [Ms. Chisolm] Do you remember about what time
5 it was you got called to the pub that day?

6 A. Like around 2:20 a.m. that morning.

7 Q. And what was the name of that call?

8 A. Assault in progress.

9 Q. Did they -- were there any other descriptions
10 that you received --

11 A. Yes.

12 We received several other descriptions: a party
13 with a firearm at the incident location; also, physical in
14 progress.

15 Q. And is that a serious call for you-all?

16 A. Yes, ma'am.

17 Q. And what do you-all do when you receive a call
18 like that?

19 A. We have to be on alert. First off, it might be
20 citizens in harm, or ourselves in harm while we're
21 responding to that incident location, so we come as
22 quickly as possible.

23 Q. Did you go to that location alone?

24 A. No, ma'am.

25 I was accompanied by Officer Devasto.

1 Q. Once you reached that location, what did you
2 observe?

3 A. We observed several parties in the front of the
4 location. We also observed Lieutenant Riccio was also at
5 the scene, and several parties at the front of the
6 business flagging us down to the rear of the location
7 where several parties had fled.

8 Q. And what did you do after speaking -- perhaps
9 speaking with those witnesses?

10 A. After they informed us that two party had fled
11 to the rear of the business, that's when myself and
12 Officer Devasto end up going to the rear of the business.

13 Q. At that time did you have any additional
14 information about who those two people were?

15 A. All we knew was they were involved in the -- in
16 the physical.

17 Q. When you went to the rear of the building, then
18 what happened?

19 A. When we went to the rear of the building, we
20 went into the wooded area. At that time we had our
21 flashlights. I said several times, Charleston police,
22 Charleston police, don't move. At that time the defendant
23 stated do not taze -- do not taze me, bro. And that's
24 when the lights were flashed. We observed two parties in
25 the wooded area. One party -- two party -- both of them

1 were actually covered in blood at the time.

2 After we assess the situation, that's when we
3 commanded them out of the wooded area. That's when both
4 parties complied. And the defendant, when he got out of
5 the wooded area to like a parking lot area, that's where
6 we tried to pretty much assess the situation and ask what
7 was going on.

8 Q. What was his conduct like?

9 A. Well, he -- at the time he was not trying to --
10 he wasn't willing to allow us to help him find out what
11 was going on because at that time he tried -- initial
12 investigation. And that's when he became very
13 belligerent, using foul language, and the people from the
14 front of the business could have heard him so at that time
15 we was trying to just control the scene. And that's when
16 at that time it was known to myself and other parties
17 involved that he was being arrested.

18 Q. You mentioned that he was using language and
19 being belligerent. Did you notice anything else about his
20 appearance?

21 A. He had blood on him. I could smell an alcoholic
22 beverage coming from his person, because we was in close
23 proximity.

24 Q. Was there anyone else back there with you?

25 A. It was myself, Officer Devasto, Lieutenant

1 Riccio, and the defendant and also with -- also with a
2 friend.

3 Q. At what point did -- did you try to detain him?

4 A. Yes, ma'am.

5 Q. And could you tell the jury about that, please.

6 A. At this time when the fight was being -- it was
7 a chaotic situation and the defendant wasn't being very
8 cooperative at the time. At the time, he knew he was
9 being detained. It was understood by everybody in that
10 area he was being arrested. That's when I took out my
11 handcuffs. It has two wenges [phonetic].

12 When I put the first handcuff on his left arm,
13 that's when he swung his hand in a very aggressive manner.
14 And the other part of the handcuff was unlocked so it
15 looked like a hook. So that part is really sharp. And
16 that was swinging in all different directions while we was
17 trying to detain him.

18 I'm a pretty small officer. And then while he
19 was swinging it, I was trying to protect my face and all
20 the parts where I could have actually got more body injury
21 while we was trying to restrain him, while we was trying
22 to put him on the ground. So I was just fearful for my
23 life.

24 Also, if he did fled the scene, I was pretty
25 much, you know, in fear for the citizens that might have

1 got injured if he left the scene.

2 Q. Could you tell the jury a little bit about the
3 chaotic atmosphere that was there that day?

4 A. First off, we get a call for assault in
5 progress.

6 MR. CONDON: Your Honor, it's been asked and
7 answered.

8 THE COURT: I'm going to allow it. You may
9 answer.

10 A. We got a call for assault in progress. We
11 already had a heightened. We got a call with a party with
12 a firearm. We have one officer already on scene with like
13 several people from the bar, several witnesses, and just
14 people -- and also a call with parties in a physical.

15 So we got three different things going on. We
16 got an assault, we got a physical that was taking place by
17 the time we was in route to the location, and we also got
18 another call like party with a firearm. So that in itself
19 is very chaotic.

20 So while we trying to assess the situation, it's
21 so much going on at the incident location so we try to
22 figure out who is what and who done pretty much what at
23 that time.

24 Q. [Ms. Chisolm] Did the defendant say anything to
25 you?

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1 A. After we had restrained him he said several
2 times while he was on the ground that he had been taught
3 to fight through that combat. Because OC spray was
4 deployed to actually calm him, but that didn't work at
5 all. So he did mention to us at the time at the incident
6 location that he had prior military background.

7 Which, I mean, OC spray whenever deployed to a
8 normal person would pretty much assess the situation.
9 Even myself, I got affected by the OC spray and I actually
10 kind of -- kind of tried to get away from the scene.
11 Because what OC spray does to you, it involuntary closes
12 your eyes, caused you to water, actually blur your vision.

13 And pretty much the defendant stated to me at
14 that time that he had been taught through a military
15 background that you got to fight through that situation.
16 So it did not work for him, so it put us and other
17 officers also at a risk because he had been taught through
18 his military background that he got to fight through
19 situations such as that.

20 Q. Did the defendant seem angry?

21 A. He just -- he just was very uncooperative,
22 angry, and he just wanted to just get away from the
23 situation.

24 Q. You said he used profanity towards you-all?

25 A. Yes, ma'am.

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1 Profanity, he was belligerent, he was very
2 aggressive in just his stance and the way he motioned, try
3 to, you know, get away from the incident location.

4 Q. If you would, if you don't mind --

5 A. Okay.

6 Q. -- could you stand and show -- well, could you
7 show us how exactly --

8 A. Sure.

9 Q. -- the struggle went?

10 A. Sure. Could I have you as a -- or anybody, or a
11 jury, if that's okay?

12 Q. Sure.

13 MS. CHISOLM: May I approach?

14 THE COURT: You may.

15 Mr. Condon, are you standing for a particular
16 reason?

17 MR. CONDON: First of all, Your Honor, I want to
18 see, Your Honor, what's happening. I can't see with
19 the podium.

20 THE COURT: All right. Counsel approach for
21 just a moment.

22 [Whereupon, an off-the-record bench conference
23 is held]

24 MS. CHISOLM: If you wouldn't mind, if you would
25 step down.

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1 THE WITNESS: Okay.

2 [Whereupon, the witness complies]

3 THE COURT: All right. Officer Ferguson and
4 Ms. Chisolm, I remind you now that you're both away
5 from microphones. Please make sure that you speak
6 loudly.

7 MS. CHISOLM: Okay.

8 THE WITNESS: Okay.

9 Q. [Ms. Chisolm] If you could use me as an example
10 how you tried to detain the defendant.

11 MR. CONDON: Your Honor, I thought she was going
12 to do something different.

13 THE COURT: Counsel approach.

14 [Whereupon, an off-the-record bench conference
15 is held]

16 THE COURT: All right. You may continue.

17 A. Okay. Pretend you're coming from the wooded
18 area, you're trying to -- trying to assess the situation.
19 Sir, sir --

20 Q. [Ms. Chisolm] And what am I doing?

21 A. You're pretty much getting away from the
22 situation.

23 At that time, if you're an officer you're trying
24 to do a -- pretty much an investigation. You want people
25 to be as cooperative as possible. So this party was

1 highly intoxicated, running away from the situation,
2 covered in blood --

3 Q. I'm not talking --

4 A. -- we're just trying to figure out what's going
5 on. You're trying to help this party --

6 Q. I'm not talking to you --

7 A. -- but this party is pretty much fleeing away
8 from you. Then when this person, party, start using, you
9 know, profane language and --

10 Q. You people --

11 A. -- you call --

12 MR. CONDON: Your Honor, may I approach the
13 bench?

14 THE COURT: You may.

15 Officer Ferguson, you may have a seat.

16 [Whereupon, the witness complies]

17 [Whereupon, an off-the-record bench conference
18 is held]

19 THE COURT: You may step down.

20 [Whereupon, the witness complies]

21 A. I want you to flail your hands in an aggressive
22 manner. I'm trying to handcuff you. I'm trying to find
23 out what's going on. You're bigger than me, you're
24 stronger than me: please, ma'am, can you get down on the
25 ground, get down on the ground, get down on the ground,

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1 stop, get down on the ground, get down on the ground,
2 don't move, police, don't move.

3 At that time, there's a handcuff flinging all in
4 my direction and I'm trying to restrain this party. As
5 you can see, she's a little bit bigger than I am and I
6 can't put that handcuff behind her back.

7 So during all this struggle, we're also going to
8 have another officer on the lefthand side trying to
9 restrain his body and also the lieutenant was trying to
10 contain it from the top, with all that trying to go on at
11 the same time.

12 So that's a little visual.

13 MS. CHISOLM: Thank you.

14 Q. [Ms. Chisolm] You mentioned that Lieutenant
15 Riccio finally came to the area where you-all were?

16 A. Yes, ma'am.

17 Q. And what happened then?

18 A. When Lieutenant Riccio observed that me and the
19 other officer could not contain the party, he assisted us
20 when --

21 MR. CONDON: Objection, Your Honor.

22 I think she's trying to testify on behalf of
23 Officer Riccio, and he already testified, and she
24 can't state what his state of mind was.

25 THE COURT: Rephrase your question. Sustained.

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1 Q. [Ms. Chisolm] What did you observe when
2 Lieutenant Riccio came to assist you-all?

3 A. When Lieutenant Riccio came to the scene to
4 assist us in detaining the party, he deployed OC spray.

5 Q. Did you -- were you actually hit?

6 A. In the process, yes, ma'am.

7 Q. Was the defendant injured at all?

8 A. Not to my knowledge, no, ma'am.

9 Q. Was EMS called?

10 A. Yes, ma'am.

11 Q. Why was EMS called?

12 A. Because OC spray was deployed, and it's our
13 department policy whenever we use any of our intermediate
14 weapon EMS has to be called.

15 Q. Do you know if he was treated for anything other
16 than the pepper spray?

17 A. Well, whenever EMS comes to the situation, EMS
18 evaluates all his injuries. Whenever he --

19 MR. CONDON: Objection, Your Honor. She doesn't
20 know what EMS did.

21 THE COURT: She may answer this question if she
22 knows and has personal knowledge as to what EMS did.

23 Q. [Ms. Chisolm] Do you know if they treated him
24 for anything else?

25 A. Possibly.

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1 But that's only for the deployment of the OC
2 spray to his eyes. They did flush his eyes out with
3 water.

4 Q. When you-all were on the ground, did that cause
5 any injuries at all?

6 A. Yes, ma'am. Minor abrasions to my arm, my
7 knees.

8 Q. After the defendant was arrested could you
9 describe the scene.

10 A. After the defendant was arrested, the scene
11 calmed down.

12 He also had his friend on the scene who actually
13 was telling him at the incident location, calm down, let
14 the police do what they need to do, calm down.

15 MR. CONDON: Objection, Your Honor. Hearsay.

16 THE COURT: Overruled.

17 Q. [Ms. Chisolm] Did he listen to them?

18 A. No. He didn't at the time.

19 MS. CHISOLM: Court's indulgence.

20 [Whereupon, Ms. Chisolm and Mr. Finch confer]

21 THE COURT: Yes, ma'am.

22 MS. CHISOLM: No further questions. Please
23 answer any questions that the defense may have.

24 MR. CONDON: Thank you, Your Honor.

25 THE COURT: Mr. Condon.

CROSS-EXAMINATION

BY MR. CONDON:

Q. Officer Ferguson, in -- during 2009, how long had you been with the force?

A. Approximately I'd say five months.

Q. Five months? Back in May or -- I mean, June of 2009?

A. Yes, sir.

Q. Now, when you did a report on this, you do a supplemental report?

A. Yes, sir.

MR. CONDON: Can I approach the witness, Your Honor?

THE COURT: You may.

Q. [Mr. Condon] Let me show you what's been marked as Defendant's Exhibit Number 2 and see if you recognize it.

[Whereupon, the witness reviews documents]

A. Yes, sir.

Q. [Mr. Condon] Do you recognize it?

A. Yes, sir.

Q. And what is it?

A. That is my supplemental report.

Q. And that's a report you generated at or near the time of the event?

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1 A. Yes, sir.

2 Q. And it was -- would have been generated I guess
3 that morning on June 13th?

4 A. Yes, ma'am. Yes, sir.

5 Q. Now, when you went to the back, you were doing
6 an investigation; isn't that true?

7 A. Yes, sir. When we went to the back.

8 Q. Okay. And you were doing an investigative stop
9 with regard to Mr. Husted; isn't that true?

10 A. Yes, sir.

11 Q. Okay. And isn't it true he just walked through
12 you and you made a command to him to stop? Isn't that
13 true?

14 A. Yes, sir.

15 Q. Okay. And at that point you decided to arrest
16 him. Isn't that true? At that --

17 A. Say that again.

18 Q. Okay. He walked by you?

19 A. Uh-huh.

20 Q. Okay. And you asked him to stop?

21 A. No.

22 He was advised to stop as soon as he came out of
23 the woods.

24 Q. Okay. And this happened in the parking-lot
25 area?

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1 A. Yes, sir.

2 Q. Okay. Now, behind the Back Nine Pub --

3 A. Yes, sir.

4 Q. -- there's a decent sized parking lot; isn't
5 that true?

6 A. Yes, sir.

7 Q. Okay. And this happened all right in the
8 parking lot?

9 A. Yes, sir.

10 Q. Okay. And so he comes out of the woods, okay,
11 complies with your commands?

12 A. Okay.

13 Q. Isn't that true?

14 A. When I told him to stop, then he continued.

15 Q. Okay. Other than that, isn't it true that he
16 never in any way threatened you? Isn't that true?

17 A. No, he hadn't did any verbal threats --

18 Q. He didn't threaten --

19 A. He became belligerent at that point.

20 Q. But he -- you asked him to stop?

21 A. Yes, sir.

22 Q. Okay. He walked by you?

23 A. He continued to -- actually, he ignored my
24 commands.

25 After he was told to stop several times, that's

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1 when he continued to walk, preventing us from actually
2 kind of [phonetic] our investigation.

3 Q. Okay. And so your command was to stop and he
4 continued to walk? Isn't that true?

5 A. Yes, sir. He didn't obey the command. Yes,
6 sir.

7 Q. Okay. And as he walked by you, he didn't in any
8 way threaten or use any type of what I call fighting
9 words; isn't that true?

10 A. He did not walk by us like nonchalant. He
11 pretty much decided at that point to not obey our verbal
12 command.

13 Q. Just answer the question.

14 A. Okay. He decided not to obey our verbal
15 commands, walk by, and then he started to pretty much try
16 to flee the scene.

17 Q. But he -- but he was walking; isn't that true?

18 A. Yeah. He was leaving the scene, sir.

19 Q. Now, and you were just doing an investigative
20 stop?

21 A. We were finding out pretty much what took place.

22 Q. Did you -- did you in any way ask anybody at the
23 scene who was involved in the altercation?

24 A. Well, when we flagged down -- when we first got
25 on the scene, several parties waived us to the back of the

1 area where two parties that were involved in a physical
2 altercation had fled to the rear of that location.

3 Q. Well, did you ask anybody who was involved in
4 the fight? Did you ask anybody?

5 A. Well, when we -- when -- initially got on the
6 scene, they said the two parties involved were to the rear
7 of the location. So I'm believing based on -- if the
8 witnesses at the scene, since they stated to us that the
9 parties involved in the altercation were in the rear,
10 these were the only two parties in the rear of the
11 location.

12 Q. Okay. But did you actually ask a witness who
13 was involved in the fight yourself, personally?

14 A. When we got on the scene, the two parties ran.
15 They were just like, they're back there, they're back
16 there and these were the parties who were in the physical
17 altercation.

18 Q. Okay. Let me ask it again.

19 But did you ever -- did you ever specifically
20 ask anybody, either before or after, who was involved in
21 the fight?

22 A. Not per se. Everybody said the parties in the
23 physical were in the rear.

24 Q. Let's go -- have you got that Exhibit Number 2
25 in front of you?

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1 A. Yes, sir, I've got Exhibit Number 2.

2 Q. Okay. Let's try to go through it.

3 A. Okay.

4 Q. Okay. This was on June 13th, 2009, 2:20 in the
5 morning. And you're Officer Ferguson, who responded to
6 Ashley River Road. Is that correct?

7 A. Yes, sir.

8 Q. In reference to an assault in progress? Is that
9 your --

10 A. Yes, sir.

11 Q. Now, when you're making a report, obviously you
12 make it at or near the time of the incident?

13 A. In a timely fashion, sir.

14 Q. Right.

15 And when your memory is fresh, that's generally
16 when you try to generate these reports; isn't that true?

17 A. Yes, sir.

18 Q. And you were instructed when you were at the
19 academy to do them as quick as possible and to put down as
20 much information, important information, with regard to
21 what was happening?

22 A. Not as quick as possible but in a timely fashion
23 that everything gets pretty much taken care of.

24 Q. And be as accurate as possible?

25 A. Yes, sir.

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1 Q. So the only -- the only thing you put down here
2 is assault in progress; isn't that true?

3 A. That's the call we were dispatched to, yes, sir.

4 Q. Okay. Pardon me. I didn't understand.

5 A. That was the call we were dispatched to.

6 Q. Okay. [Reading] Upon arrival, Officer Ferguson
7 and Devasto was informed by an employee that two white
8 males ran to the back of the pub into the woods.

9 Isn't that true?

10 A. Yes, sir.

11 Q. Okay. [Reading] Officer Ferguson, along with
12 Devasto, went into the woods to retrieve the possible
13 parties that fled the scene?

14 A. Yes, sir.

15 Q. Okay. [Reading] Officer Ferguson advised the
16 two males to come out of the woods. Officer Ferguson gave
17 verbal commands to one Jason Thomas Husted to come out --
18 to come to a complete stop.

19 A. Yes, sir.

20 Q. Okay. [Reading] Mr. Husted continued to walk
21 away from the officers?

22 A. Yes, sir.

23 Q. [Reading] At this time Officer Ferguson --
24 That's you; right?

25 A. Yes, sir.

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1 Q. -- [reading] pulled out her handcuffs to
2 restrain Mr. Husted.

3 A. Yes, sir.

4 Q. So he's walking away and you pull out your
5 handcuffs. Isn't that true?

6 A. Yes, sir.

7 Well, within that time frame, yeah. After he
8 was being belligerent at that time, being disorderly,
9 that's when the cuffs were taken out.

10 Q. But if he had been disorderly --

11 A. Yes, sir.

12 Q. -- or disruptive or belligerent --

13 A. Okay.

14 Q. -- wouldn't you have put it in your report?

15 A. Yes, sir.

16 Q. [Reading] Officer Ferguson was able to place one
17 handcuff on Mr. Husted's left arm when he pulled away from
18 officers by swinging the loose handcuff in a combative
19 manner.

20 A. Yes, sir.

21 Q. [Reading] Officer Devasto grabbed hold of
22 Mr. Husted's left arm and again asked him to stop.

23 A. Yes, sir.

24 Q. That's true?

25 A. Yes, sir.

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1 Q. [Reading] Mr. Husted began shoving officers in
2 attempt to flee the scene. Officer Ferguson tried to gain
3 hold of the other end of the handcuff to place the party
4 in custody.

5 A. Yes, sir.

6 Q. [Reading] It was this -- at this time during the
7 struggle that Lieutenant Riccio deployed OC spray in the
8 eyes of Mr. Husted.

9 A. Yes, sir.

10 Q. And you were able to restrain Mr. Husted.

11 A. Yes, sir.

12 MR. CONDON: Okay. Now, Your Honor, I would
13 move Defendant's Exhibit Number 2 into evidence.

14 MS. CHISOLM: Objection, Your Honor. Hearsay.

15 THE COURT: All right. Counsel approach.

16 [Whereupon, an off-the-record bench conference
17 is held]

18 THE COURT: Note your exception for the record,
19 but I am sustaining the Court's objection, Mr. Condon.

20 MR. CONDON: Yes, ma'am.

21 [Whereupon, Mr. Condon reviews documents]

22 Q. [Mr. Condon] Officer, you're used to a few
23 words of profanity, aren't you?

24 A. Say it again?

25 Q. You're used to profanity? In your training you

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1 anticipate that or, you know, when you -- as a police
2 office, that's something -- that's not something that's
3 unusual for you. Isn't that true?

4 A. What I use on scene or on my --

5 Q. No. That you've -- that you've heard profanity.

6 A. Yes, sir, I've heard profanity before.

7 Q. And as a police officer, you're trained to
8 expect it or are used to it; isn't that true?

9 A. I hear it often.

10 Q. Pardon?

11 A. I hear it often.

12 Q. All right. But that's to be expected sometimes
13 as a part of your job. Isn't that true?

14 A. Yeah.

15 MR. CONDON: Okay. Just a second, Your Honor.

16 THE COURT: Yes, sir.

17 [Whereupon, Mr. Condon and the defendant confer]

18 MR. CONDON: No further questions, Your Honor.

19 THE COURT: Redirect?

20 MS. CHISOLM: Briefly.

21

22

23

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REDIRECT EXAMINATION

BY MS. CHISOLM:

Q. You were asked if you've heard cursing before.

A. Yes, ma'am.

Q. Can you tell us what about this incident made it rise to a level of disorderly conduct?

A. Well, first --

MR. CONDON: Objection, Your Honor. I don't think it's an area for cross -- or redirect.

THE COURT: I'm sorry?

MR. CONDON: She's trying to go over something that she didn't go into on direct examination.

THE COURT: Overruled. You may inquire.

A. Cursing, profane language, causing a scene, having people gathering, and just pretty much the noise level of the incident.

Q. [Ms. Chisolm] And was he intoxicated?

A. Yes, ma'am.

Q. Was he being boisterous?

A. Yes, ma'am.

Q. Was the parking lot a public place?

A. Yes, ma'am.

MS. CHISOLM: No further questions, Your Honor.

THE COURT: Mr. Condon?

MR. CONDON: A few, Your Honor.

RECROSS-EXAMINATION

BY MR. CONDON:

Q. In the back of the parking lot it's just you and Officer Riccio, Officer Devasto, and a gentleman by the name of Robert Morris?

A. Yes, sir.

Q. And Mr. Husted?

A. Yes, sir.

O. Nobody else; right?

A. Not at this time, no.

Q. Now, isn't it -- isn't it true that Jason Husted just used profanity just one time? Isn't that true?

A. No.

He used it several times in the incident, sir.

Q. You're sure?

A. Yes, sir.

Q. Do you remember that you had a preliminary hearing?

A. Yes.

Q. Okay. Do you remember that happening on July 1st, 2009?

A. Yes.

THE COURT: Is that a yes?

THE WITNESS: Yes, ma'am.

1 Q. [Mr. Condon] Do you remember being asked about
2 profanity?

3 A. [No response]

4 Q. Do you remember that?

5 A. I'm sorry. Repeat your question, sir.

6 Q. Do you remember being asked about profanity?

7 A. Yes, sir, I believe.

8 Q. And isn't it -- isn't it true you couldn't quite
9 remember what he said?

10 A. At the incident?

11 Q. Right.

12 A. It's possible.

13 That happened in you said July, you said, the
14 preliminary hearing?

15 Q. Well, the preliminary was in July of 2009.

16 A. Yes, sir.

17 Q. But you couldn't remember what he said in terms
18 of profanity?

19 A. Well, he was being disorderly so while he was
20 being disorderly he did use profane language at the
21 incident time.

22 Q. He just used it like one time, even if you
23 remember what he said --

24 A. It could have been like several words he said
25 just at that time, sir.

1 You're asking me to recall how many different
2 profane words he used at that time?

3 Q. Or just that it happened --

4 A. I wasn't counting.

5 Q. But just that it happened one time? You said --

6 A. At that time in the back, yeah, when he used it.
7 I wasn't -- in the heat of -- in the heat of the moment, I
8 wasn't -- when I'm detain -- when I was detaining the
9 defendant, I wasn't counting the number of profane words
10 he used. I mean, that's not something that normally you
11 would be counting how many times he used, you know, a
12 profane word.

13 Q. So when you decided to put the handcuff on
14 Mr. Husted, he had walked by you and not listened to your
15 commands, and at that point you decided to put the
16 handcuff on him?

17 A. No. When he was being --

18 Q. Isn't that true?

19 A. Say that again, sir.

20 Q. He walks -- he walks past you --

21 A. Okay.

22 Q. -- and you -- he doesn't listen to your commands
23 but walks past you. And at that point you decide to put
24 the handcuff on him. Isn't that true?

25 A. After he was --

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1 Q. Yes or no.

2 A. Yes. If you want to put it that way, yes.

3 MR. CONDON: No further questions, Your Honor.

4 THE COURT: Officer, you may step down. Thank
5 you.

6 THE WITNESS: All right. Thank you, ma'am.

7 [Whereupon, the witness is excused and exits the
8 witness stand]

9 THE COURT: Call your next witness.

10 MS. CHISOLM: The State calls Officer Devasto.

11 [Whereupon, Ms. Devasto comes forward]

12 THE CLERK OF COURT: Put your left hand on the
13 Bible and raise your right hand.

14 [Whereupon, Ms. Devasto is duly sworn by the
15 clerk of court as follows: do you swear or affirm
16 that your testimony will be the truth, the whole
17 truth, and nothing but the truth, so help you God.

18 THE WITNESS: I do.

19 THE CLERK OF COURT: Be seated.

20 [Whereupon, the witness takes the witness stand]

21 THE CLERK OF COURT: If you'll state your full
22 name and then spell your last name for the record.

23 THE WITNESS: Officer Christine Devasto. City
24 of Charleston Police. Last name is D-E-V-A-S-T-O.

25 MS. CHISOLM: Good afternoon, Ms. Devasto.

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1 CHRISTINE DEVASTO,
2 Having Been First Duly Sworn,
3 was Examined and Testified as Follows:

4 DIRECT EXAMINATION

5 BY MS. CHISOLM:

6 Q. Could you please tell the jury who you work for.

7 A. I work for the City of Charleston Police
8 Department.

9 Q. And what do you do for the City of Charleston
10 Police Department?

11 A. I'm a patrol officer for West Ashley.

12 Q. How long have you been an officer?

13 A. Since October, 2008.

14 Q. Do you remember an incident that took place on
15 June 13th, 2009?

16 A. Yes, I do.

17 Q. Do you remember where that location was?

18 A. It was at Back Nine Pub. I think it was 2457
19 Ashley River Road. I don't -- I'm not sure of the exact
20 address.

21 Q. Do you recall why you were dispatched to that
22 location?

23 A. We got a call for an assault in progress
24 involving weapons.

25 Q. When you got to the scene, were there any other

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1 officers there?

2 A. Lieutenant Riccio was the first on the scene,
3 and then myself and Officer Ferguson arrived afterwards.

4 Q. What did you learn when you arrived at the
5 scene?

6 A. At first it seemed like there was a lot of chaos
7 or a lot of people around, bystanders. We weren't sure
8 what was really going on. Lieutenant Riccio detained one
9 person that had a firearm.

10 We talked to some of the bystanders. They
11 advised that two white males -- they gave us a description
12 of them -- ran behind the business and into the woods.
13 And one of the bystanders -- I don't know if it was an
14 employee or just someone that was there, ran back with us
15 and pointed out to where they were.

16 Q. When you went to the back of the building, did
17 you see anyone?

18 A. We walked into the woods and we saw two white
19 males, one being the defendant and his codefendant,
20 Mr. Morris, squatting in the woods. Mr. Morris was
21 covered with blood. And the codefendant also had blood on
22 him.

23 Q. Were they trying to hide?

24 A. It appeared that way, yes.

25 Q. You said one of them -- one of them was covered

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1 with blood or --

2 A. Mr. Morris, from his head down all the way to
3 his shirt, was all bloody. And the -- the defendant also
4 had blood on him.

5 Q. Would those -- would that appearance give you
6 any indication that they may have been involved in the
7 incident?

8 A. Yes.

9 O. What did you do after you saw them in the woods?

10 A. Myself and Officer Ferguson advised them to come
11 out of the woods. Mr. Morris came out first. He was
12 cooperative.

13 We asked the defendant to also step out. And he
14 was cooperative at first. When he started walking away we
15 asked him to stop, that he was going to be detained. At
16 that point he started running towards the front of the
17 business. I ran after him, grabbed him by one arm, and
18 that's when he started being combative with us.

19 Q. Do you recall if he said anything to you?

20 A. I'm sorry?

21 Q. Do you recall if he said anything to you?

22 A. He said that he didn't have to stop and he
23 didn't have to listen to what we had to say.

24 Q. Why did you think it was necessary to detain
25 him?

1 A. We got the description. People advised us that
2 they had seen two white males that were possibly involved
3 in the altercation run into the woods. Both of them had
4 blood on them so it was reasonable suspicion to believe
5 that they are involved.

6 Q. Did you notice anything else about his
7 appearance?

8 A. They both seemed highly intoxicated.

9 Q. And what gave you that impression?

10 A. We could smell the odor off their breath. And
11 Mr. Morris also advised that they had been drinking that
12 night.

13 Q. Who was that?

14 A. Mr. Morris advised that they had been drinking
15 that night.

16 MR. CONDON: Just object in terms of hearsay,
17 Your Honor.

18 THE COURT: Sustained.

19 Ladies and gentlemen, I have determined that the
20 response is not admissible. Please strike that
21 response from your notes. You are not to consider
22 that response in any way in your deliberations.

23 You may continue.

24 MS. CHISOLM: Thank you, Your Honor.

25 Q. [Ms. Chisolm] At what point did you-all attempt

1 to put him in handcuffs?

2 A. Right when he walked out of the woods when we
3 asked him to come out. I asked him to stop several times,
4 told them that they were both being detained. He kept on
5 walking away. He started running. I grabbed one hand on
6 him and he kind of pushed me away. Officer Ferguson was
7 able to get one cuff on his left arm.

8 Q. Would you say -- was the defendant being
9 boisterous at all?

10 A. He was shouting.

11 You know, like I said, we gave him several
12 verbal commands to stop, stop resisting, and he wasn't
13 complying to any of them.

14 Q. Was he conducting himself disorderly there at
15 all?

16 A. Yes, he was.

17 MR. CONDON: Object, Your Honor. It's a leading
18 question, Your Honor.

19 THE COURT: I'm going to allow it.

20 Q. [Ms. Chisolm] Was this a public place that you-
21 all --

22 A. Yes, it was.

23 Q. Could you tell the jury: once you put the
24 handcuffs on him, what happened next or what -- or once
25 the handcuff was placed on him, what happened next?

1 A. Once the one handcuff was placed on his left
2 wrist, he started pulling away. He took the other
3 handcuff that we attempted to place on his right wrist, he
4 opened the cuff and at that point -- I don't know if you
5 know what an open cuff looks like. It's sharp on the end.
6 And he started flailing that behind him and trying to get
7 away. So it looked like he was trying to strike us with
8 it.

9 Q. Would you say that -- did he use force?

10 A. Yes, he did.

11 Q. Did you observe anyone being hit by either his
12 arms or any part of his body?

13 A. I'm not sure.

14 Q. After -- while he was flailing, was he saying
15 anything to you-all?

16 A. I can't recall.

17 Q. Once he began swinging, what happened next?

18 A. It was a struggle.

19 From then on we tried to gain control of him and
20 we were unable to. We were able to take him down to the
21 ground. He was still fighting with us. That's when
22 Lieutenant Riccio realized that we needed help and he
23 came. He deployed his OC spray once. It had no effect on
24 him and he sprayed it several more times.

25 Q. Do you know why it had no effect?

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1 A. It's unknown.

2 Sometimes people are highly intoxicated or if
3 they're on drugs, which, you know, I don't think he was,
4 sometimes it doesn't have affect on them.

5 Q. Do you know if the defendant has any training of
6 any sort?

7 A. He did say to us that he knows how to fight
8 through it from training in the military.

9 Q. When you-all were in the back, were there other
10 witnesses?

11 A. No.

12 Q. At any point did a crowd begin to form?

13 A. No.

14 MS. CHISOLM: Court's indulgence.

15 THE COURT: Yes, ma'am.

16 [Whereupon, Ms. Chisolm and Mr. Finch confer]

17 MS. CHISOLM: No further questions. Please
18 answer any questions that the defense may have.

19 CROSS-EXAMINATION

20 BY MR. CONDON:

21 Q. Officer Devasto, Officer Riccio was back there,
22 too, wasn't he?

23 A. Yes, sir.

24 Q. And y'all went back there to investigate; isn't
25 that true? To investigate what happened?

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1 A. Yes. Uh-huh.

2 Q. And you were just doing an investigative stop;
3 isn't that true?

4 A. I wouldn't call it an investigative stop.

5 When we detained him, we were conducting an
6 investigation. We were figuring out what happened during
7 this incident.

8 Q. Right. But you were just doing basically an
9 investigative stop to see what happened?

10 A. Yes.

11 Q. Did anybody after the incident ever tell you
12 that you had arrested the wrong man? Did anybody from the
13 building or --

14 A. There were bystanders around.

15 At this point, after he did resist arrest and he
16 did assault, then it was a different situation. It was no
17 longer what happened when we first arrived at the call.

18 Q. But did anybody ever tell you that he wasn't
19 involved in the fight?

20 A. I don't recall.

21 Q. But what y'all did in the back was to
22 investigate; isn't that true?

23 A. Yes.

24 MR. CONDON: No further questions, Your Honor.

25 MS. CHISOLM: Brief redirect, Your Honor.

REDIRECT EXAMINATION

BY MS. CHISOLM:

Q. Did you-all ever arrest the defendant for the fight in the bar?

A. We arrested him for resisting arrest and assault on police.

Q. His conduct for --

A. Yes, his combative behavior.

MR. CONDON: Objection, Your Honor. Leading the witness.

THE COURT: Ms. Chisolm, please rephrase your question so you do not lead this witness. Thank you.

MS. CHISOLM: Yes, Your Honor.

Q. [Ms. Chisolm] At some point did the event change from an investigative stop to an arrest?

A. Yes. When we asked him to stop and he didn't; at that point when we told him that he was being detained, he needs to stop; and at that time we could detain him as long as we want until we complete the investigation.

MS. CHISOLM: No further questions, Your Honor.

THE COURT: Mr. Condon, recross?

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- - -

- - -

RECROSS-EXAMINATION

BY MR. CONDON:

Q. So the only reason you detained him was because he did stop; isn't that true? Isn't that true?

A. We detained -- we detained him because we were conducting an investigation.

Q. Right.

A. They were hiding in the woods --

Q. One second. Just answer yes or no, and then you can explain.

A. What was your question?

Q. Isn't it true that the only reason you detained him was because he didn't stop? Isn't that true?

A. No.

He was detained because he was hiding in the woods. He had blood on his shirt. We had the right to conduct the investigation. We had the right to detain any person that we thought may be involved.

Q. But you didn't even know who was involved. Isn't that true?

A. We had witnesses stating that two white males that were possibly involved ran to the back to the woods.

Q. So isn't it true that you're conducting an investigation?

A. Yes.

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1 Q. Okay.

2 A. And we have the right to detain people for an
3 investigation.

4 Q. And the only reason you detained him was because
5 he didn't stop; isn't that true?

6 A. No.

7 MR. CONDON: No further questions, Your Honor.

8 THE COURT: You may step down. Thank you.

9 [Whereupon, the witness is excused and exits the
10 witness stand.

11 THE COURT: Call your next witness.

12 MS. CHISOLM: Your Honor, the State rests.

13 THE COURT: Ladies and gentlemen, of the jury,
14 that indicates to the Court there's a matter of law
15 that I must take up outside of your presence. Do not
16 begin your deliberations. Do not discuss this case
17 amongst yourselves.

18 Please also use this time to take our mid-
19 afternoon break.

20 Please rise for the jury.

21 [Whereupon, the jury exits the courtroom at
22 2:28 p.m.]

23 THE COURT: Thank you. Be seated.

24 - - -

25 - - -

MOTION FOR A DIRECTED VERDICT

THE COURT: Mr. Condon, I'll be happy to hear from you.

MR. CONDON: Your Honor, we would make a motion for a directed verdict. There's no basis -- no probable cause for an arrest, and they have to have an arrest in order to arrest somebody and then to have the arresting arrest.

There's no probable cause. They're strictly conducting an investigative investigation. A person is not required legally to talk to the police. A case of the State vs. Brennan there's a Terry stop, and you're free to walk away from that -- from that stop. There's no legal requirement to talk to police.

Based on that, Your Honor, and the fact that there's no probable cause that a crime has been committed by Mr. Husted, as well as the only reason they stopped him was because he did not talk to them, we would ask for a directed verdict.

They don't have a lawful arrest and they don't have probable cause for an arrest.

THE COURT: Mr. Condon, it is -- is it your position that if you do not have probable cause for a lawful arrest, then you may assault a police officer?

MR. CONDON: My position is that they arrested

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1 him without probable cause that he had committed a
2 crime. And only after the arrest, if it's lawful, if
3 it's lawful, could you have the -- then can you have
4 the charge of, number one, of resisting arrest or
5 assault on a police officer while resisting arrest.
6 So number one, the fundamental basis of it is if they
7 have to have probable cause that a crime has been
8 committed. We're talking about a misdemeanor -- and
9 it's got to be committed in the officer's presence.
10 If it's not committed in the officer's presence, they
11 have to have -- number one, they have to have probable
12 cause.

13 Here in this case there's no probable cause that
14 a crime has been committed. All we have is an
15 investigation and he didn't talk to the police and
16 walked away from them, then they detain him. And they
17 detain him merely because he didn't talk to them.

18 There is no basis that a crime has been
19 committed by Mr. Husted for there to be a lawful
20 arrest, and they need a lawful arrest in order to have
21 resisting arrest. It's an element, I think, of the
22 charge. And there's no evidence that he, in fact,
23 committed a crime.

24 THE COURT: There's no evidence that has been
25 presented? Mr. Condon, I'm just trying to make -- I'm

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1 trying to break your argument down so that I
2 understand your position.

3 Your position is that there was no probable
4 cause for a lawful arrest?

5 MR. CONDON: Correct.

6 THE COURT: And, thus, even if, assuming that
7 the State has produced testimony that would indicate
8 that your client had committed an assault on a police
9 officer or resisted in some form or fashion, you
10 believe that because he was not under lawful arrest
11 that he cannot commit that offense?

12 MR. CONDON: Correct.

13 THE COURT: All right. Ms. Chisolm?

14 MS. CHISOLM: May it please the Court.

15 Your Honor, we've provided testimony that the
16 defendant -- well, I'll talk about the disorderly
17 conduct first. We've provided evidence -- or
18 testimony that the defendant was intoxicated, that he
19 was behaving in a disorderly and boisterous manner, he
20 was using profane and obscene language in a public
21 place, and that was why they were -- that's why they
22 were arresting him.

23 As far as the investigation goes, they had
24 probable cause to think that he might have been
25 involved in that -- in the possible assault, because

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1 he had -- he did have blood on him. They also found
2 out that -- they also learned that he run behind the
3 building when the police had come. They found him
4 hiding. They had reason to detain him to, you know,
5 further investigate.

6 Additionally, physical force, touching,
7 restraint, or formal declaration of arrest is not
8 essential --

9 THE COURT: I'm going to need you to slow down
10 and speak up, Ms. Chisolm, so that --

11 MS. CHISOLM: I'm sorry.

12 THE COURT: -- my court reporter can write down
13 what you are saying.

14 MS. CHISOLM: Yes, Your Honor.

15 Physical force, touching, restraint or formal
16 declaration of arrest is not essential as long as the
17 intention to arrest is made plain.

18 An intention is, you know, determined by conduct
19 and circumstances. And I believe that by putting --
20 placing a handcuff on the defendant by, you know --
21 all the circumstances that surrounded that event, that
22 he knew that he was being detained. If not, he knew
23 he was being -- that there was an intention to being
24 arrested.

25 As far as the assault, assault is -- assault

1 occurs when a person violently or forcibly attempts to
2 hurt or injure a person. There was testimony that he
3 had a -- one handcuff on him and an open handcuff
4 which had a sharp edge. He was flailing his arms
5 around forcibly and had every reason to know that, in
6 the close proximity that they were, that if not his
7 arms or his elbows or his hands, that that handcuff
8 could possibly injure someone.

9 It's not necessary that the actual injury or
10 harm take place. You heard the officer also say that
11 she was in fear for her life. She didn't know what
12 was -- you know, what to expect or what was going on.
13 And so I think that those facts go to assault as well
14 as battery because they were -- they were touches of
15 the defendant of his own person as well as the
16 handcuff.

17 As far as the resisting arrest, he was opposing
18 the arrest. He was obstruct -- he was obstructing
19 their investigation. I believe that the State has put
20 forth effort -- not put forth effort. I'm sorry --
21 put forth testimony that the jury can consider in
22 order to find him guilty.

23 [Whereupon, Ms. Chisolm and Mr. Finch confer]

24 MS. CHISOLM: So with those facts, Your Honor,
25 we believe that we have put in evidence to cover each

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1 of the elements of the crimes he's been charged with.

2 THE COURT: All right. Thank you.

3 Mr. Condon, I'll be happy to hear from you.

4 MR. CONDON: Your Honor, it is not against the
5 law to not talk to the police and it is not against
6 the law to walk away from a Terry stop. And that's
7 what this is. It's not against the law. State vs.
8 Brennen clearly states that it's not against the law
9 to walk against -- walk away from a Terry stop.

10 And that's what this is, the Terry stop, and
11 it's not against the law. And so there's no lawful
12 arrest at that point. The only -- resisting arrest,
13 because they tried to detain somebody who didn't commit
14 a crime, basically. There's no basis for the arrest.
15 They have to have a basis for the arrest. And right
16 at that point, they're just doing a Terry stop.

17 THE COURT: All right. Under Rule 19 the Court
18 is concerned with the existence or nonexistence of
19 evidence, not as to its weight.

20 Based upon the testimony that the Court has
21 heard so far, the Court must determine whether or not
22 -- the essential element comes down to whether or not
23 Mr. Husted could have lawfully resisted arrest. I
24 must consider whether or not at the moment the arrest
25 was made the officers had probable cause to make that

1 arrest. I must consider whether at that moment the
2 facts and circumstances -- looking at the totality of
3 the circumstances surrounding the arrest, based upon
4 the facts as presented, whether they had information
5 which was sufficient to warrant a prudent man in
6 believing that the defendant had committed or was
7 committing an offense.

8 Based upon the totality of the circumstances,
9 there was testimony by witnesses that indicated that
10 the defendant was hiding in the woods, that he had
11 blood on his shirt, and based upon that they had
12 placed Mr. Husted under arrest. Based upon the
13 existence, not as to the weight of the evidence I
14 believe and I do find the State has met its burden.

15 I deny your motion for a directed verdict at
16 this time, Mr. Condon.

17 MR. CONDON: Just note -- Your Honor, just note
18 my objection for the record.

19 THE COURT: It is clearly notes.

20 MR. CONDON: The case is State vs. Brennen.

21 THE COURT: Thank you.

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23 - - -

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1 [Whereupon, the witness takes the witness stand]

2 THE CLERK OF COURT: Ms. Corley, if you'll
3 please speak into this microphone and say your full
4 name and then spell your last name for the record.

5 THE WITNESS: It's Tamera Nicole Corley.
6 C-O-R-L-E-Y.

7 THE COURT: Mr. Condon.

8 MR. CONDON: Thank you, Your Honor.

9 - - - - -

10 TAMERA CORLEY,

11 Having Been First Duly Sworn,
12 was Examined and Testified as Follows:

13 DIRECT EXAMINATION

14 BY MR. CONDON:

15 Q. Ms. Corley, could you give the jury the benefit
16 of a little bit about of background and, you know, what
17 you do in terms of work or education.

18 A. I'm a full-time student at College of
19 Charleston. I work at Back Nine Pub as a full-time
20 bartender. I also volunteer twice a week at Habitat for
21 Humanity.

22 Q. Were you there on the night of June -- I'm
23 talking about the Back Nine Pub. Just, you know, briefly
24 describe what kind of establishment it is.

25 A. Well, this is a small like neighborhood bar. I

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1 think our max capacity is like eighty people.

2 Q. And how long -- how long have you worked there?

3 A. I've been there a little over two years.

4 Q. And were you working there on the night of June
5 13th, 2009?

6 A. I was.

7 Q. Did you call the police?

8 A. I did.

9 Q. Now, why did you call the police?

10 A. There was just some hostility, and you could
11 tell there was a fight that was about to break out. And I
12 had warned the guys several times that if they started
13 fighting, I was going to call the cops.

14 Q. Okay. And the people you're talking about were
15 who?

16 A. It was Jason Ayers and Robbie Morris, I believe.

17 Q. And you know them by them having been there at
18 the bar?

19 A. That's correct.

20 Q. Okay. And did the fight involve anybody other
21 than those two individuals?

22 A. No.

23 Q. Did you see the fight?

24 A. I did.

25 Q. What happened in the fight?

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1 A. Basically like Jason Ayers hit Robbie Morris and
2 then people just were pulling them off of each other. It
3 lasted for about twenty seconds.

4 Q. And who helped break up the fight?

5 A. There were several people that were outside.

6 The bar was actually closing, so it was end of
7 the night, so just customers that were standing out there.

8 Q. Okay. And do you recall who would have helped
9 break up the fight?

10 A. Jason Husted was there; Jason Jackson was there;
11 Robbie Gass, which is Jason Ayers' cousin, was helping. I
12 don't recall anybody else, specifically.

13 Q. Okay. And those -- and those individuals helped
14 break up the fight?

15 A. That's correct.

16 Q. Now, that particular night do you remember, you
17 know, seeing Jason Husted earlier before the -- before the
18 bar closed?

19 A. Yes.

20 Q. Okay. Was he there long or just a short period
21 of time?

22 A. He wasn't there very long, as far as I remember.

23 Q. And was there anything unusual about his
24 behavior or how he was doing in -- in terms of his
25 behavior?

1 A. No.

2 Q. Okay. Other than calling -- did you talk to the
3 police at the scene?

4 A. I did.

5 Q. Okay. And do you remember what you told the
6 police?

7 A. Well, whenever the first cop pulled up, the
8 fight was already over with so people were -- people were
9 actually getting in their cars leaving. And he was trying
10 to find out, you know, who was in the fight. So we were
11 letting -- we were pointing him in the direction of where
12 the people were.

13 Q. And would you have told them that Robert Morris
14 was in the fight?

15 A. Yes.

16 I don't think I knew his last name at the time
17 but, yeah. He had a bright-white shirt on and he was
18 bleeding, so it wasn't hard to find him.

19 Q. And that the other person involved was Jason
20 Ayers involved in the fight?

21 A. Correct.

22 Q. During this time did you ever go to the back of
23 the bar? in the back of the pub that night?

24 A. No.

25 Q. Okay. So you stayed up front?

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1 A. Yes.

2 Q. Okay. So when the first officer arrived, the
3 situation with -- people were leaving and the situation
4 was calming down?

5 A. Yes.

6 Q. Okay. Did you ever see Jason Husted later on
7 that night?

8 A. The next time I saw Jason he was coming from
9 around the bar in handcuffs.

10 Q. Did anybody come tell the police that they had
11 the wrong man?

12 A. Yes.

13 Q. Was that -- was that a common sentiment conveyed
14 to the police?

15 A. Yes.

16 Q. Do you know how long Jason Husted was in the
17 police cruiser before EMS arrived or treated him? Do you
18 know?

19 A. No.

20 I don't know exactly how long. I would say
21 maybe, I mean, a good thirty minutes at least. I don't --
22 I'm not exactly sure, though.

23 MR. CONDON: No further questions, Your Honor.

24 THE COURT: Mr. Finch?

25 MR. FINCH: Thank you, Your Honor. Just a

1 couple of questions.

2 Ms. Corley?

3 THE WITNESS: That's correct.

4 CROSS-EXAMINATION

5 BY MR. FINCH:

6 Q. Ms. Corley, you gave quite a -- quite a bit of
7 detail about who was involved throughout the night. It
8 seems like you know a lot of these individuals; is that
9 true?

10 A. That's true.

11 Q. And how do you know all these individuals that
12 you mentioned earlier?

13 A. From the bar.

14 We're kind of a regulars bar, so pretty much
15 people that come in there come in there on a regular
16 basis.

17 Q. So would it be fair to say, then, that the
18 people you mentioned are regular customers?

19 A. Yes.

20 Well, everyone but Robbie Morris.

21 Q. Okay. So Mr. Husted is a regular customer?

22 A. Yes.

23 Q. And you normally serve him --

24 A. That's correct.

25 Q. -- at the bar?

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi Harrington, Circuit Court Judge

Case No. 2010180066

The State..... Respondent

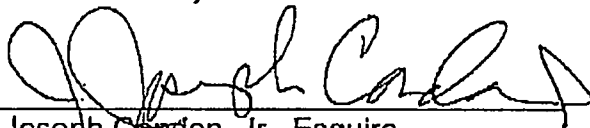
v.

Jason Thomas Husted..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 10, 2012


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Attorney for Appellant

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1 A. That's correct.

2 Q. Okay. And I know it's tough being a student and
3 working full time. Is that where you make most of your
4 money, working at the bar?

5 A. Yes.

6 Q. So Mr. Husted tips you and pays you at the bar;
7 correct?

8 A. Yes.

9 Q. And the other gentlemen you mentioned also buy
10 drinks and tip you at the bar?

11 A. Yes.

12 Q. When you were working that night you saw a fight
13 break out, or about to break out, and that caused you to
14 call the police; correct?

15 A. That's correct.

16 Q. And do you recall the warnings you gave the
17 individuals who were about to fight, what kind of warnings
18 you gave them?

19 A. Probably just to cut it out and go home.

20 Q. Do you remember what you told the 911 operator
21 when you called?

22 A. No.

23 I just -- that people were fighting.

24 Q. Did you -- do you recall if you said they were
25 fighting inside or outside of the bar?

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1 A. Outside.

2 Q. Did you say how many people were fighting?

3 A. I don't -- I don't recall. I don't think so.

4 Q. Okay. So it's fair to say, then, that perhaps
5 the police didn't know the whole story that you knew,
6 because you were there, because you didn't tell them, did
7 you?

8 A. On the phone, no.

9 Q. Okay. So it would be fair to assume, then, that
10 police, when they arrived, didn't have a complete picture
11 of what was going on; correct?

12 A. Sure.

13 Q. Okay. And you -- did you go outside of the bar
14 after the fight was over when people were outside? Were
15 you inside or outside of the bar?

16 A. I went outside of the bar.

17 Q. Outside.

18 Were you close to the door?

19 A. Sure. Yeah.

20 Q. Okay. Well, I don't know if you -- I don't
21 know.

22 A. Yeah.

23 Q. Okay. But you never went around back?

24 A. That's correct.

25 Q. But you heard people say that people involved in

1 the fight went around the back of the bar; correct?

2 A. We told the police that the other guy involved
3 had walked in that direction, yes.

4 Q. Okay. The other guy.

5 A. Right. And he --

6 Q. You told the police and the police understand
7 that the other guy or maybe guys, because they didn't have
8 the complete picture, went around the side of the bar?

9 MR. CONDON: Your Honor, he testified -- she
10 testified one other guy. I just don't want him to put
11 words in her mouth.

12 THE COURT: Are you making an objection?

13 MR. CONDON: Objection, Your Honor.

14 THE COURT: And basis?

15 MR. CONDON: He just needs to ask a question,
16 not give a speech.

17 THE COURT: I think he was getting to the
18 question.

19 Please get to the question. Thank you.

20 Q. [Mr. Finch] Based on your earlier testimony
21 that the police probably didn't have all the information
22 and that somebody told them that a guy had gone --
23 involved in the fight had gone around the corner --

24 A. Uh-huh.

25 Q. -- the police knew or the police assumed -- it's

1 fair to assume that the police assumed that someone around
2 the corner had been involved in a fight; correct?

3 A. Sure.

4 Q. Okay. So the police went around the corner to
5 check it out I guess?

6 A. Uh-huh.

7 Q. Correct?

8 A. [No response]

9 Q. You saw the police go around the corner?

10 A. There were a couple of cops there that night.

11 I don't specifically remember seeing anyone walk
12 back there, no.

13 Q. Okay. But you didn't go back there?

14 A. That's correct.

15 Q. Okay. You don't know what happened back there?

16 A. That's correct.

17 Q. Okay. And you have -- you have really no idea
18 why Mr. Husted was placed in handcuffs, do you?

19 A. No.

20 Q. You have really no knowledge of the arrest cause
21 at all, do you?

22 A. [No response]

23 MR. FINCH: No further questions.

24 MR. CONDON: Just a few, Your Honor.

25 - - -

REDIRECT EXAMINATION

BY MR. CONDON:

Q. Ms. Corley, Mr. Husted that night was not intoxicated or agitated or in any type of manner like that?

A. Not that I -- not that I saw, no.

Q. Okay. And you know him from being a regular customer?

A. That's correct.

Q. And he comes there to play pool and other -- you have other activities besides --

A. Yes.

Q. -- being a bar?

A. Right.

Q. And you told the police that there was one other guy involved in the fight?

A. Right.

MR. CONDON: No further questions, Your Honor.

MR. FINCH: Just one question.

RECROSS-EXAMINATION

BY MR. FINCH:

Q. You're familiar with Mr. Husted's behavior inside the bar?

A. Correct.

Q. But you don't really know what he does outside

1 the bar, do you --

2 A. No.

3 Q. -- at least that night?

4 MR. FINCH: No further questions.

5 THE COURT: Ms. Corley, you may step down. You
6 are excused.

7 THE WITNESS: Thank you.

8 THE COURT: Thank you.

9 [Whereupon, the witness is excused and exits the
10 witness stand]

11 THE COURT: Mr. Condon, call your next witness.

12 MR. CONDON: Thank you, Your Honor. We call
13 Brian Buckner.

14 [Whereupon, Mr. Buckner comes forward]

15 THE CLERK OF COURT: Sir, if you'll stand right
16 over there. I need to swear you in.

17 Put your left hand on the Bible and raise your
18 right hand.

19 [Whereupon, Mr. Buckner is duly sworn by the
20 clerk of court as follows: do you swear or affirm
21 that your testimony will be the truth, the whole
22 truth, and nothing but the truth, so help you God]

23 THE WITNESS: I do.

24 THE CLERK OF COURT: Be seated.

25 [Whereupon, the witness takes the witness stand]

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ROBERT OTTS,

Having Been First Duly Sworn,
was Examined and Testified as Follows:

DIRECT EXAMINATION

BY MR. CONDON:

Q. Were you there on -- at the Back Nine Pub on
June 13th, 2009?

A. Yes, I was.

Q. Do you know Jason Husted?

A. I do.

Q. Okay. And do you know the other people involved
in this incident?

A. A few of them.

Q. All right. Do you see -- what did you see that
night on June 13th, 2009?

A. Well, Jason and I were --

THE WITNESS: Sorry. I'm just a little nervous.

A. Jason and I were leaving the bar -- or not
leaving the bar. Jason and I were at the bar.

And outside the bar there was a disturbance.
And two gentlemen were just talking and then they started
fighting. And they were going at it pretty hard. And it
got broke up. Then they started jawing back and forth,
and then they went back at it again, and jawing again, and
went back at it again. It happened a couple of times.

1 And about that time --

2 Q. Well, first of all, who were -- who were those
3 people?

4 A. It was Jason Ayers, who I didn't know. I didn't
5 know him before that night. And a guy named Robbie
6 Morris, I believe. And I've never seen that guy ever
7 again. So I never knew the guys.

8 But one guy was getting beat really bad. He was
9 getting pounded. And I looked at Jason, I said -- I said
10 -- after we broke it up a couple of times I was like,
11 we've got to get -- we've got to get them separated.
12 Every time they would jaw back and forth, this guy is just
13 getting pounded. And --

14 Q. You're talking about Robert Morris?

15 A. Robert Morris.

16 Q. Okay. And did he have like a white shirt on?
17 Do you know what he was wearing?

18 A. I really -- I don't really know what color shirt
19 it was. I just know it was bloody.

20 Q. Okay. Go ahead. And what happened next?

21 A. So I was talking to Jason. I was like, Jason,
22 we've got to separate these guys. If it happens again,
23 I'm not -- I don't know how much more this guy can take.
24 He was conscious but he didn't understand how bad he was
25 being hurt.

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1 Q. When you say Jason, you're talking about Jason
2 Husted?

3 A. Jason Husted.

4 Q. Okay.

5 A. So Jason grabs the guy and he -- I was like,
6 Jason, get him around back. So Jason helps the guy around
7 back. And that's the last time I saw Jason until he was
8 being handcuffed. Or not until he was being handcuffed --
9 until he came around the end of the building clearly
10 upset.

11 And at that point in time, I -- I didn't say
12 anything then. They put him in handcuffs -- or they had
13 him handcuffed, they got him in the car. And I was like
14 what's going on here. And then I started stating, they
15 got the wrong guy, they've got the wrong guy, over and
16 over again, to the point where I was told to be quiet.

17 And we all stood on the corner of the curb and
18 that was -- that was it.

19 Q. Prior to the incident is Jason Husted
20 intoxicated or in any way belligerent or upset or
21 anything like that?

22 A. No.

23 We're -- we had been riding motorcycles all day,
24 had a great time, got done eating dinner. This was going
25 to be the last stop. And he wanted to play some pool and

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1 so we went in there to shoot a couple games of pool. We
2 were having a great time. It was a good atmosphere. It
3 just ended bad.

4 MR. CONDON: No further questions, Your Honor.

5 THE COURT: Mr. Finch?

6 MR. FINCH: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MR. FINCH:

9 Q. Mr. Otts, as you testified, you and Mr. Husted
10 were at the bar?

11 A. Uh-huh.

12 Q. And things were going pretty well?

13 A. Yes.

14 Q. Pretty good night? Pretty good day, it sounds
15 like.

16 A. Uh-huh.

17 Q. And this fight breaks out as bars -- sometimes
18 as bar fights. You've seen bar fights before; right?

19 A. Yes.

20 Q. And usually if people are fighting, they should
21 be arrested; correct?

22 A. The people fighting.

23 Q. The people fighting, right. Of course.

24 And that's why you assumed that the police
25 arrested the wrong guy, because Jason wasn't in the fight

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1 inside the bar, was he?

2 A. Jason was not involved in the fight inside the
3 bar.

4 Q. But you didn't see what happened outside the bar
5 around the back, did you?

6 A. Did not see around the back side of the bar.

7 Q. You never went back there?

8 A. Was not allowed back there.

9 Q. So it's possible that something happened behind
10 the bar that led to Mr. Husted's arrest?

11 MR. CONDON: Objection, Your Honor. That calls
12 for speculation. He either knows or he doesn't. He's
13 asking him to speculate.

14 THE COURT: Sustained.

15 Q. [Mr. Finch] You said that when Mr. Husted came
16 up front, he was handcuffed and clearly upset. Could you
17 describe that for the jury, please?

18 A. He wasn't crying or -- but you could just tell
19 he was like, why am I handcuffed, why -- what have I done
20 wrong. And that -- at least that was the view I saw.

21 Q. It wasn't what he was saying.

22 A. He -- I'm not going to say what he said, but it
23 was to that -- I can't quote his words. But it was in
24 that realm, yes.

25 Q. But it was your testimony, so I'm clear, that

1 after he went around the corner you didn't see him or hear
2 about anything or hear anything back there until he came
3 to the front in handcuffs?

4 A. That's correct.

5 MR. FINCH: No further questions.

6 THE COURT: Mr. Condon?

7 MR. CONDON: Mr. Otts, just a few questions.

8 REDIRECT EXAMINATION

9 BY MR. CONDON:

10 Q. In terms of how Jason was when he came around
11 the building after going back there -- well, let me ask
12 you -- let me back up just a second.

13 In breaking up the fight, did you ask Jason
14 Husted to take Robert Morris around the back?

15 A. I did. I did.

16 Q. Did -- when Jason Husted came around, he was
17 upset because of why?

18 A. They had him handcuffed and --

19 MR. FINCH: Objection. Speculation. He doesn't
20 know why he was upset.

21 THE COURT: If he knows.

22 A. That they had him handcuffed.

23 And I -- I don't think he did anything wrong. I
24 can't tell you. He was handcuffed and he came around
25 there and you could tell he was physically shaken. He

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1 didn't understand why he was being arrested, I guess.

2 MR. CONDON: No further questions, Your Honor.

3 THE COURT: Mr. Finch?

4 MR. FINCH: No questions, Your Honor.

5 THE COURT: Mr. Otts, you may step down. Thank
6 you.

7 THE WITNESS: Thank you.

8 [Whereupon, the witness is excused and exits the
9 witness stand]

10 THE COURT: Call your next witness.

11 MR. CONDON: Thank you, Your Honor.

12 Your Honor, I would call -- it's -- her name,
13 previously it was Shannon Hayes but she got divorced
14 so her name now is Shannon McKevlin.

15 [Whereupon, Ms. McKevlin comes forward]

16 THE CLERK OF COURT: This way, Ms. McKevlin.

17 Please put your left hand on the Bible. Raise
18 your right hand.

19 [Whereupon, Ms. McKevlin is duly sworn by the
20 clerk of court as follows: do you swear or affirm
21 that your testimony will be the truth, the whole
22 truth, and nothing but the truth, so help you God]

23 THE WITNESS: I do.

24 THE CLERK OF COURT: Be seated.

25 [Whereupon, the witness takes the witness stand]

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1 THE CLERK OF COURT: Ms. McKevlin, I need you to
2 speak into this microphone and state your full name,
3 and then spell your last name for the record.

4 THE WITNESS: Shannon Leigh McKevlin.
5 M-C-K-E-V-L-I-N.

6 THE COURT: Mr. Condon.

7 MR. CONDON: Thank you, Your Honor.

8 - - - - -

9 SHANNON HAYES MCKEVLIN,
10 Having Been First Duly Sworn,
11 was Examined and Testified as Follows:

12 DIRECT EXAMINATION

13 BY MR. CONDON:

14 Q. Shannon, previously you were Shannon Hayes?

15 A. Yes, sir.

16 Q. Okay. And your name now is -- you're divorced,
17 and Shannon McKevlin?

18 A. Yes, sir.

19 Q. Shannon, I just want to go over a couple of
20 things.

21 You -- were you at the Back Nine Pub that night
22 on June the 13th, 2009?

23 A. Yes, sir.

24 Q. Okay. Well, first of all, the people in the
25 fight that night were who?

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1 A. It was Jason Ayers and Robbie Morris I believe
2 is his last name.

3 Q. Okay. Now, had you ever previously dated Jason
4 Ayers?

5 A. Yes, sir.

6 Q. And y'all had broken up?

7 A. Yes, sir.

8 Q. And did Robbie Morris ask you to go on a
9 motorcycle ride?

10 A. Yes, sir.

11 Q. Is that -- is that in a sense what precipitated
12 the fight between those two gentlemen, Jason Ayers and
13 Robbie Morris?

14 A. Yes, sir. Pretty much, yes, sir.

15 Q. And did you see the fight between those two?

16 A. Yes, sir. Between those two.

17 Q. And when you came -- when the police came, did
18 you explain to the police it was a one-on-one -- one-on-
19 one fight between Jason Ayers and Robbie Morris?

20 A. Yes, sir.

21 Q. And did Jason Husted help break up that fight?

22 A. Yes, sir.

23 Q. Now, after this whole incident and after -- did
24 you see Jason Husted a few days after this incident?

25 A. Yes, sir, I did.

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1 Q. Okay. And what kind of physical condition was
2 he in?

3 A. He had bruises.

4 He had bruises on his arm, he had a marking on
5 his head that almost looked like it was a cut mark or
6 maybe hitting pavement, I'm not sure. But he had a
7 marking on his head. And I know he had a bruise on his
8 arm, a major like holding bruise.

9 Q. And you would have told the police that it was a
10 fight one-on-one between two gentlemen?

11 A. Yes, sir, right when they got there. Yes, sir.

12 MR. CONDON: No further questions, Your Honor.

13 THE COURT: Mr. Finch?

14 CROSS-EXAMINATION

15 BY MR. FINCH:

16 Q. Ms. McKevlin, you didn't see anything that went
17 on between Mr. Husted and the police behind the pub, did
18 you?

19 A. No, sir.

20 Q. Didn't hear anything while it was going on? As
21 far as contemporaneously as what was happening at the same
22 time, did you hear what was going on?

23 A. No, sir.

24 Q. And you saw -- you saw Mr. Husted several days
25 later and he had some bruising on him?

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1 A. Yes, sir.

2 Q. Did you see him in between 2:20 a.m. June 13th,
3 2009, and those several days any time in between?

4 A. No, sir. He was incarcerated.

5 Q. So you don't know how the bruises got there?
6 You just saw bruises; correct?

7 A. Right. When he was dismissed. Yes, sir.

8 MR. FINCH: No further questions.

9 THE COURT: Redirect?

10 MR. CONDON: No, Your Honor.

11 THE COURT: Ma'am, you may step down. Thank
12 you.

13 THE WITNESS: Thank you.

14 [Whereupon, the witness is excused and exits the
15 witness stand]

16 THE COURT: Call your next witness.

17 MR. CONDON: Thank you, Your Honor.

18 Robert Gass, Your Honor. I'm sorry. Robbie
19 Gass.

20 [Whereupon, Mr. Gass comes forward]

21 THE CLERK OF COURT: This way, sir. Just stand
22 right here.

23 I need you to put your left hand on the Bible
24 and raise your right hand.

25 [Whereupon, Mr. Gass is duly sworn by the clerk]

1 of court as follows: do you swear or affirm that your
2 testimony will be the truth, the whole truth, and
3 nothing but the truth, so help you God]

4 THE WITNESS: Yes, sir, I do.

5 THE CLERK OF COURT: Be seated.

6 [Whereupon, the witness takes the witness stand]

7 THE CLERK OF COURT: I need you to speak into
8 this microphone.

9 THE WITNESS: Yes, sir.

10 THE CLERK OF COURT: State your full name and
11 then spell your last name for the record.

12 THE WITNESS: Robert Noroy [phonetic] Gass, IV.
13 G-A-S-S.

14 THE COURT: Mr. Condon.

15 MR. CONDON: Thank you, Your Honor.

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17 ROBERT GASS,

18 Having Been First Duly Sworn,
19 was Examined and Testified as Follows:

20 DIRECT EXAMINATION

21 BY MR. CONDON:

22 Q. Mr. Gass, I'll just get right to the point.
23 Were you at the Back Nine Pub on June the 13th, 2009?

24 A. Yes, sir.

25 Q. Okay. Earlier there was an allegation that you

1 had a weapon out that night. Did you have a weapon
2 outside your vehicle that night?

3 A. No, sir.

4 Q. Tell me -- tell us -- tell this jury what
5 happened.

6 A. I had Lieutenant Riccio come up, pulled in
7 behind my truck. Me and my cousin were actually getting
8 in the truck to leave. He pulled up, told us to get out,
9 and asked me if I had anything in the truck that he needs
10 to be worried about. And I said, yes, sir, I have a
11 license to carry a .45 and I have a .45 in the console of
12 the truck. And then he handcuffed me and put me on -- in
13 front of the truck and went inside the truck and got the
14 gun.

15 Q. Now, you were -- were you also arrested for
16 being in a fight that night?

17 A. Yes, sir.

18 Q. Okay. Were you in the fight that night?

19 A. No, sir.

20 Q. Okay. Did you in any way participate in that
21 fight?

22 A. No, sir.

23 Q. Did you help break it up?

24 A. Yes, sir.

25 Q. And who was the fight between?

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1 A. It was between Robert Morris and Jason Ayers.

2 Q. And you know Jason Ayers; right?

3 A. Yes, I do. That is my cousin.

4 Q. And you helped break up that fight?

5 A. Yes, sir.

6 Q. Now, did other people try to help break up that
7 fight?

8 A. Yes, sir.

9 Q. Okay. And who else?

10 A. Jason did.

11 Jason grabbed Robert Morris and I grabbed Jason
12 Ayers and Jason, outside, helped me grabbed Jason Ayers.

13 Q. Is that Jason Jackson?

14 A. Jason Jackson, yes.

15 Q. Now, were -- the charge of being in the fight,
16 as well as the possession of the firearm, were those
17 charges dismissed against you?

18 A. Yes, they were.

19 MR. CONDON: No further questions.

20 THE COURT: Ms. Chisolm?

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CROSS-EXAMINATION

BY MS. CHISOLM:

Q. Did you see what happened behind the Back Yard
Pub on June 13th?

A. No, ma'am.

MS. CHISOLM: No further questions, Your Honor.

THE COURT: Mr. Condon?

MR. CONDON: Nothing further, Your Honor.

THE COURT: Mr. Gass, you may step down. Thank
you.

THE WITNESS: Yes, ma'am.

THE COURT: Call your next witness.

MR. CONDON: Thank you, Your Honor.

Your Honor, I call Jason Jackson.

[Whereupon, Mr. Jackson comes forward]

THE CLERK OF COURT: This way, sir.

I need you to stand there, please. I'm going to
swear you in.

I need you to put your left hand on the Bible
and raise your right hand.

[Whereupon, Mr. Jackson is duly sworn by the
clerk of court as follows: do you swear or affirm
that your testimony will be the truth, the whole
truth, and nothing but the truth, so help you God]

THE WITNESS: Yes.

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1 THE CLERK OF COURT: Be seated.
2 [Whereupon, the witness takes the witness stand]

3 THE CLERK OF COURT: I need you to speak into
4 this microphone.

5 State your full name and then spell your last
6 name for the record.

7 THE WITNESS: My name is Jason Kenyata Lamar
8 Jackson. J-A-C-K-S-O-N.

9 - - - - -

10 JASON JACKSON,
11 Having Been First Duly Sworn,
12 was Examined and Testified as Follows:

13 DIRECT EXAMINATION

14 BY MR. CONDON:

15 Q. Mr. Jackson, what do you do for a living?

16 A. I work for AT&T. I'm a service technician.

17 Q. How long have you done that?

18 A. Around eleven years.

19 Q. And your -- in terms of your other skills that
20 you have, you have a background in what?

21 A. In --

22 Q. Like marshal arts or anything like that?

23 A. Yes.

24 Q. And what is that?

25 A. It's Akihito.

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1 I've been taking and teaching Akihito for six
2 years.

3 Q. Were you at the Back Nine Pub on June the 13th,
4 2009?

5 A. I was.

6 Q. Okay. Tell the jury what happened that night.

7 A. That night there was -- Robert Morris was there.
8 And it was karaoke night. We were hanging out, singing,
9 the whole thing. And somebody found out -- or he had
10 found out that I take marshal arts so he came up to me and
11 offered me \$100 to fight. And I told him, aw, get away, I
12 don't even know you, the whole thing.

13 Well, he was looking for a fight that night and
14 ended up fighting Jason Ayers. And when they fought out
15 front, I broke that up. And then the police came, the
16 whole thing, and then later I led the police to the back
17 where Robert Morris was and, you know, they arrested, you
18 know, everybody, the whole thing.

19 Q. Now, you went -- you went to the back briefly?

20 A. I did for a minute.

21 Q. Did you see anything unusual that Jason Husted
22 or Robert Morris were doing?

23 A. I didn't.

24 Q. All right. And you and other people helped
25 break up that fight?

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1 A. Right.

2 Q. And prior to the fight was Jason Husted -- did
3 you see him earlier that day, earlier -- a little bit
4 before the fight?

5 A. I did.

6 Q. Okay. Was there anything unusual about Jason
7 Husted that night?

8 A. Not at all.

9 Q. He was acting his normal self?

10 A. Right.

11 Q. And wasn't intoxicated, wasn't upset?

12 A. No.

13 MR. CONDON: No further questions, Your Honor.

14 CROSS-EXAMINATION

15 BY MR. FINCH:

16 Q. Mr. Jackson, you led the police to the back --

17 A. I did.

18 Q. -- of the Back Nine Pub?

19 A. Right.

20 Q. You were there briefly. About how long would
21 you say?

22 A. Just long enough to point to the direction of
23 where they were. And the police started going in a
24 different direction. They went to the left. I pointed
25 over here and they started going to the left and I said,

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1 no, it's over here towards the right, right side of the
2 building.

3 And then I took a left and went back to the
4 front because that's where my friends were getting
5 arrested there and, you know, detained, all that stuff,
6 so --

7 Q. And you stayed up front?

8 A. I stayed up front.

9 Q. Until you saw -- until you saw police officers
10 come up front --

11 A. Right.

12 Q. -- you were still up front?

13 A. Right. Right.

14 Q. So you didn't see anything that happened back
15 there --

16 A. I did not.

17 Q. -- you didn't hear anything?

18 A. No.

19 MR. FINCH: No further questions.

20 THE COURT: Mr. Condon?

21 MR. CONDON: Just a few, Your Honor.

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REDIRECT EXAMINATION

BY MR. CONDON:

Q. Jason, when you were in the back you didn't hear any loud noises, any boisterous behavior, or anything like that?

A. I didn't.

MR. CONDON: No further questions, Your Honor.

RECROSS-EXAMINATION

BY MR. FINCH:

Q. And you didn't hear any loud voices, behaviors, when you were in the back; correct? That was your testimony you just gave?

A. Right.

Q. You were only back there for a little while?

A. Right.

Q. And not while the police were engaging Mr. Husted?

A. Right.

MR. FINCH: No further questions.

THE COURT: Sir, you may step down. Thank you.

THE WITNESS: Thank you.

[Whereupon, the witness is excused and exits the witness stand]

THE COURT: Call your next witness.

MR. CONDON: Thank you, Your Honor.

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1 Your Honor, I would call Jenny Stoltz. Jennie
2 Stoltz.

3 [Whereupon, Ms. Stoltz comes forward]

4 THE CLERK OF COURT: This way, ma'am.

5 Please put your left hand on the Bible and raise
6 your right hand.

7 [Whereupon, Ms. Stoltz is duly sworn by the
8 clerk of court as follows: do you swear or affirm
9 that your testimony will be the truth, the whole
10 truth, and nothing but the truth, so help you God]

11 THE WITNESS: I do.

12 THE CLERK OF COURT: Be seated.

13 [Whereupon, the witness takes the witness stand]

14 THE CLERK OF COURT: I need you to speak into
15 this microphone and state your full name and then
16 spell your last name.

17 THE WITNESS: My middle name, too?

18 THE CLERK OF COURT: Yes.

19 THE WITNESS: Jennie Coleen Stoltz. Stoltz is
20 S-T-O-L-T-Z.

21 THE COURT: Mr. Condon?

22 MR. CONDON: Thank you, Your Honor.

23 Ms. Stoltz, make sure I pronounce your last name
24 correct. Okay? It's Schults?

25 THE WITNESS: Stoltz.

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1 MR. CONDON: Stoltz. I'm sorry.

2 - - - - -

3 JENNIE STOLTZ,

4 Having Been First Duly Sworn,
5 was Examined and Testified as Follows:

6 DIRECT EXAMINATION

7 BY MR. CONDON:

8 Q. Jennie, you know Jason Husted; right?

9 A. Yes.

10 Q. I mean, y'all are boyfriend-girlfriend?

11 A. Yes. He's my fiancé.

12 Q. Oh. Okay. And what -- have y'all set a date or
13 anything like that?

14 A. March 26th.

15 Q. In terms of -- were you there that night on June
16 13th, 2009?

17 A. Yes, sir.

18 Q. And we're talking about a place called the Back
19 Nine Pub.

20 A. Yes, sir.

21 Q. And you're familiar with it?

22 A. Yes, sir.

23 Q. Now, just briefly tell the jury what you saw
24 that night.

25 A. Well, we had come up there. We were playing

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1 some pool. It was me, Jason, his cousin Robert Otts. And
2 it was Jason Ayers and Jason Morris were getting into a
3 fight in the front and -- over Sharon. And Jason Husted
4 and Robert Gass are the ones that actually pulled them
5 apart.

6 And once we saw how bad Robert Morris was beat
7 up, Robert Otts actually told Jason to take him around
8 back so that way it would break it up and that way Jason
9 Ayers wouldn't attack Robert Morris again.

10 Q. Did you go into the back of the Back Nine Pub?

11 A. No. I stayed in the front.

12 Q. Obviously, you don't know what happened in the
13 back?

14 A. No.

15 Q. Did you ever hear any noises from the back or
16 anything like that? You know, any boisterous noises or
17 anything like that?

18 A. Whenever they were coming back around with Jason
19 in handcuffs.

20 Q. Okay. And that's the next -- that's the next
21 time you saw Jason Husted?

22 A. Yes.

23 MR. CONDON: Your Honor, could I mark these as
24 exhibits for identification?

25 THE COURT: You may.

1 [Whereupon, Defendant's Exhibit Number 4 is
2 marked by the court reporter]

3 [Whereupon, Defendant's Exhibit Number 5 is
4 marked by the court reporter]

5 [Whereupon, Defendant's Exhibit Number 6 is
6 marked by the court reporter]

7 [Whereupon, Defendant's Exhibit Number 7 is
8 marked by the court reporter]

9 MR. CONDON: May I approach the witness, Your
10 Honor?

11 THE COURT: You may.

12 MR. CONDON: Thank you.

13 Q. [Mr. Condon] Jennifer, can you identify those?

14 A. Yes.

15 These are the pictures I took once I got Jason
16 out of jail.

17 Q. And what are the pictures of?

18 A. All of the bruises and marks that were all over
19 his body whenever I picked him up.

20 Q. And you would have picked him up after this
21 incident?

22 A. It was on -- it was Sunday.

23 Q. Now, when Jason came around the corner after
24 being arrested, what happened next to him in terms of
25 where he was seated, was he ever treated, or anything like

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1 that?

2 A. He was placed in the back of the cop car.

3 And we were all trying to tell the police that
4 they had gotten the wrong Jason, it was Jason Ayers not
5 Jason Husted, and we all got yelled at and told us to stay
6 back up on the curb or else we could be arrested.

7 Q. Now, how long was it -- was Jason Husted ever
8 treated?

9 A. The only thing he ever got was a bottle of water
10 thrown at his face and basically just washing his face
11 with the pepper spray being washed off. But it was a
12 while. He was in the cop car for a good probably thirty
13 minutes to an hour before they even did that.

14 Q. After Jason Husted was arrested and brought
15 around the corner, did you hear anything that he said, or
16 anything like that, after he was arrested and brought
17 around the corner?

18 A. He was asking why he was being arrested.

19 MR. CONDON: No further questions, Your Honor.

20 THE COURT: Ms. Chisolm?

21 MS. CHISOLM: Yes, please.

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CROSS-EXAMINATION

BY MS. CHISOLM:

Q. After Jason and the other man went around the building, did you see what happened?

A. No.

Q. The next time you saw him was when he was being brought out in cuffs?

A. Yes.

Q. And you said he was put into the cop car?

A. He was put in the cop car, yes.

Q. And then he was taken to jail?

A. Well, he sat in the cop car for a long time before they drove with him.

Q. When they drove off with him --

A. Yes.

Q. -- he ended up in jail; correct?

A. Yes.

Q. And how long was he in jail?

A. From Friday -- well, actually, like it was Saturday morning until Sunday. It was probably around 12:00 or 1:00 whenever I got him out.

Q. Did you see him in the jail that time?

A. No, not since whenever I -- he got taken away and whenever I picked him up.

MS. CHISOLM: No further questions.

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1 THE COURT: Mr. Condon?

2 MR. CONDON: Nothing further, Your Honor.

3 THE COURT: You may step down. Thank you.

4 [Whereupon, the witness is excused and exits the
5 witness stand]

6 THE COURT: Mr. Condon?

7 MR. CONDON: Your Honor, the defense calls Jason
8 Husted.

9 [Whereupon, Mr. Husted comes forward]

10 THE CLERK OF COURT: Put your left hand on the
11 Bible and raise your right hand.

12 [Whereupon, Mr. Husted is duly sworn by the
13 clerk of court as follows: do you swear or affirm
14 that your testimony will be the truth, the whole
15 truth, and nothing but the truth, so help you God]

16 THE WITNESS: I do.

17 THE CLERK OF COURT: Be seated.

18 [Whereupon, the witness takes the witness stand]

19 THE CLERK OF COURT: Please state your full name
20 and then spell your last name for the record.

21 THE WITNESS: Jason Thomas Husted. H-U-S-T-E-D.

22 THE COURT: Mr. Condon.

23 MR. CONDON: Yes, ma'am?

24 THE COURT: Your witness.

25 MR. CONDON: Thank you.

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1 Jason, I'll get -- I'll get right to the point.

2 - - - - -

3 JASON T. HUSTED,

4 Having Been First Duly Sworn,

5 was Examined and Testified as Follows:

6 DIRECT EXAMINATION

7 BY MR. CONDON:

8 Q. Let's walk through what happened on June 13th,
9 2009. You don't necessarily have to start at breakfast
10 time, but let's say earlier in the evening. What were you
11 -- had been doing?

12 A. Well, we had gone to the Back Room Bar
13 [phonetic] on our motorcycles to play pool and we ran into
14 Shannon, who was talking to Robert Morris. And Bob and I,
15 Robert Otts and I, were introduced to Robert Morris at
16 that time. And we hit it off pretty well because he was
17 riding his motorcycle that night. He gave me his helmet
18 and his keys and told me to take his bike for a ride. And
19 I left the bar, went down the road, came back.

20 And when I got back, he was out front with
21 Shannon. And Robert Gass was there. And I noticed Jason
22 Ayers was there, also, and I could tell by the look on
23 Jason Ayers' face that he wasn't happy because Robert
24 Morris was talking to Shannon.

25 Q. Well, how -- I mean, you know Jason. You had to

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1 know a little bit of history between the two.

2 A. Yeah.

3 I have known Jason Ayers and Shannon for
4 probably -- I had known them for about a year at that
5 point. And they had dated prior to that, but they had
6 broken up just a week before this night.

7 Q. Now, just kind of walk through what happened
8 after that in terms of, you know, step by step.

9 A. Okay. Well, Robert Gass and I watched Jason
10 approach Robert Morris and, you know, words sort of back
11 and forth, and it escalated into a fight. Jason Ayers hit
12 Robert Morris. Hit him in the head and knocked him
13 backwards onto the ground and then he was on top of him
14 with his knees on his shoulders and he was just punching
15 his face.

16 So myself and Robert Gass broke up the fight. I
17 pulled Robert Morris away and Bob Otts helped me pull him
18 away, and then Jason Jackson and Robert Gass pulled Jason
19 Ayers away. But Jason Ayers was still trying to get at
20 him. And that's when Bob Otts told me to take him away
21 and take him around back.

22 So I led him around back. And I didn't really
23 know where to go or what to do at that point. We went
24 into the woods and there was a trail that stopped about
25 twenty feet into the woods. And we were back there for, I

1 don't know, it was a few minutes. And he lit up a
2 cigarette.

3 And I was using my cell phone to look at the cut
4 on his forehead. And I realized at that point he was
5 bleeding really bad and I knew he was going to need some
6 medical attention. So we heard voices and saw flashlights
7 flashing back into the woods. And that's when I heard a
8 female voice ask us to come out, asked us if we had any
9 weapons. I said no.

10 And when I walked out I did say, don't taze me,
11 bro. It was a light-hearted kind of thing. I was -- I
12 was having fun that night and I just -- I guess it was
13 kind of a smart-alecky thing to say. I didn't mean
14 anything by it.

15 So I walked toward the police officers. And I
16 walked past them, actually. And they asked me to stop.
17 And I turned around when I got to the pavement and I put
18 my arms out and I said, I didn't do anything; this is the
19 guy that you -- that you're looking for. And I said, I'm
20 going back to the front of the building.

21 And then I turned and started walking and took
22 about three or four steps. And one of the female officers
23 grabbed my right arm and spun me around, and the other
24 officer grabbed my left arm and they bent my head forward
25 and pushed me down onto the ground. I was on my hands and

1 knees. And they put my arms behind my back, put a
2 handcuff on one wrist.

3 And at the same time that's when Lieutenant
4 Riccio came up and pepper-sprayed me in the face.

5 Q. If you look at the video, could you explain what
6 happens on that video?

7 A. Sure.

8 [Whereupon, Defendant's Exhibit Number 3, DVD,
9 plays from 4:05 p.m. to 4:12 p.m.]

10 MR. CONDON: And I will start it now.

11 THE WITNESS: You have it at half-speed, so it's
12 going to take a while to get to anything.

13 MR. CONDON: Is that better?

14 THE WITNESS: That would be good. Do you want
15 to put it right in the middle here -- you can actually
16 just point here and tap and then the bar should come
17 down. Just tap the -- and keep tapping. Tap, tap,
18 tap. Okay.

19 Q. [Mr. Condon] What are we seeing right now?

20 A. This is the back of the Back Nine. In that
21 corner is the path that leads to the woods off to the left
22 of the screen.

23 All right. That's myself in the dark shirt and
24 that's Robert Morris in the white shirt. And I was
25 saying, let's go over here, let's get away from -- let's

1 get away from that guy. And he was very confused. He was
2 very disoriented.

3 We're back there for a few minutes and then
4 you're going to see Jason Jackson walk up. And he's in
5 the white shirt, also. And that's when he saw where we
6 went back there. Then he goes to let the police know.

7 Q. What's happening right now?

8 A. This is when I'm back there looking at his
9 injury. And he's smoking a cigarette. And there's a --
10 that's Jason Jackson, Officer Devasto and Officer
11 Ferguson. And we were back there for a while.

12 Q. Okay. What's this?

13 A. Looks like Jason Jackson, Officer Ferguson and
14 Officer Devasto again. And he's pointing to the path.
15 And then they walked into the woods. That's when I saw
16 the flashlights.

17 Q. And who is that?

18 A. That's Jason Jackson walking to the edge. So he
19 kind of watched what happened there but I guess he didn't
20 see anything.

21 Q. Who is that?

22 A. That's Officer -- or Lieutenant Riccio.

23 This is where they're instructing us to walk
24 out, asking us if we had any weapons.

25 Q. Right there. What is that?

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1 A. That's me walking backwards into the scene,
2 because I had walked past Officer Devasto and Officer
3 Ferguson and then they asked me to stop and I turned
4 around and I said, I didn't do anything, that's the guy
5 you want. I'm walking back to the front.

6 Q. At this point have you been handcuffed?

7 A. No.

8 Q. And you were facing which way?

9 A. Well, right now I'm in the mid-turn but I'm
10 still facing backwards. And you'll see my arm swing
11 around and then I'll start walking forward here after you
12 unpause it. All right.

13 Q. You're walking away?

14 A. I'm walking away.

15 Q. What happens here?

16 A. That's when I think it was Officer Ferguson
17 grabbed my hand and spun me around. So now I'm facing
18 backwards. And Officer Devasto runs up and grabs the
19 other side and they bent --

20 Q. And what happens now?

21 A. They bent me forward.

22 Q. You're bent to the ground?

23 A. And pulled my arms behind my back.

24 Q. And who's the other person in the picture just
25 standing --

1 A. That's Lieutenant Riccio.

2 He's coming up to spray me in the face with
3 pepper spray like immediately.

4 Q. Did you get sprayed right then?

5 A. I got sprayed there the first time.

6 And now they kind of kick me in the back of the
7 knees and I'm down on my hands and knees. And he's
8 spraying me in the face repeatedly.

9 But, you know, at some point I got hit in the
10 side of the head and I saw stars. It was kind of brutal.
11 And I was begging and pleading the whole time for them to
12 just listen to me because, you know, I hadn't done
13 anything.

14 Q. And what's happening here?

15 A. That's the rest of the police officers that came
16 back there.

17 And then they picked me up, and then they walked
18 me to the front.

19 And then the next thing you'll see is them take
20 Robert Morris to the front.

21 Q. But what happens next is strictly dealing with
22 Robert Morris?

23 A. Yeah, in the video. That's all that's left in
24 the video.

25 [Whereupon, State's Exhibit Number 3, DVD,

1 concludes]

2 Q. [Mr. Condon] Did they ever explain to you why
3 you were being arrested?

4 A. Not that I remember. It was -- everything
5 happened so fast.

6 Q. Did you in any way try to flail a handcuff at
7 these officers or anywhere like that?

8 A. Absolutely not.

9 Q. Did anybody announce to you, before running up
10 and grabbing you, that you were under arrest for
11 disorderly conduct or anything like that?

12 A. No.

13 MR. CONDON: May I approach the witness, Your
14 Honor?

15 THE COURT: You may.

16 Q. [Mr. Condon] Let me show you what's been marked
17 as Exhibit 4, 5, 6 and 7. Do you recognize them?

18 A. Sure.

19 Q. What is that?

20 A. Those are pictures that were taken of my
21 injuries after I came home from the jail.

22 MR. CONDON: Your Honor, I would move those into
23 evidence.

24 THE COURT: 4, 5, 6 and 7?

25 MR. CONDON: Yes, ma'am.

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1 THE COURT: Any objection?

2 MS. CHISOLM: No objection.

3 THE COURT: Defendant's 4, 5, 6 and 7 into
4 evidence without objection.

5 [Whereupon, Defendant's Exhibit Number 4 is
6 admitted into evidence by the Court]

7 [Whereupon, Defendant's Exhibit Number 5 is
8 admitted into evidence by the Court]

9 [Whereupon, Defendant's Exhibit Number 6 is
10 admitted into evidence by the Court]

11 [Whereupon, Defendant's Exhibit Number 7 is
12 admitted into evidence by the Court]

13 Q. [Mr. Condon] Now, what happened to you after
14 you got arrested and were put in the -- well, actually, as
15 you were brought around the side of the Back Nine Pub?

16 A. As I got to the front of the bar my fiancé
17 Jennie, and Bob Otts, were there. And they started
18 telling the police, you've got the wrong guy. And I said
19 to them, please don't let them do this to me.

20 And then they put me in the squad car. Bob told
21 me to ask for EMS. And while I was in the back of the
22 squad car I repeatedly asked for EMS because my face was
23 burning, it had so much OC spray on it. And the police
24 officers were directly behind me on the trunk of the car
25 filling out the paperwork. And this went on for about

1 thirty minutes. And finally at some point the door opens
2 up and a guy splashed some water in my face and then tells
3 me to be quiet and shuts the door again.

4 Q. Now, did anybody ever ask you were you in an
5 altercation or a fistfight? Any of the officers ask you
6 that?

7 A. No.

8 Q. Okay. Robert Morris, what kind of -- he was
9 wearing a white shirt?

10 A. Yes.

11 Q. Okay. And was he in bad physical condition?

12 A. Yes.

13 He had to go to the hospital and get nine
14 stitches.

15 Q. First of all, did you know why you were being
16 arrested?

17 A. I really had no idea. I was bewildered. I
18 didn't expect to be arrested for anything that night
19 because I hadn't done anything wrong.

20 Q. Did you -- did you feel like you were the good
21 guy that night?

22 A. Absolutely.

23 Q. In terms of breaking up the fight?

24 A. Breaking up the fight, and trying to take Robert
25 Morris to safety, and do the right thing.

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1 Q. Were you intoxicated that night?

2 A. No.

3 Q. You had been riding motorcycles earlier?

4 A. Yes.

5 Q. Did you in any way threaten any of these police
6 officers?

7 A. No, I didn't.

8 Q. Did you in any way try to hurt anybody?

9 A. Not whatsoever.

10 Q. When the police asked you to stop, why didn't
11 you just stop?

12 A. I -- well, like I said, I explained to them that
13 I hadn't done anything and that was the guy they were
14 looking for, so I didn't think I had any reason to stop.
15 And I told them that I was going back to the front of the
16 bar.

17 I wasn't trying to escape, I wasn't trying to
18 flee, I wasn't running. I really expected to get back to
19 the front of the bar and have the police come up and ask
20 everybody questions and find out who had done what. And
21 that didn't happen.

22 MR. CONDON: I have no further questions at this
23 time, Your Honor.

24 THE COURT: Mr. Finch?

25 - - -

CROSS-EXAMINATION

BY MR. FINCH:

Q. Mr. Husted, you just told us that you were trying to be the good guy, trying to do the right thing, trying to help out somebody injured at the bar?

A. Yes, sir.

Q. He had a pretty bad injury? A lot of blood?

A. Yes, sir.

Q. And were you concerned about his safety?

A. Yes.

Q. Did you call 911?

A. I had been arrested so I --

Q. Did you call 911 that night? Yes or no.

A. No.

Q. You did not.

But he needed medical attention, didn't he?

A. Yes, he did.

Q. And you wouldn't disagree that the police can call out and get EMS to a spot pretty quickly, can't they?

A. Sure.

Q. So if you saw an officer, you could tell an officer to call 911 and get somebody medical attention immediately, couldn't you?

A. Yes, sir.

Q. But you didn't do that, did you?

1 A. The first officer I saw was --

2 Q. Yes or no.

3 MR. CONDON: He can explain his answer, Your
4 Honor. He's answered yes or no.

5 THE COURT: The procedure is -- and you pointed
6 it out, Mr. Condon, is a yes or no response and then
7 he's allowed to answer it. So --

8 MR. FINCH: Yes, ma'am.

9 THE COURT: -- thank you for the clarification.
10 Mr. Finch, go ahead.

11 Q. [Mr. Finch] After the fight inside the bar had
12 broken up, you went around back with the injured party;
13 correct?

14 A. Yes, sir.

15 Q. And you went into the woods?

16 A. Yes, sir.

17 Q. Did you expect to find EMS in the woods?

18 A. I didn't realize how bad his injuries were until
19 we got into the woods.

20 Q. Is that a yes or a no?

21 A. Ask the question again, please.

22 Q. Did you expect to find EMS in the woods?

23 A. No, sir.

24 Q. Did you expect to find the police in the woods?

25 A. No, sir.

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1 Q. Did you expect to find anybody who could help
2 you or the injured party in the woods?

3 A. No, sir.

4 Q. But eventually the police did arrive?

5 A. Yes, sir.

6 Q. But you didn't tell them that there was somebody
7 injured here that needed help, did you?

8 A. It was pretty clear to them.

9 Q. Yes or no. Did you tell them that he needed
10 help?

11 A. No, sir.

12 Q. And how long were you in the woods with the
13 injured party?

14 A. I couldn't say for sure. It was a few minutes.
15 It was maybe five.

16 Q. You know a lot about that videotape; right?
17 Seen it a couple of times?

18 A. I've watched it many times.

19 Q. Many times.

20 You almost know it frame by frame. Is that fair
21 enough to say? You've watched it enough times that you
22 can tell us in each individual frame what was happening?
23 You just told us as it was playing.

24 A. Sure.

25 Q. And there's a time signature on the bottom of

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1 that, isn't there?

2 A. But it's not accurate.

3 Q. So it's not an accurate time. So we don't
4 really know, judging from that, how long you were in the
5 woods, do we?

6 A. Yes, sir.

7 Q. Is it a shortened time or a longer time in real
8 life? Real time is shorter or longer than that video
9 represents?

10 A. I'm not sure.

11 I mean, they're -- you know, the way those
12 digital video recorders record, they leave frames out.

13 Q. So they leave frames out. Probably shortened
14 five minutes to say three minutes?

15 A. Except for the fact that it was recorded in fast
16 forward. So it's really hard to even guess.

17 Q. So it's not an accurate time? You at least know
18 that?

19 A. [No response]

20 Q. So we don't know exactly how long. So it
21 certainly could have easily been longer than we were
22 watching? If somebody stopped -- started a stopwatch and
23 we got real time, that altercation with you and the
24 officers could have taken longer than what we would have
25 timed on our watches. Correct?

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1 A. I really couldn't say for certain.

2 Q. If it was obvious to the officers that the
3 injured party needed help, and you were there to help him,
4 why didn't you escort him to -- over to the officers?

5 A. The officers were looking for somebody who was
6 in a fight. They had found him. He was injured. They
7 had it under control at that point --

8 Q. Were you --

9 A. -- as far as I was concerned.

10 Q. Were you part of the police investigation?

11 A. No, sir.

12 Q. So you don't know who they're looking for, do
13 you?

14 A. No, sir.

15 Q. You've been in the courtroom to hear everybody
16 testify, haven't you?

17 A. Yes, sir.

18 Q. And you heard the officers testify that they
19 didn't really have a handle on the scene until everybody
20 was arrested or taken into custody --

21 A. No.

22 Q. -- and even then they may not have had a
23 complete picture?

24 A. They definitely didn't.

25 Q. But the police were there pretty soon after the

1 fight ended; is that correct?

2 A. I'm not sure.

3 I took Robert Morris around back behind the bar,
4 so I don't know when they arrived.

5 Q. I mean, we can't tell from the video because
6 that time signature may be incorrect; correct?

7 A. I guess.

8 Q. You testified that you walked out of the woods
9 and said, don't taze me, bro; correct?

10 A. Yes, sir.

11 Q. And you were being smart-alecky; correct?

12 A. Yes, sir.

13 Q. You didn't tell the police, I'm just kidding,
14 let me comply, let me help you, did you?

15 A. No. No, sir.

16 Q. And by the time they put a handcuff on you, you
17 didn't stop moving, did you?

18 A. I was in a prone position. I wasn't moving.

19 Q. So that's a no, you didn't stop moving?

20 A. No, sir.

21 Q. There were three officers on that -- on you at
22 that time; right? Or addressing you?

23 A. Yes, sir.

24 Q. And you know their names: Devasto, Ferguson,
25 and Riccio?

1 A. Yes, sir.

2 Q. They all testified. And they all testified,
3 just like you said, that once they took you into their
4 custody that you didn't stop moving. You didn't stop
5 moving, did you?

6 A. I wasn't fighting them, if that's what you're
7 trying to ask.

8 Q. I'm just asking if you were moving. Your arms
9 moving?

10 A. I was on my knees and my face was pushed into
11 the pavement and I wasn't moving.

12 Q. Your arms weren't moving?

13 A. My arms were behind my back.

14 Q. Do you recall saying anything other than don't
15 taze me, bro?

16 A. Yes.

17 Q. Did you swear, use curse words --

18 A. No, I didn't.

19 Q. -- profanity?

20 A. No.

21 I wasn't upset about anything. That's why I was
22 making jokes.

23 Q. But you're aware that the police testified that
24 you were cursing, using profanity, belligerent?

25 A. They have to.

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1 Q. They have to?

2 A. To make me look like I was being belligerent.

3 Q. So your testimony, then, is this was all a rouse
4 by the police crafted to make you look like a bad guy?

5 A. [No response]

6 Q. All their testimony, their sworn testimony, was
7 a rouse to make you look like a bad guy and then look like
8 the good guys?

9 A. Yes, sir.

10 MR. FINCH: No further questions.

11 THE COURT: Mr. Condon?

12 MR. CONDON: Thank you, Your Honor.

13 REDIRECT EXAMINATION

14 BY MR. CONDON:

15 Q. Did the police overact?

16 A. Absolutely.

17 Q. Why do you say that?

18 A. Because of the brutality of the arrest. It was
19 uncalled for. I hadn't -- I hadn't done anything to
20 invite that treatment. I was simply walking away.

21 Q. Other than walking away, had you done -- did you
22 do anything else?

23 A. No, sir.

24 Q. And what did they -- one officer grabs one arm
25 and the other officer grabs the other arm and they bend

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1 you forward and you're in a prone position at that point?

2 A. Yes, sir.

3 Q. Did you in any way try to hurt any of these
4 officers?

5 A. Not at all.

6 Q. Did you --

7 A. I was --

8 Q. Did you even know why you were being arrested?

9 A. I had no idea what was going on. And I was
10 begging them to please not do what they were doing.

11 MR. CONDON: No further questions, Your Honor.

12 MR. FINCH: Your Honor, may we approach?

13 THE COURT: You may.

14 [Whereupon, an off-the-record bench conference
15 is held]

16 Q. [Mr. Condon] Mr. Husted --

17 MR. CONDON: Your Honor, may we approach the
18 bench a second?

19 THE COURT: You may.

20 [Whereupon, an off-the-record bench conference
21 is held]

22 [Whereupon, Mr. Finch and Ms. Chisolm confer]

23 MR. FINCH: No questions, Your Honor.

24 THE COURT: Thank you.

25 You may step down. Thank you.

1 [Whereupon, the witness is excused and exits the
2 witness stand]

3 THE COURT: Call your next witness.

4 MR. CONDON: The defense rests, Your Honor.

5 THE COURT: Any rebuttal witnesses?

6 MS. CHISOLM: Nothing further, Your Honor.

7 THE COURT: Ladies and gentlemen, you have now
8 heard all of the testimony that will be presented in
9 this case, as well as received into evidence all
10 exhibits that will be made part of the record of this
11 case.

12 Ladies and gentlemen, what is now left is
13 closing arguments and the instruction on the law
14 applicable to this case.

15 Ladies and gentlemen, due to the lateness of the
16 hour, I am not going to -- we're not going to attempt
17 to squeeze all of that in this afternoon so we will
18 break for the evening hour.

19 Please remember my admonition. Do not read,
20 watch, listen to, any news accounts regarding this
21 case should there be any. Please do not do any
22 independent investigation. That involves searching on
23 Google Earth or driving by the locations mentioned
24 during the trial. Please do not make any entry into
25 Face Book, My Space, any of those nature -- internet

1 social sites. Do not communicate with each other.
2 You're going to go home this evening and your
3 significant other likely will say tell me about your
4 day in court and you need to respond, I may not speak
5 about this case to anyone and that includes you.

6 Ladies and gentlemen, please be back in your
7 jury room at 9:30. We will at that point hear closing
8 arguments from the State and from the defendant and I
9 will then instruct you on the law applicable to this
10 case.

11 Please have a wonderful and restful evening.
12 Stay warm. I'll see you in the morning.

13 Please rise for the jury.

14 [Whereupon, the jury exits the courtroom at
15 4:31 p.m.]

16 THE COURT: Please be seated.

17 Anything before we break for the evening?
18 Anything --

19 MS. CHISOLM: No, Your Honor.

20 THE COURT: -- further?

21 MR. CONDON: Your Honor, I just renew my motion
22 for directed verdict.

23 THE COURT: I'm sorry, Mr. Condon. I've got
24 something in my throat. I'm coughing, so I was trying
25 to get off the bench. I apologize. I'm not rushing.

1 I will be happy to hear you if you wish to argue
2 anything further based upon the evidence that has been
3 presented.

4 MR. CONDON: Your Honor, I just renew that
5 motion in terms of I just don't think that there's
6 probable cause for an arrest and I think that's the
7 essence of what their case -- the foundation was
8 arrest. There's no probable cause for arrest. There
9 can't be a lawful arrest, and you have a right to
10 resist a -- if there is resistance, an unlawful
11 arrest.

12 And so I think the whole case is hinged on
13 whether there's probable cause for an arrest. You
14 can't detain somebody and then say they were resisting
15 arrest because you detained them. There has to be an
16 arrest, a basis for probable cause and an arrest and
17 not just to detain this person and then because they
18 resist detainment say they resisted an arrest or
19 assault an officer by resisting arrest.

20 THE COURT: All right. The Court stands by the
21 initial ruling. There has been nothing in the defense
22 case that changes the basis for the ruling under Rule
23 19. I deny your motion for a directed verdict.

24 I have included the lesser included resisting.
25 Is there any other -- I don't know of any other lesser

PROCEEDINGS

THE COURT: All right. We're back on the record.

Has the State had time to review the defendant's request to charge?

MS. CHISOLM: Yes, Your Honor.

THE COURT: And the State's position?

MS. CHISOLM: Your Honor, I oppose the proposed charges.

THE COURT: You oppose 1 through 5; is that correct? 1 through 6?

MS. CHISOLM: 1 through 6.

THE COURT: And the basis for your opposition?

MS. CHISOLM: The basis for the opposition is that the jury instruction shouldn't be -- well, shouldn't be given if they are going to confuse or mislead the jury.

And as to request number 1, request number 2, request number 3, number 4 -- as to request number 1 through 4, there has been no evidence presented that would give the jury any guidance as to how to interpret fighting words.

The underlying -- the defendant was indicted for assaulting an officer while resisting arrest. And while, you know, the underlying offense is definitely

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1 an issue, I don't -- I think it's going to confuse the
2 jury as to what fighting words are, as well as what --
3 and just as well as what would constitute -- trying to
4 think -- what would constitute a proper arrest for
5 disorderly conduct by an officer.

6 I just don't think that they have the
7 information that they would need in order to make that
8 determination. Besides the fact that in State v.
9 Lacoste, the facts there mirror a lot of the facts
10 that we had in our case and there -- based on those
11 facts, it was proper to have arrested the defendant
12 for disorderly conduct.

13 As to charge number 5, I'm not sure what your
14 charges are going to be and if they're going to -- or
15 I don't remember if you said them yesterday. But I'm
16 not sure exactly what your charge is going to be. But
17 this is a bit wordy and if it is given as an
18 instruction, I would actually just request that it
19 could be shortened. I have a proposed charge if you
20 are going to use this type of charge.

21 As to the last charge, the request to charge
22 that person -- police officer's simple demand to stop
23 is not committing or resisting arrest. It doesn't
24 apply. The case of State v. Brennan that the defense
25 is using to cite here, it was a completely different

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1 set of facts and we've not -- we've not maintained
2 that the defendant resisted a simple demand to stop.
3 There was a lot more -- you know, a lot more going on
4 than just that.

5 The officers did have probable cause to arrest
6 him and I just don't think that this is appropriate
7 for our case.

8 THE COURT: All right. I am marking defendant's
9 request to charge 1 through 6 as a Court's Exhibit for
10 the record. It will be Court's 1.

11 [Whereupon, Court's Exhibit Number 1 is marked
12 by the court reporter]

13 THE COURT: Mr. Condon, I am charging: the
14 State may not punish a person for voicing an objection
15 to a police officer where no fighting words are used.
16 Fighting words are words which by their very utterance
17 inflict injury or tend to incite an immediate breach
18 of the peace.

19 I am also charging separate and distinct from
20 the law of self-defense is the right of any citizen to
21 resist an unlawful arrest under the law of this state.
22 No citizen is required to submit to an illegal arrest
23 and may use reasonable force in resisting an illegal
24 arrest.

25 I believe, Mr. Condon, that in some form or

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1 fashion most of your requests to charge have been
2 included in the Court's charge but just so the record
3 is preserved, I am marking your request to charge.

4 Counsel, I need you to come approach to review
5 the verdict form.

6 [Whereupon, counsel review documents]

7 [Off the record momentarily]

8 THE COURT: Any objection from the State?

9 MS. CHISOLM: No, Your Honor.

10 THE COURT: Mr. Condon?

11 MR. CONDON: I don't -- I don't have any problem
12 with putting on there like, you know, lesser included
13 offense of resisting arrest or something like that,
14 you know, to make it clear that it's a lesser included
15 offense. I guess that's how you're going to charge
16 it.

17 THE COURT: Yes, sir. It is a lesser included.
18 It is not a separate offense.

19 MR. CONDON: Right.

20 THE COURT: So this is the way that I will be
21 presenting the verdict form to the jury.

22 MR. CONDON: Okay.

23 THE COURT: Thank you.

24 MR. CONDON: Yes, ma'am.

25 And on the jury charge, I just wanted to make

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1 sure I -- you're charging number 3? You're charging
2 number 3; is that --

3 THE COURT: Yes, sir. I just read that to you.

4 MR. CONDON: Right.

5 THE COURT: It's included in the charge.

6 MR. CONDON: Okay. But like -- as far as like
7 1, 2, 4, 5 and 6?

8 THE COURT: I did not include anything as to 1.
9 I do not know that that needs to be included in the
10 Court's instructions as to the training of a police
11 officer.

12 MR. CONDON: Well, I think it ties in with the
13 issues of fighting words in terms of whether there's
14 going to be disorderly conduct towards a police
15 officer. And I think that's what the issue here is,
16 is disorderly conduct towards a police officer.
17 That's the basis for their arrest in this case is
18 disorderly conduct towards a police officer. And, you
19 know, in order to have that, there's got to be, you
20 know, fighting words with regard to a police officer.

21 And also the fact that they're specially trained
22 in use -- should not -- does not constitute fighting
23 words as a matter of law. And, therefore, you know,
24 that -- request that be charged.

25 And then number 4, you know, a person who voices

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1 an objection to a police officer is not guilty of
2 disorderly conduct in the absence of fighting words.

3 I just think that with regard to the application
4 of disorderly conduct towards a police officer, it's a
5 much more narrow application as opposed to the general
6 public. And what we're dealing here is with two
7 police officers. And they're alleging my client was
8 disorderly with regard to them. And so I think that
9 the application of the statute and the case law is
10 that with regard to a police officer it's a much more
11 narrowly defined definition of what disorderly conduct
12 is.

13 THE COURT: Mr. Condon, I have charged the law
14 applicable to the state, based upon my reading of the
15 case law as well as the testimony that was presented.
16 I have indicated to you my instruction as to fighting
17 words. Thank you.

18 MR. CONDON: Yes, ma'am.

19 THE COURT: Anything before we bring in the
20 jury? From the State?

21 MS. CHISOLM: No, Your Honor.

22 THE COURT: From the defense?

23 MR. CONDON: No, ma'am.

24 THE COURT: Are you waiving first close?

25 MS. CHISOLM: Yes, Your Honor.

CLOSING ARGUMENT

MR. CONDON: As you know, I represent Jason Husted. And we've gone through a lot of evidence in one day.

And I want to be to -- first of all, I appreciate your time and attention to this case. It's a very important case, very important obviously for the State and it's very important to my client what happened that night on June 13th, 2009, at the Back Nine Pub.

Now, you know, I mentioned at the beginning that the State has the burden of proof. And that's a very real concept and I'll explain that as we go through and as we review the evidence.

But it's important to understand that the ruling -- the way I look at it, the ruling on the field today, as we stand here today, is that Jason Husted is innocent and that they have the burden of proof to overturn that ruling.

And that's the way I look at it in terms of like to me in a commonsense reality, is it's sort of like when you see a football -- the field and the pass is completed, or whatever, and they have to go to the video to overturn that ruling and to make a decision where there was irrefutable evidence -- beyond a

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1 reasonable doubt that the person is not innocent.

2 Now, the ruling now is he is innocent. And I
3 would present to you that the State has not presented
4 any evidence that he is in any way guilty in this
5 case. So the ruling stands. The evidence is not
6 sufficient to show that Mr. Husted in any way
7 assaulted a police officer during a lawful arrest.

8 Now, there's a number of elements that the State
9 has got to prove in this case. There's a number of
10 elements. This is not a simple case. First of all,
11 you have the element of knowing and willing. That's
12 part of what it is to the defense of assault on a
13 police officer while resisting arrest. It's a knowing
14 and willing. Okay? That's -- it's a conjunctive.
15 It's not either/or. It's got to be both.

16 The second thing it is is that the person must
17 oppose or resist. That is one part of resisting
18 arrest. It's a lesser included offense, and the judge
19 will charge you on that.

20 But the other offense has to do with that you
21 assault, wound, or beat a police officer in the
22 commission of a lawful arrest. A lawful arrest. Now,
23 you've got to understand what the basis of a lawful
24 arrest is. A lawful arrest is based on the fact that
25 there's probable cause that a crime has been

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1 committed. That's what a lawful arrest is. And only
2 when there's a crime committed does the arrest
3 initiate.

4 In this case I want to be able to go through
5 what happened that night. The police are
6 investigating an assault at the Back Nine Pub. That's
7 what they are there for. You heard from Officer
8 Riccio two officers went to the back and he went to
9 the back and that all that happened back there -- he
10 saw the entire thing -- is an investigative stop.
11 That's what that -- happened back there, strictly
12 investigating what happened. That's what Officer
13 Riccio indicated. And he was the senior officer on-
14 place. He saw everything, what happened in the back.

15 Now, as you go through all that, you've got to
16 understand that probable cause is a reasonable belief
17 that a crime has been committed, okay, separate and
18 apart from the arrest, totally separate and apart from
19 the arrest, probable cause that a crime has been
20 committed and that that person did it. Not that you
21 have a suspicion, not that you have a thought, not
22 that you're investigating, but that you have a
23 reasonable belief that this individual, this
24 individual, has committed a crime.

25 Now, the basis of their arrest is disorderly

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1 conduct. That's what they're basing this case on,
2 disorderly conduct that happened that night at the
3 Back Nine Pub. Now, when you look at the evidence --
4 and the officers have testified, Riccio, Ferguson,
5 Devasto -- all of them said that when they were in the
6 woods, everything was fine and when they walked out
7 Jason continued to walk. Okay? He didn't follow
8 their commands. That's very important. Now, there's
9 no threats, no fighting words, no language to indicate
10 that he was a threat. He was just walking away.

11 Now, what you need to do is couple that with
12 what the video shows. And I want to be able to go
13 through that video with you. It's in evidence. You
14 can look at it at any time during the course of your
15 deliberation. It's part of the evidence in this case.
16 and I think it's very key evidence. It's evidence we
17 presented that we got up. The State didn't present
18 it. I wanted to be able to show you the whole
19 picture, what happened that night. Not just bits and
20 pieces, but what happened the whole night.

21 You heard from witnesses that were at the bar,
22 from the lady who called the police, Tamera Corley, to
23 the gentleman who had the video on the Ashley Public
24 Storage. You had the people there who helped show
25 that Jason Husted helped break up a fight between..

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1 Jason Ayers and Robert Morris, that he was instructed
2 to bring Robert Morris to the back. He did that. And
3 you'll see it on the video.

4 Now, when you look at everything in terms of
5 what they have to prove for the arrest -- I'm not
6 talking about what happened after he's detained.
7 We'll go over that in a second. But they have to
8 prove probable cause that a crime has been committed
9 before you have an arrest.

10 Police don't have a right to detain everybody,
11 arrest everybody, and then sort it out later. They've
12 got a tough job, there's no doubt about it. They've
13 got a tough job. But that is their job to sort it out
14 and not arrest people and then -- and then -- try to
15 sort it out. They've got to sort it out before the
16 arrest.

17 That's why you have probable cause that there's
18 a lawful arrest going on. That's the basis of their
19 whole case. It's based on that. And they have to be
20 able to show that there was unlawful -- that's an
21 element of resisting arrest. So we have to start with
22 that.

23 Is there disorderly conduct that night with
24 regard to a police officer, now? I'm not talking an
25 average citizen. We're talking about what happened at

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1 the Back Nine Pub with regard to two police officers.

2 And the Court is going to instruct you on what
3 the law is. But the State may not punish a person for
4 voicing an objection to a police officer where no
5 fighting words are used. Fighting words are words
6 which by their utterance inflict injury or tend to
7 incite an immediate threat, breach of the peace.
8 Fighting words exception may require narrow
9 applications involving words addressed to the police.

10 The police are trained individuals. They're
11 supposed to be. That's part of their job, to
12 investigate situations like that. And that's why you
13 have to focus on that first before you even get to the
14 resisting arrest. Before you even get to it, there
15 has to be a lawful arrest. That's a key element of
16 their case and they've got to prove that beyond a
17 reasonable doubt.

18 Now, I want to walk through you -- walk you
19 through with the video. It's important from a couple
20 of aspects. And feel free, you know, obviously when
21 you deliberate, to look at it any time; that you'll
22 see Jason Husted, Robert Morris come by. It might
23 take a little bit to get to it.

24 MR. HUSTED: Are you ready for it to start Joe?

25 MR. CONDON: Right.

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1 But you understand that an element of being
2 disorderly is not this allegation of being
3 intoxicated. That's not it. The element is grossly
4 intoxicated. You've got to understand that they've
5 got to prove every single element beyond a reasonable
6 doubt.

7 I think that was -- why don't you back it up
8 just for a second. Right there. Okay.

9 What's important in that situation is that
10 they're trying to say that he's highly intoxicated.
11 They never use that word highly, they just say
12 intoxicated. But the statute requires under
13 disorderly conduct that it be grossly intoxicated.
14 That's an element they've got to prove. Please
15 understand that they've got to prove every single
16 element of what happened that night with regard to
17 disorderly conduct before you can have an arrest.
18 That is key.

19 Okay. Jason Husted is directing Robert Morris.
20 He's the one disoriented because of the fight. You
21 heard that testimony. Asked him to go in the back.
22 Now, it's important to understand that the police will
23 come. Jason Jackson will direct them where it is. He
24 doesn't hear anything about any loud or boisterous
25 noise. You've got to understand this is a disorderly

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1 conduct with regard to police. This is not in the
2 public. This is to do with two police officers.
3 Actually three, with Lieutenant Riccio. And it's
4 different as a police officer. Eventually we'll get
5 to that part.

6 But the officers come. They go back. And all
7 of them testify that what happened in the woods,
8 everything was fine and that --

9 This is Jason Jackson directing the police
10 officers. And he testified he didn't hear anything.
11 He'll come back again on the tape. It might take a
12 little bit to get to it.

13 So the officers come, Officers Devasto and
14 Ferguson. And then there's -- there's Jason Jackson
15 again. Doesn't hear anything about any loud noise or
16 being boisterous. Walks back up. There's also Riccio
17 coming up. Then you see Jason Husted leave that area.
18 All the officers testified that everything happened in
19 the woods was fine. He's walking away, walking away.
20 Now, it's important to look --

21 Stop. Stop right there.

22 -- that one officer grabs one arm, one officer
23 grabs the other one, and he's forced forward. He's
24 forced forward. He's on his knees. He's on his
25 knees, and each officer has got one of his arms, and

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1 then Officer Riccio comes up and pepper sprays him.

2 There has got to be, when you arrest somebody,
3 notice of what you're doing wrong. Here the officers
4 come up, command him to stop. But mere stopping is
5 not disorderly conduct. Mere refusal to stop to a
6 police officer is not disorderly conduct. It has to
7 be under what the statute says in terms of being
8 grossly intoxicated, loud, or boisterous. That's what
9 the statute requires before they can even arrest this
10 person. They're only -- and Officer Riccio said the
11 entire time was an investigative stop, they're trying
12 to sort out what happened.

13 You'll have the pictures of the wounds that
14 Jason Husted had. Were admitted into evidence.
15 You'll be able to take them back to your jury room and
16 look at them. He got pepper-sprayed. But the
17 important thing in this photograph is that he's pushed
18 forward and held down, pepper-sprayed. You can see
19 how it goes on, why he would have so many bruises.

20 But you've got to understand the element of this
21 case is a knowing and willing, knowing and willing,
22 resisting arrest. You've got to know what you're
23 being arrested for and you've got to understand that
24 that's the only way that you can -- that's what the
25 statute requires in order to be guilty of resisting

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1 arrest. And there's two parts of it, one part dealing
2 with strictly resisting; the other part dealing with
3 beating or assault of a police officer.

4 Officer Devasto says they don't even know things
5 like that in terms of a police officer. You have to
6 look at that video and see whether there's any
7 evidence of him swinging a handcuff around like
8 they -- in a combative manner. He's on his knees with
9 an officer on each arm.

10 Now, one of the things I went over with Officer
11 Ferguson -- sometimes what's important is in a record
12 and sometimes what's important is not in the record.
13 An issue that -- and the reason I went over the
14 supplemental report with Officer Ferguson is because
15 it's important what's not in here. Okay? This is
16 report generated, as she testified, June 13th, that
17 morning, about what happened. It is important to
18 understand she said she advised the two males to come
19 out of the woods. We all agree with that.

20 MR. FINCH: Objection, Your Honor. May we
21 approach?

22 THE COURT: Basis.

23 MR. FINCH: Reading from a non-evidentiary
24 piece. Hearsay.

25 THE COURT: Counsel.

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1 [Whereupon, an off-the-record bench conference
2 is held]

3 THE COURT: Please continue.

4 MR. CONDON: Thank you, Your Honor.

5 Officer Ferguson testified what's in the report
6 but also what's not in the report. And what's not in
7 the report is any description what Jason Husted did
8 that night in terms of being disorderly, boisterous,
9 intoxicated. You need to look at that, her testimony,
10 about what she said. That's why I went over it line
11 by line with her in that report. And this is
12 something she generated hours -- not minutes, but
13 hours right after this thing. And it's the same day.

14 The only thing that Jason Husted did wrong was
15 not follow her commands, and that is not disorderly
16 conduct. Under the statute it's not. That's a key
17 element of their case. They've got to prove knowing
18 and willing. They've got to prove that there's a
19 lawful arrest, that there's probable cause, a crime
20 has been committed separate and apart from what you
21 see on the video. Because what you see on the video
22 is just a gentlemen walking away from a police
23 officer, and that is not a crime. That is not
24 disorderly conduct. If the police could made
25 everybody talk to them, we would not be the United

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1 States.

2 Obviously, the police have a tough job. But
3 that is their job. Their job, being training, going
4 to the police academy, being a twenty-four-year
5 veteran, coming on the scene where there's a number of
6 people, it is to bring calm and to resolve what's
7 happened. It is to investigate, talk to people, what
8 happened that night, identify who was involved, and
9 arrest those people. It is not to go headlong,
10 rushing into a situation without -- that's what should
11 have been done.

12 Now, you heard from all the people that was
13 there that night. You heard from Tamera Corley, the
14 person that called the police. You heard from Mr.
15 Buckner, who had the security cameras. We presented
16 that. The State could have presented it. It's
17 evidence out there for everybody to present. I wanted
18 to be able to give you the whole picture of what
19 happened that night, that, in fact, what happened was
20 that Jason Husted was trying to help out someone and
21 that he talked to the police --

22 He may have been a smart aleck in making
23 comments to the police. That's not a crime. Poor
24 judgment is not a crime. That's not a crime. You
25 have to go by what the elements of the crime. That's

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1 what the State has to prove and they've got to prove
2 each -- each -- element beyond a reasonable doubt.

3 And that's why I say the ruling on the field
4 when you came in today is that he's innocent. He's
5 innocent. And that same ruling stands. When you go
6 to the video, when you go to the replay booth, when
7 you go up there, there's no evidence in any way that
8 he was guilty of, first of all, being disorderly and
9 second of all of resisting and knowing and willingly
10 resist arrest. That's the key. That's why the --
11 there was evidence, specific evidence, from people
12 involved and the people that maintained those video
13 cameras that night.

14 Lastly, I want to -- I'm not sure what the
15 demonstration that they had. They demonstrated.
16 Because it's important to not just have a
17 demonstration of what you think happened, but what
18 actually happened. That's what the video shows. And
19 you've got to understand also that in this case Jason
20 Husted is walking away, not confronting the police,
21 not causing any problems. He is walking away.
22 Walking away. That is not disorderly conduct.

23 The police have been trained as to fighting
24 words. Nobody testified about him threatening anybody
25 in any way. He simply, based on what Officer

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1 Ferguson had in her report that she testified about,
2 that he didn't follow her command to stop. And that
3 is not disorderly conduct.

4 And, lastly, when we look at the video, Jason is
5 walking away. He did not initiate anything with the
6 police. That's the key. And feel free to look at
7 this video as many times. I know it's not, you know,
8 crystal clear but it is specific enough to be able to
9 discern the basic things that happened in that parking
10 lot when they got out of the woods. He walked away
11 and that he was taken down by one officer on one arm,
12 an officer on the other, and pepper-sprayed
13 repeatedly, that he sustained injuries.

14 And what's interesting, too, is Devasto didn't
15 even know of a police officer that was hit. During
16 that going on, she didn't even know. And she's right
17 there. Right there.

18 There's a lot of doubt in this case. There's
19 doubt from the start to the beginning. There's
20 reasonable doubt. The judge may sometimes define
21 reasonable doubt where a person hesitates to act. In
22 this situation there's plenty of doubt from the moment
23 you see that video, from the evidence of the police
24 officers themselves, and nothing happening in the
25 woods but the -- everything happened in the parking

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1 lot and it's right there on that video. So look at
2 it. Feel free to look at it as many times as you
3 want.

4 Mr. Husted was not guilty of disorderly conduct.
5 He didn't resist the police knowing and willingly.
6 That -- you know, that that's an element that they've
7 got to prove beyond a reasonable doubt. So I ask you
8 to go to the video. Nothing has changed. The ruling
9 on the field is still the same. He's innocent. Thank
10 you.

11 THE COURT: Mr. Finch.

12 MR. FINCH: Thank you, Your Honor.
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CLOSING ARGUMENT

MR. FINCH: Ladies and gentlemen, you were asked yesterday, and you're continued to ask -- be asked today to use your common sense and apply your common sense to the facts, facts as introduced through evidence, testimonial evidence, and the exhibits that you'll be able to take back to the jury room with you, exhibits you were shown here in court, you've been shown again in closing arguments. You just apply your common sense. That's what we're asking of you.

I want to address a couple of things before I start with a couple of things that Mr. Condon brought out. One thing I want to clear up here is that the defendant is not on trial for disorderly conduct. He's being charged with assault on a police officer while resisting arrest. You don't need to go through all the different elements of disorderly conduct. What's important is that there was a lawful arrest.

Now, think back to the testimony of the officers. They arrived on scene. Three trained officers, decorated, celebrated, trained officers, all showed up at a chaotic scene of a fight in progress, a physical confrontation, with a weapon. As information is coming over the radio, they're getting little bits of information.

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1 They get on the scene, there's twenty-five or
2 thirty people outside of the bar, an admittedly
3 chaotic scene. People on the scene, people who know
4 everybody there, they know everybody by name. They
5 say two guys went around the corner, those are the
6 guys.

7 So the police, acting on that information, go
8 around the corner. They find two men with blood on
9 them crouching down and hiding in the woods. What
10 happens next? You have two versions in front of you,
11 two versions that were offered by testimony yesterday.
12 There was a lot of testimony, but there's only two
13 versions.

14 There's the police's version that they went in,
15 they confronted the suspects, one of them was
16 compliant, one of them was taken into arrest without
17 incident. The other was not. The other used
18 boisterous behavior. He was belligerent, intoxicated,
19 used profanity over and over again, resisted the
20 lawful orders of police to stop, to come out of the
21 woods, continued to resist once a handcuff was placed
22 on his wrist.

23 Clearly, clearly, the defendant should have
24 known he was under arrest at that point. The
25 continued resistance to police at that point is known.

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1 It wasn't an accident that he flailed his arms. There
2 was no testimony that there's a condition or some
3 other reason that would cause him to accidentally flail
4 his arms at the police. That's your willing component
5 that Mr. Condon was so helpful to point out. Those
6 elements are necessary, sure: knowing and willing.
7 And that's your knowing and your willing. You have a
8 handcuff on your wrist and you have free will to swing
9 that handcuff like a weapon, swing your other arm, all
10 the while telling the police that this fight is not
11 going to end soon because you have special training.
12 That's the testimony of the officers.

13 Now, I want to talk about a couple of things
14 that the State has to prove, because, again, the
15 defendant is on trial for assaulting a police officer
16 while resisting arrest pursuant to a lawful arrest.
17 The lawful arrest comes from the totality of the
18 circumstances when the police arrive on scene and were
19 confronted with this situation and dealt with these
20 individuals in the woods, their behavior, and then
21 their resistance to lawful order caused the arrest.

22 The two elements that we must prove are that the
23 defendant assaulted, beat, or wounded an officer.

24 Now, keep in mind an assault, as Ms. Chisolm pointed
25 out yesterday in her opening arguments, is just that

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1 threatening posture. It is an action or words that
2 put a person in reasonable fear for their safety. She
3 used an analogy, an example, of pulling back her fist
4 while in close proximity to another. If you
5 reasonably feared imminent harm, that's an assault.
6 You don't have to contact someone to be assaulted.
7 It's the nature of the threat of the harm which
8 creates the assault.

9 Now, this has to happen while the defendant was
10 resisting an arrest being made by the person the
11 defendant knew or reasonably should have known was a
12 law enforcement officer. Each officer testified
13 yesterday that they arrived. The first thing that
14 happened was when Officer Riccio, a twenty-three-year
15 highly-decorated veteran of the Charleston Police
16 Department did, when he arrived, albeit in an unmarked
17 car, was to turn on his blue lights, blue lights that
18 clearly illuminated the scene. Then he emerged from
19 his vehicle in uniform and placed a suspect
20 immediately under arrest because that suspect was
21 holding a firearm, a .45 caliber semiautomatic handgun
22 while all this chaos was going on. He did that to
23 secure the scene. There should have been no doubt in
24 anybody's mind at that point who Lieutenant Riccio
25 was, who he worked for.

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1 Now, when two other officers arrived on scene to
2 support Lieutenant Riccio, they were directed by the
3 people at the scene, by the people who had seen the
4 fight, and by the people who knew everybody there by
5 name, as was recounted over and over again, all the
6 different characters of this bar. Those police
7 officers were directed around the corner. They
8 announced themselves and said, Charleston Police
9 Department. That was the testimony of Officers
10 Devasto and Ferguson, Charleston Police Department,
11 Charleston Police Department.

12 They're in uniform. They're using flashlights.
13 A flashlight is a heck of a lot brighter than a cell
14 phone to see what the injury is. At no point in time
15 did the defendant stand up and say, police, thank
16 goodness you're here, we have an injured man, police,
17 help us, police, this man was beaten and I'm trying to
18 help him. No. He stayed in the woods and crouched
19 down and hid in the woods.

20 Take a look at the video. There's plenty of
21 light at that end of the -- at that end of the parking
22 lot. There's no reason to go into the woods and hide
23 in the woods and try to use a cell phone to illuminate
24 some injuries. That's suspicious behavior. And in
25 the totality of the circumstances, in that scene that

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1 is going to give probable cause to the police to make
2 a lawful arrest based on the totality of the
3 circumstances.

4 Let's also think about that cell phone. It was
5 in the defendant's hand the whole time. His testimony
6 was that he was being a good guy, he was helping out
7 an injured friend. He had a cell phone in his hand.
8 Instead of using it to illuminate the guy's face, how
9 about dialing 911 and say, police, get here,
10 ambulance, get here, help. That didn't happen. Told
11 you it didn't happen. Clearly said no.

12 Now, keep in mind this is the law of the case.
13 And your job is to apply the facts. You're the judges
14 of the facts. There's two kinds of facts we have to
15 deal with and that's been introduced. It's that you
16 have the testimony, and then you have these exhibits.
17 You can take back with you. And I encourage you to
18 watch the video as many times as you see fit, as many
19 times as you need to, to be firmly convinced of your
20 decision, because that's what reasonable doubt means.
21 Not beyond any doubt, but to be firmly convinced.

22 So let's talk about the testimony. Mr. Condon
23 is correct. You heard from a lot of people who were
24 at the bar. He said everybody that was there that
25 night. But not everybody was there that night. We

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1 didn't hear from everybody that was there that night.
2 We heard from about six or seven people who saw a
3 fight happening in the bar, who all tracked a very
4 similar story. Nothing wrong with that. Only problem
5 is none of them saw anything behind the Back Nine Pub.
6 Not one person could tell us that they were back there
7 when the police engaged the defendant and his conduct
8 led to his arrest. And his further conduct led to the
9 charge of assault on a police officer while resisting
10 that arrest.

11 There was somebody else there who could have
12 testified, though. Robert Morris, he was there. He
13 complied with police. He was even assaulted. He
14 didn't assault the police. He wasn't charged with
15 that. Why would -- why were the police -- if we're
16 going to go with Jason Husted's version of events,
17 this is all a vast conspiracy to set him up and to
18 cover up the polices' illegal actions. And if the
19 police were so hell bound on abusing citizens, why
20 didn't they abuse Robert Morris? It would have been
21 so much easier for the police for the probable cause,
22 with the blood streaming down his face, that everybody
23 testified to, including the defendant.

24 But that's not what happened. What happened is
25 just like the police reported in their reports, just

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1 like they testified to yesterday, the defendant became
2 combative, the defendant became belligerent, the
3 defendant became resistant, the defendant uses
4 boisterous activity, profane language, over and over
5 again, and resisted lawful commands of the officers
6 that he knew or should have known that were in control
7 of that situation, to stop, and then resisted that
8 arrest, and then assaulted the officers.

9 Let's talk about the assault on the officers.
10 Each officer recounts a loose handcuff with a sharp
11 edge being used and flung around as the defendant
12 tried to fend off the officers. Officer Ferguson
13 testified that she was in fear for her life and
14 safety. She was also struck, which completes the
15 assault and makes it a battery, struck on her wrist
16 repeatedly with that open handcuff.

17 Now, the defense is going to want you to go back
18 to that video. And I urge you to go back to that
19 video. But remember something about that video. It
20 is a small frame of activity. It doesn't capture
21 anything that happened in the woods where the police
22 all tell you that's where it started. And he broke
23 free from them. And that's the testimony of the
24 officers, that he broke free from them and was trying
25 to evade their arrest. That's what he was doing.

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1 Keep in mind that this video is not at the same
2 speed as real time. It's recorded in fast forward. I
3 don't know. I wish I could tell you what that means,
4 translated to. But it's technically a lot longer in
5 real time than what you're seeing up there. That
6 means the encounter in the woods happens longer and
7 that struggle where the defendant was bent over took a
8 long time, a lot longer.

9 Take a look at the pictures, as well. They show
10 bruises on an arm, bruises to a head, more bruises. I
11 don't know where these bruises came from. Nobody
12 could tell us yesterday where those bruises came from.
13 The defendant told us where those bruises came from.
14 He characterized those bruises as a result of police
15 brutality, a brutal beating. Those were his words.
16 It could have happened in jail. Or they could just
17 have happened as a result of the defendant resisting
18 and becoming combative with police and those bruises
19 were the result of their trying to take control of the
20 prisoner, at that time their suspect, while he's --
21 while he's fighting them, while being sprayed in the
22 face with the OC spray multiple times, many more times
23 than is normally sufficient to subdue a suspect. That
24 was also the testimony of the officers.

25 This brings us back again to the credibility of
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1 the witnesses. You're going to have this physical
2 evidence to look at. I want you to think about that.
3 You're missing a large chunk of what that video shows.
4 But I'm glad you get to see it because the bulk of
5 what you see on that video tracks exactly what the
6 officers have explained to you. You just don't get to
7 see the parts of him, you don't get to see -- you
8 don't get to see it in real time. I wish you could
9 see it a little bit closer. But all three officers
10 with no reason to lie, no reason to exaggerate, and no
11 reason to change the facts into a story, tell you the
12 exact same story, tell you exactly the events that
13 happened.

14 An officer with a bright career ahead of her
15 tells you the same story. Another officer who's been
16 on the force a little bit longer, and a very bright
17 career ahead of her, as well, already PPO of the year,
18 decorated twice for valor, she doesn't have a reason
19 to lie, throw it all away. A twenty-three year
20 veteran that the City trusts as its sole
21 representative of its one department in livability
22 court. He represents the entire -- he's the face of
23 the City out there doing code enforcement day to day
24 with people. Highly decorated, highly trained. No
25 reason to lie. No reason to play fast in relation to

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1 the facts. Those three all tell you the exact same
2 story about what happened that night.

3 Now, if you want to believe the other version of
4 events, you're going to have to believe that all three
5 of those officers, as well as the Charleston Police
6 Department, are in cahoots and this is a conspiracy
7 theory. And to cover that, and to make that -- and to
8 put that theory into action, all three of those
9 officers, who are sworn to protect every member of our
10 community, including Mr. Husted, got on the stand,
11 sworn to tell the truth, and then lied, perjured
12 themselves in this courtroom. I'm not even going to
13 address the seriousness of those allegations other
14 than to say that's not reasonable doubt. That's not
15 even reasonable.

16 The only person you've heard of that difference
17 in the accounts was not the only person who could have
18 differed in the accounts but the only person who did
19 here, and that is the defendant. You have to judge
20 his credibility as well. That's up to you. You're
21 the judges of the credibility, you're the judges of
22 the facts, you judge the witnesses. You judge what
23 the exhibits mean. You judge.

24 I want to talk to you again about reasonable
25 doubt. It's an important concept. The State does

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1 have the burden of proving each and every element of
2 the crime in every crime beyond a reasonable doubt.
3 That's a heavy burden. It's a burden we shoulder and
4 we continue to shoulder without complaint. And in
5 this case I believe the State has proven each element
6 beyond a reasonable doubt.

7 Now, keep in mind reasonable doubt is not beyond
8 all doubt. There are so few things that anyone could
9 ever know beyond any doubt. But, again, it's that
10 removable doubt that leaves you firmly convinced in
11 your -- in your judgment, in your decision. And when
12 you've reviewed the evidence, when you review the
13 facts and the testimony, and what you were shown and
14 what you weren't shown, and what people who knew and
15 saw said, and what other people knew and saw said of
16 what they knew and saw, which wasn't related to the
17 incident that led to this charge, there's only one
18 possible verdict: guilty.

19
20
21
22
23 - - -

24 - - -

25 - - -

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CHARGE OF THE COURT

THE COURT: Ladies and gentlemen, I remind you that during this trial you and I have had certain duties to perform. As the trial judge it is my responsibility to preside over the trial in this case and I also have the duty to rule on the admissibility of the evidence that has been offered during this trial.

You are to consider only the competent evidence before you. If there was any testimony ordered stricken from the record in this case, you must disregard that testimony. You are to consider only the testimony which has been presented from the witness stand, the exhibits which have been made part of the record in this case, as well as the stipulations of counsel. Ladies and gentlemen, you will be given the exhibits that have been admitted into evidence and those will go back with you in the deliberation room.

I have the additional duty to charge you on the law applicable to this case. As the presiding judge, I am the sold judge of the law in this case and it is your duty as jurors to accept it and apply it as I state it to you now. If you already have any idea as to what the law is or what the law should be and it

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1 does not agree with what I am about to tell you, you
2 must abandon your own ideas because you were sworn to
3 accept the law and apply the law as I state it to you
4 now.

5 In every case tried in this court before a jury,
6 the jury becomes the sole and exclusive judge of the
7 facts in a case. A trial judge may not make any
8 comment on, or a statement about, the facts in a case.
9 Since you the jury are the sole judge of the facts in
10 this case, you are not to infer from anything that I
11 have said during the progress of this trial in ruling
12 upon the admissibility of the evidence, or otherwise,
13 or anything that I say now during the course of this
14 instruction to you, that I have any opinion about the
15 facts in this case. The law does not allow me to have
16 an opinion about the facts in this case. This is a
17 matter solely for you, the jury, to determine. As
18 jurors it is your duty to determine the effect, value
19 and weight and truth of the evidence presented during
20 this trial.

21 The indictment charges the defendant with
22 assaulting an officer while resisting arrest. I
23 remind you the fact that the defendant was arrested,
24 charged, indicted in this case is not evidence in this
25 case and is not to be considered by you as evidence of

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1 guilt in this case, nor does it create any presumption
2 or inference of guilt. This document is simply the
3 formal written instrument by which this case is
4 brought into this court.

5 The defendant has pled not guilty to this
6 indictment and that plea puts the burden on the State
7 to prove the defendant guilty. A person charged with
8 committing a criminal offense in South Carolina is
9 never required to prove himself innocent. I charge
10 you it is an important rule of the law that the
11 defendant in a criminal trial, no matter what the
12 seriousness of the charge may be, will always be
13 presumed to be innocent of the crime for which the
14 indictment was issued unless guilt has been proven by
15 evidence satisfying you of that guilt beyond a
16 reasonable doubt.

17 This presumption of innocence does not end when
18 you begin your deliberations but it accompanies the
19 defendant throughout the trial until you reach a
20 verdict of guilt based on evidence satisfying you of
21 that guilt beyond a reasonable doubt. The presumption
22 of innocence is like a robe of righteousness placed
23 around the shoulders of the defendant, which remains
24 with the defendant until it has been stripped from the
25 defendant by evidence satisfying you of the .

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

7 The State has the burden of proving the
8 defendant guilty beyond a reasonable doubt. Some of
9 you may have served as jurors in civil cases where you
10 were told that it was only necessary to prove that a
11 fact is more likely true than not true, such as by a
12 greater weight or preponderance of the evidence. In
13 criminal cases the State's proof must be more powerful
14 than that. It must be beyond a reasonable doubt.
15 Proof beyond a reasonable doubt is proof that leaves
16 you firmly convinced of the defendant's guilt. There
17 are very few things in this world that we do know with
18 absolute certainty and in criminal cases the law does
19 not require proof that overcomes every possible doubt.
20 If based upon your consideration of the evidence you
21 are firmly convinced that the defendant is guilty of
22 the crime charged, you must find the defendant guilty.
23 If on the other hand you think there is a real
24 possibility that the defendant is not guilty, you must
25 give the defendant the benefit of the doubt and find

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1 him not guilty.

2 There are two types of evidence that are
3 generally presented throughout a trial: direct
4 evidence and circumstantial evidence. Direct evidence
5 is the testimony of a person who claims to have actual
6 knowledge of a fact, such as an eyewitness. It is
7 evidence which immediately establishes the main fact
8 to be proved. Circumstantial evidence is proof of a
9 chain of facts and circumstances indicating the
10 existence of a fact. It is evidence which immediately
11 establishes collateral facts from which the main fact
12 may be inferred. Circumstantial evidence is based on
13 inference and not on personal knowledge or
14 observation. The law makes absolutely no distinction
15 to be given between the weight or value to be given
16 either direct or circumstantial evidence, nor is a
17 greater degree of certainty required of circumstantial
18 evidence than that of direct evidence. You should
19 weigh all of the evidence in this case and after
20 weighing all of the evidence if you are not convinced
21 of the guilt of the defendant beyond a reasonable
22 doubt, you must find the defendant not guilty.

23 Necessarily, you must determine the credibility
24 of the witnesses who have testified in this case.
25 Credibility simply means believability. It becomes

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1 your duty as jurors to analyze and to evaluate the
2 evidence and determine which evidence convinces you of
3 its truth. In determining the believability of the
4 witnesses who have testified in this case, you may
5 believe one witness over several witnesses or several
6 witnesses over one witness. You may believe a part of
7 the testimony of a witness and reject the remaining
8 part of the testimony of that same witness. You may
9 believe the testimony of a witness in its entirety or
10 reject the testimony of a witness in its entirety.
11 You may consider whether any witness has exhibited to
12 you an interest, bias, prejudice, or other motive in
13 this case and you may also consider the appearance and
14 the manner of a witness while on the witness stand.

15 In order to establish criminal liability,
16 criminal intent is required. For example, the mental
17 state required to be proven by the State for a
18 particular crime might be purpose, intent, knowledge,
19 recklessness, or criminal negligence. Criminal intent
20 must be proven by the State beyond a reasonable doubt.
21 Criminal intent is always a matter that must be
22 determined by the jury from the circumstances
23 surrounding the situation. There is no way to prove
24 intent to a mathematical certainty. There is no way
25 that medical science can dissect a person's brain and

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1 determine what that person had in mind so the law says
2 that criminal intent may be inferred from the
3 circumstances shown to have existed. This is how you
4 make a determination of whether or not the element
5 requiring intent was present. It is not necessary to
6 establish intent by direct and positive evidence but
7 intent may be established by inference in the same way
8 as any other fact, by taking into consideration the
9 acts of the parties and all the facts and
10 circumstances of the case. Criminal intent is a
11 mental state, a conscious wrongdoing. It is up to you
12 to determine what the defendant intended to do based
13 upon the circumstances shown to have existed.

14 Criminal intent can arise from action or a
15 failure to act. It may arise from negligence,
16 recklessness, or an indifference to consequences that
17 is considered by the law to be the equivalent of
18 criminal intent.

19 The defendant is charged with assaulting a law
20 enforcement officer while resisting a lawful arrest.
21 The State must prove beyond a reasonable doubt that
22 the defendant assaulted, beat, or wounded an officer
23 when the defendant was resisting an arrest being made
24 by a person the defendant knew or reasonably should
25 have known was a law enforcement officer. To find the

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1 defendant guilty of assault by resisting arrest, the
2 State must first prove beyond a reasonable doubt that
3 the defendant knowingly and willfully resisted a
4 lawful arrest being made by a person the defendant
5 knew or reasonably should have known was a law
6 enforcement officer. Resist means to oppose, strive
7 against, or obstruct. Obstruct means to impede,
8 hinder, or interfere with. Even peaceful, nonviolent,
9 indirect obstruction of an arrest or the service or
10 execution of process is considered resisting arrest.
11 If the means used are sufficient to prevent the
12 officer from making an arrest, the defendant is guilty
13 of resisting arrest.

14 A citizen is not required to submit to an
15 illegal arrest and may use as much force as is
16 reasonably necessary to prevent an unlawful arrest.
17 Separate and distinct from the law of self-defense is
18 the right of any citizen to resist an unlawful arrest.
19 Under the law of this state, no citizen is required to
20 submit to an illegal arrest and may use reasonable
21 force in resisting an illegal arrest.

22 I charge you that a person who flees a police
23 officer's demand to stop is not committing resisting
24 arrest. The State may not punish a person for voicing
25 an objection to a police officer where no fighting

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1 words are used. Fighting words are words which by
2 their very utterance inflict injury or tend to incite
3 an immediate breach of the peace.

4 The State must also prove beyond a reasonable
5 doubt that the defendant assaulted that police
6 officer. An assault occurs when a person violently or
7 forcefully attempts to hurt or injure another person
8 and has the present ability to complete the attempted
9 injury. An assault is the intentional creation of
10 fear of immediate bodily harm. It is not necessary
11 that the attempted injury or harm actually take place.
12 For example, if I walk up to you and when we are
13 within arm's reach I draw back to hit you, that is an
14 assault. A battery is the unlawful touching of
15 another person by a person who has committed the
16 assault. An unlawful touching can be caused by a part
17 of the accused or by any object the accused puts in
18 motion. A battery is the completion of the assault by
19 using or applying force to another person, however
20 slight, in a rude, angry, or resentful manner, without
21 legal justification for doing so. Using my earlier
22 example, if I carry through the assault by hitting
23 you, then that is a battery.

24 A law enforcement officer means any duly
25 appointed or commissioned law enforcement officer of
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1 the state, county, or municipality.

2 Ladies and gentlemen, if you find that the State
3 has failed to prove beyond a reasonable doubt that the
4 defendant assaulted a police officer while resisting
5 arrest, you may consider whether the State has proved
6 beyond a reasonable doubt that the defendant committed
7 the lesser included offense of resisting arrest.

8 Resisting arrest does not include any assault on an
9 officer.

10 Ladies and gentlemen, I will now go over the
11 verdict form with you. There is no significance
12 whatsoever in the fact that I read these in the order
13 that I read them. It's simply one must go first on
14 the paper.

15 In the Court of General Sessions, State of South
16 Carolina, County of Charleston, the State of South
17 Carolina versus Jason Thomas Husted, indictment number
18 2010-GS-10-2968, number one, we the jury find the
19 defendant not guilty, or we the jury find the
20 defendant guilty of assault on a police officer while
21 resisting arrest, or we the jury find the defendant
22 guilty of resisting arrest.

23 The decision must be a unanimous decision of the
24 jury.

25 Mr. Foreperson, once you have reached a verdict

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1 you will sign the verdict form and date it, indicating
2 that this is the unanimous decision of the jury.

3 Ladies and gentlemen, this will be the last time
4 that I say this to you: do not begin your
5 deliberations. Do not discuss this case amongst
6 yourselves. We will be gathering the evidence to go
7 back to you in the deliberation room, as well as the
8 verdict form. So until the bailiff instructs you that
9 you may begin your deliberations, you must not begin
10 your deliberations.

11 Mr. Alternate, you have satisfied your service
12 at this time to this case. I'm going to have you
13 remain in a separate room for just a few moments so
14 that I ensure that all twelve are able to begin their
15 deliberations, and at that time I will release you
16 from your service to this case.

17 Please rise for the jury.

18 [Whereupon, the jury exits the courtroom at
19 10:41 a.m.]

20 THE COURT: Thank you. Be seated.

21 Any objection to the charge as read? From the
22 State?

23 MS. CHISOLM: No, Your Honor.

24 THE COURT: From the defense?

25 MR. CONDON: Yes, ma'am.

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1 I've just got one issue. I think the element of
2 lawful arrest needs to be explained to the jury what a
3 lawful arrest is. And I think that that's an element
4 that they have to prove and I think that that concept
5 needs to be defined, too. And I think at one point
6 you said just an arrest, and I think it should be
7 prefaced with lawful arrest.

8 THE COURT: All right. Your exception is noted
9 for the record, Mr. Condon. Those are the charges
10 that have been approved by the State. And pursuant to
11 case law, your objection is noted for the record.

12 There was no objection to the verdict form.

13 I show that the defense has entered into
14 evidence 3, 4, 5, 6, and 7. I show nothing for the
15 State.

16 Is that correct, Mr. Condon?

17 MR. CONDON: Yes, Your Honor. Yes, ma'am. I
18 think.

19 THE COURT: Is that correct from the State?

20 MR. CONDON: You're talking about exhibits,
21 right?

22 THE COURT: Yes.

23 MS. CHISOLM: Yes, Your Honor.

24 THE COURT: All right. If the two of you will
25 come and make sure that the appropriate ones go back
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1 MR. HUSTED: My fiancé.

2 THE COURT: Your fiancé.

3 If you'll hand the phone to Ms. Stoltz. She may
4 have the phone back.

5 MR. CONDON: Your Honor, I just wanted to let
6 you know I did have a bill from Ms. Stoltz to show
7 that it was her phone.

8 THE COURT: I'm going to -- I believe that it's
9 Ms. Stoltz' phone and she may --

10 Ms. Stoltz. Please hand it to Ms. Stoltz.

11 It's the order of the Court on indictment 2010-
12 GS-10-2968 that you be committed to the State
13 Department of Corrections for a term of one year
14 provided upon the service of sixty days the balance is
15 suspended with probation for one year. Terms and
16 conditions, you are to complete a hundred hours of
17 community service, successfully complete substance
18 abuse counseling, random drug and alcohol testing,
19 anger management.

20 Good luck to you, sir.

21 MR. CONDON: Thank you, Your Honor.

22 MR. CONDON: Your Honor, is it possible that he
23 serve it on the weekends?

24 THE COURT: No, sir.

25 Mr. Husted, you have the right to appeal this

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APPELLANT'S EXHIBIT 3

DVD

FILED SEPARATELY IN
LOWER COURT

APPELLANT'S EXHIBIT 4, 5, 6, 7

PICTURES

FILED SEPARATELY IN
LOWER COURT

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT
) WARRANT NO. K-606072

STATE OF SOUTH CAROLINA,

-v-

JASON THOMAS HUSTED,

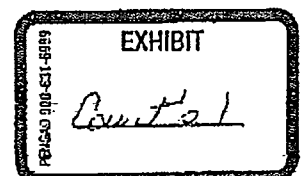
Defendant.

)
)
) DEFENDANT'S REQUEST TO CHARGE
)
)
)

NO. 1

"Because a properly trained police officer may reasonably be expected to exercise a higher degree of restraint than the average citizen,..." (Citing City of Houston v. Hill, 482 U.S. 451, 461, 107 S.Ct. 2502, 2510 (1987)), in order for a Defendant to be arrested for disorderly conduct towards a police officer, fighting words must be used.

State v. Bailey, 368 S.C. 39, 629 S.E. 2d 898 (Ct. App. 2006).



STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
WARRANT NO. K-606072

STATE OF SOUTH CAROLINA,)
-v-) DEFENDANT'S REQUEST TO CHARGE
JASON THOMAS HUSTED,) NO. 2
Defendant.)
_____)

"The use of profanity alone does not constitute fighting words. Probable cause to arrest an individual requires more than profanity or loud and boisterous behavior directed at the officers." *In re Jeremiah W.*, 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003), decision aff'd in part, rev'd in part on other grounds, 361 S.C. 620, 606 S.E.2d 766 (2004).

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
WARRANT NO. K-606072

STATE OF SOUTH CAROLINA,)

-v-)

JASON THOMAS HUSTED,)

Defendant.)

DEFENDANT'S REQUEST TO CHARGE

NO. 3

"The State may not punish a person for voicing an objection to a police officer where no fighting words are used." *In re Jeremiah W.*, 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003), decision aff'd in part, rev'd in part on other grounds, 361 S.C. 620, 606 S.E.2d 766 (2004).

"Fighting words are words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. The fighting words exception may require narrow application in cases involving words addressed to a police officer." *In re Jeremiah W.*, 353 S.C. 90, 576 S.E.2d 185 (Ct. App. 2003), decision aff'd in part, rev'd in part on other grounds, 361 S.C. 620, 606 S.E.2d 766 (2004).

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

) IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT
) WARRANT NO. K-606072

STATE OF SOUTH CAROLINA,

-v-

JASON THOMAS HUSTED,

Defendant.

)
)
) DEFENDANT'S REQUEST TO CHARGE
)
)
)

NO. 4

" A person who voices an objection to a police officer is not guilty of public disorderly conduct in the absence of "fighting words." When verbally challenged, a properly trained police officer may reasonably be expected to exercise a higher degree of restraint than the average citizen. In the absence of words which, by their very utterance inflict injury or tend to incite an immediate breach of the peace, a person does not commit public disorderly conduct merely by verbally criticizing or challenging a law enforcement officer." *State v. Perkins*, 306 S.C. 353, 412 S. E. 2d 385 (1991).

STATE OF SOUTH CAROLINA) IN THE COURT OF GENERAL SESSIONS
COUNTY OF CHARLESTON) FOR THE NINTH JUDICIAL CIRCUIT
WARRANT NO. K-606072

STATE OF SOUTH CAROLINA,)

-v-)

JASON THOMAS HUSTED,)

Defendant.)

DEFENDANT'S REQUEST TO CHARGE

NO. 5

" A law enforcement officer is authorized to arrest a citizen for a misdemeanor, such as public drunkenness or disorderly conduct or breach of peace, when committed in his presence. The subject must submit or yield to arrest, and should the subject resist, the law enforcement officer is justified in using as much force as is reasonably necessary to take the subject into custody. However, a citizen is not required to submit to an illegal arrest and may use as much force as is reasonable necessary to prevent an unlawful arrest.

Separate and distinct from the law of self-defense is the right of any citizen to resist an unlawful arrest. Under the law of this state a person has the right to resist an unlawful arrest by force, if such be necessary. In so doing, he may use such force as is apparently necessary to regain his liberty if such be necessary. *State v. Robertson*, 191 S.C. 509, 5 S.E. 2d 285 (1939); *State v. Bethune*, 112 S.C. 100, 99 S.E. 753 (1919).

— Citizens arrest

In order to justify the use of force in resisting an unlawful arrest, it is not necessary for the defendant to show that he had no opportunity to retreat or escape. He may stand his ground and use such force as may be apparently necessary to repel an unlawful arrest or detention or interference with his person, provided such force is reasonable in

degree and kind. *State v. Young*, 243 S.C. 187, 133 S.E. 2d 210 (1963); *State v. Poinsett*, 250 S.C. 293, 157 S.E. 2d 570 (1967); *State v. De Berry*, 250 S.C. 314, 157 S.E. 2d 637, cert. Denied, 88 S. Ct. 1857 (1967); *Columbia v. Bouie*, 239 S.C. 570, 124 S.E. 2d 332, rev'd on other grounds, 84 S. Ct. 1697 (1964); *Annotation, Arrest Right to resist Excessive Force*, 77 A. L. R. 3d 281.

1995 Supplement

(also note the following citations)

State v. Grate, 310 S.C. 249, 423 S. E. 2d 119 (1992) (a person has the right to resist an unlawful arrest even to the extent of taking the life of the aggressor if necessary to maintain liberty under *State v. Robertson*, 19 S.C. 509, 5 S.E. 2d 285 (1939); *State v. Bethune*, 112 S.C. 100, 99 S.E. 753 (1919))."

) IN THE COURT OF GENERAL SESSIONS
) FOR THE NINTH JUDICIAL CIRCUIT
) WARRANT NO. K-606072

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3

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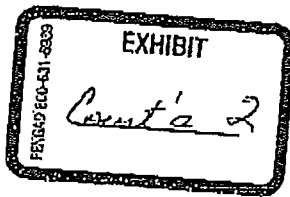
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JUDGE,

WE ARE UNABLE TO VIEW THE VIDEO WITH THE EQUIPMENT SUPPLIED TO US IN OUR ROOM AND WOULD LIKE TO VIEW IT AGAIN.

ALSO, WE WOULD LIKE THE STATUTE DEFINING RESISTING ARREST (I.E. HOW RESISTING ARREST IS DEFINED).




WILLIAM J. ALLEN
JURY FOREMAN

We will receive you back into the courtroom to view the video.



TO BE CLEAR JUDGE, WE WOULD LIKE THE ABILITY TO DELIBERATE WHILE VIEWING THE VIDEO.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi Harrington, Circuit Court Judge

Case No. 2010180066

The State..... Respondent

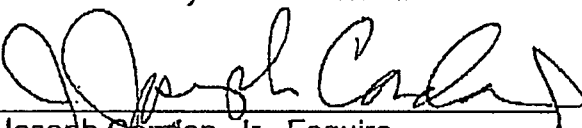
v.

Jason Thomas Husted..... Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

August 10, 2012



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington Circuit Court Judge

Case No. 2010180066

State of South Carolina..... Respondent,

v.

Jason Thomas Husted..... Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE APPELLANT'S MOTION FOR A DIRECTED VERDICT?
2. DID THE TRIAL COURT ERR IN FAILING TO CHARGE THE JURY THAT A LAWFUL ARREST WAS A NECESSARY ELEMENT WHICH THE STATE NEEDED TO PROVE AND WHAT DEFINED A LAWFUL ARREST?
3. DID THE TRIAL COURT ERR IN FAILING TO CHARGE THE JURY ON APPELLANT'S JURY CHARGES ONE THROUGH FOUR AND SIX?

STATEMENT OF THE CASE

The Appellant was arrested on June 13, 2009 for disorderly conduct and assault on a police officer while resisting arrest. He was indicted on May 10, 2010. The disorderly conduct charge is still pending in the City of Charleston Municipal Court. The trial for the charge of assault on a police officer while resisting arrest was held in Charleston County on December 8th and 9th, 2010. The Appellant was found guilty of resisting arrest. He was sentenced to a term of one year provided on the service of sixty days, the balance is suspended with probation for one year. This appeal followed.

FACTS

On June 13, 2009, there was a fight between two men at the Back Nine Pub which is located in a small strip shopping center. The Appellant was not involved in the fight. (R. p. 108, line 24 - p. 109, line 23) The Back Nine Pub is in the City of Charleston located on Ashley River Road. The City of Charleston Police responded to the scene. Three police officers, Lt. Daniel M. Riccio, Officer Terri Ann Ferguson and

Officer Christine DeVasto testified about this incident on behalf of the State. The Appellant and several patrons testified for the Appellant. Lt. Riccio arrived first at the scene. He did not observe the fight. The fight was over by the time Lt. Riccio arrived. (R. p. 10, lines 9-11) When Lt. Riccio initially arrived he handled, in the front of the shopping center, an individual, Robert Gass, who allegedly had illegal possession of a gun. That charge involving Robert Gass was later dismissed. (R. p. 114, lines 15-18). Lt. Riccio later went to the back of the strip center. When Officer Ferguson and DeVasto arrived at the scene, they went to the back of the small strip center. These officers were told that other people possibly involved in the fight had went to the back of the small strip center. While in the back, the officers spotted two men, the Appellant and Robbie Morris, in a nearby wooded area and asked them to come out. The two men complied and they proceeded out of the wooded area to the back parking lot area. All three officers testified that they were conducting an investigation into what occurred and were making an investigative stop as to the Appellant. In the back parking lot area, the Appellant continued to walk pass Officers Ferguson and DeVasto. The Appellant did not stop and continued to move to the front of the shopping center. Officer Ferguson gave verbal commands to the Appellant to stop. Officer Ferguson testified she handcuffed one hand of the Appellant. (R. p. 47, line 12) The officers physically restrained the Appellant and the Appellant was pepper sprayed by Lt. Riccio in order to effect the seizure of the Appellant.

ARGUMENTS

- I. THAT THE STATE FAILED TO PROVE THERE WAS PROBABLE CAUSE FOR THE ARREST OF THE APPELLANT, THEREFORE THE MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED.

The Appellant moved for a directed verdict at the conclusion of the State's case (R. p. 82, line 1 - p. 88, line 21) and at the conclusion of the trial. (R. p. 150, lines 4-23) The standard of review for the denial of a directed verdict for an appellate court is to view the evidence and all reasonable inferences in the light most favorable to the State. State v. Weston, 367 S.C. 279, 625 S.E. 2d 641 (2006).

In order to arrest the Appellant, there must be probable cause that a crime has been committed. State v. Baccus, 367 S.C. 41, 625 S.E. 2d 216 (2006). Prior to the physical seizure of the Appellant, there was no probable cause that the Appellant had committed the crime of disorderly conduct. The officers admitted that they were merely conducting an investigative stop.

Officer Riccio stated at trial:

- Q. Okay. Now, when you went to the back and you saw Officer Ferguson and DeVasto there, the individual that first walked out was the defendant, Jason Husted?
- A. Yes. He was being escorted out.
- Q. Okay. And the officers merely wanted to talk to him; isn't that true?
- A. That is true.
- Q. And it's my – isn't it true that he walked past the officers and they asked him to stop? Isn't that true?
- A. In the rear, or in the front?
- Q. In the rear.
- A. In the rear. I would not say he passed in front of them. He was being escorted. Basically, they were – the path was very small between the wooded area and the big fence so they were basically kind of following him, trying to, you know, kind of holding onto him. And he was the first out of that little path as I walked up.

- Q. And when you walked up, he is now in the parking lot of that – of that back of the bar?
- A. Correct.
- Q. Okay. And he continues to walk?
- A. He basically darted away, not walked, and that's when the officer said, hey, hey, hold up, and went to grab him and stop him because he had blood on him, as well.
- Q. But the officers merely wanted to talk to him; isn't that true?
- A. Sure.
- Q. That's it?
- A. We had to figure what's going on, who's all involved.
- Q. Right. And you're just trying to do an investigative stop?
- A. Investigative stop.

(R. p. 20, line 15 - p. 21, line 22)

Officer Ferguson stated at trial:

- Q. Okay. And so he comes out of the woods, okay complies with your commands?
- A. Okay.
- Q. Isn't that true?
- A. When I told him to stop, then he continued.
- Q. Okay. Other than that, isn't it true that he never in any way threatened you? Isn't that true?
- A. No, he hadn't did any verbal threats - -
- Q. He didn't threaten - -
- A. He became belligerent at that point.
- Q. But he - - you asked him to stop?
- A. Yes, sir.
- Q. Okay. He walked by you?
- A. He continued to - - actually, he ignored my commands. After he was told to stop several time, that's when he continued to walk, preventing us from actually kind of (phonetic) our investigation.
- Q. Okay. And so your command was to stop and he continued to walk? Isn't that true?
- A. Yes, sir. He didn't obey the command. Yes, sir.
- Q. Okay. And as he walked by you, he didn't in any way threaten or use any type of what I call fighting words; isn't that true?
- A. He did not walk by us like nonchalant. He pretty much decided at that point to not obey our verbal command.
- Q. Just answer the question.
- A. Okay. He decided not to obey your verbal commands, walk by, and then he started to pretty much try to flee the scene.
- Q. But he - - but he was walking; isn't that true?

- A. Yeah. He was leaving the scene, sir.
Q. Now, and you were just doing an investigative stop?
A. We were finding out pretty much what took place.

(R. p. 58, line 10 - p. 59, line 21)

Officer DeVasto stated at trial:

- Q. Right. But you were just doing basically an investigative stop to see what happened?
A. Yes.

(R. p. 78, lines 8-10)

The resisting arrest statute (S.C. Code 16-9-320(B)) does not apply to an investigative stop. S.C. Code § 16-9-320(B) refers to resisting an arrest. At time of the seizure of the Appellant, he was not being arrested for being disorderly conduct. The officers merely wanted to talk to him to find out what was happening. The Appellant had the right not to talk to the officers. There is no obligation to speak to the police. The Appellant was seized because he would not respond to the officer's verbal commands to stop. The court in State v. Brannon, 388 S.C. 498, 697 S.E. 2d 593 (2010) discussed the difference between arrest and seizure. In Brannon, the trial court held there was no arrest at the time Brannon fled from police. In our case, the Appellant is leaving the area and is seized by the police for questioning. The Appellant has no idea why he is being seized by the police. (R. p. 135, lines 9-12 and p.137, lines 15-19) The resisting arrest statute is clear that there has to be an arrest for a crime. S.C. Code 16-9-320(B) is a criminal statute and should be strictly construed in the defendant's favor. State v. Blackmon, 304 S.C. 270, 304 S.E. 2d 660 (1991). In order to have a lawful arrest, there needs to be probable cause that the Appellant has committed a crime. At the time of the seizure of the Appellant there was no probable

cause that he had committed a crime.

The police cannot arrest someone for an investigative stop and then say the person was resisting because he resisted the seizure. The State has failed to provide evidence that the pre-restraint behavior of the Appellant was the cause of the arrest. The State has failed to show that a lawful arrest for disorderly conduct was being made at the time the Appellant was seized. The Appellant did not become disorderly in the police's eyes until the Appellant was physically restrained. The Appellant's pre-restraint conduct is merely walking pass the officers and not responding to their commands.

The resisting statute does not allow for a Terry stop seizure. The trial court denied the direct verdict motion. The trial court held that the Appellant was arrested based of the totality of the circumstances. (R. p. 87, line 20 - p. 88, line 16).

This case differs from State v. Lacoste, 347 S.C. 153, 553 S.E. 2d 464 (Ct. App. 2001). In Lacoste, that appellant did not raise lack of probable cause as a basis for his directed verdict. Also, Lacoste is factually different because that appellant was told he was being placed under arrest for disorderly conduct. Id. at 164. Whereas, here the Appellant is being stopped for questioning and failure to follow the commands of the officer, which is a Terry stop. In our case, the police are investigating as opposed to making an arrest for a crime as to a particular person.

II. THAT THE TRIAL COURT FAILED TO DEFINE WHAT A LAWFUL ARREST WAS AND THAT A LAWFUL ARREST IS A NECESSARY ELEMENT OF RESISTING ARREST.

In order to prove a resisting charge, there must be a lawful arrest. That is an essential element of the statute and the Indictment mentions a lawful arrest. The jury needed to know what defines a lawful arrest. The elements of a lawful arrest needed to

be defined to the jury. Merely stating the words "lawful arrest" without defining what a lawful arrest meant is an incorrect and confusing jury charge. The jury needed to realize that the Appellant had to be first lawfully arrested. The Trial Court's charge encompassed only a lawful arrest, resistance and possibly assault on a police officer. The Trial Court did mention "lawful arrest", (R. p. 190, line 19 - p. 191, line 21), but the Trial Court did not define what a lawful arrest was or what conduct required the arrest of the Appellant. The definition of disorderly conduct as stated in S.C. Code §16-17-530 was never mentioned to the jury. The Trial Court's jury charge was insufficient.

III. THAT THE TRIAL COURT FAILED TO CHARGE THE APPELLANT'S REQUESTS TO CHARGE ONE THROUGH FOUR AND SIX.

Some parts of the Appellant's charges were used in the Trial Court's general charge. Appellant's Requests to Charge one through four and six should have been charged in full. The proposed jury charges were correct statements of the law and appropriately fit this case because this case involved the interaction between police officers and the Appellant. The general public was not part of that interaction. There is a stricter application of disorderly conduct when dealing with police officers, as opposed to the general public. The jury should have been instructed on the stricter application of disorderly conduct.

CONCLUSION

The Trial Court should have granted the motion for a directed verdict and the case should have been dismissed. The Trial Court failed to charge all of the key elements of resisting arrest, and therefore a new trial should be granted. Lastly, the Trial Court failed to fully charge the jury on all of the Appellant's request to charge and

therefore a new trial should be granted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "J. Joseph Condon, Jr.", written in a cursive style.

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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Charleston County

Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No. 2010-180066

THE STATE

Respondent

VS.

DASON THOMAS HUSTED

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. The defendant asks whether the trial court made an error of law in failing to grant his motion for directed verdict but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 1).

2. The defendant asks whether the court made an error of law in failing to define "lawful arrest" for the jury when that lawful arrest was a necessary element of an [unidentified] offense. (Appellant's Statement of Issues on Appeal 2).

3. The defendant asks whether the court made an error of law in failing to charge his proposed jury instructions 1-4 and 6 but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 3).

STATEMENT OF THE CASE

The Charleston County Grand Jury charged the defendant with assault on a police officer while resisting arrest (2010-GS-10-2968). The defendant and his counsel came to trial December 8-9, 2010, before the Honorable Kristi L. Harrington, Judge, and a jury. The jury found the defendant guilty of resisting arrest, and the court imposed a sentence of one year imprisonment suspended upon service of sixty days, probation for one year, and certain terms and conditions. The defendant served opposing counsel with a timely notice of appeal.

ARGUMENT

I.

The trial judge soundly denied the motion for directed verdict for assault on a police officer while resisting arrest.

The defendant asks whether the trial court made an error of law in failing to grant his motion for directed verdict but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 1). The statement of an issue on appeal must present a purported error the appellate court's review, Rule 208(b)(1)(B)SCACR, and the want of a complete assignment of error presents nothing for review.

The substance of the defendant's argument on appeal is that the "officers merely wanted to talk to him to find out what was happening[,] . . . [and he] had the right not to talk to the officers." The officers lacked probable cause for an arrest, and he, then, could not have resisted a lawful arrest. (IBOA pp. 3-6). This is similar to his position at trial: After the state rested, the defendant made a motion for directed verdict on the ground that there had been no probable cause for an arrest, and he could then resist. The defendant also offered that one is free to walk away from a Terry stop and cited State v. Brannon.¹ There is no legal requirement to talk to the police, and the police had detained him merely because he did not talk to the police. (ROA. p. 82 - p. 84, line 12; p. 87, lines 2-16). The court denied the

¹ State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010)(police responded to 911 report of unauthorized person in a vehicle, arrived at scene and saw defendant; police approached and shouted "stop, police!"; defendant fled, and police caught him and charged resisting arrest; the Court found there was no evidence an arrest was being made when the defendant fled from police; also noting that under Terry v. Ohio an individual can be seized under the Fourth Amendment without being arrested under state law, and an individual is seized under the Fourth Amendment when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave).

motion. (ROA. p. 87, line 17 - p. 88). At the close of the evidence the defendant renewed his motion for a directed verdict. There was no probable cause for the arrest, no lawful arrest, and one has the right to resist an unlawful arrest. Resisting detention is not the same as resisting arrest. The court again denied the motion. (ROA. p. 148; p. 149, line 21 - p. 150). An examination of the evidence and applicable law shows that the police attempted to investigate an incident, stopped the defendant on the basis of reasonable suspicion, and the defendant responded by assaulting the officers and resisting arrest. The motion for directed verdict for assault on a police officer while resisting arrest was soundly denied.

Summary of Pertinent Testimony

Officer Riccio responded to a parking lot fight in progress that involved many individuals. Coincidentally, he was close to the Back Nine Pub and was on the scene some five seconds after receiving the call at about 2:20 AM on June 13, 2009. The Pub is in a strip-mall building, and a storage facility was in the back of the building. (ROA. pp. 6-8). He arrived in an unmarked vehicle and turned on his blue lights. When he saw an unrelated co-defendant carry a handgun to a truck, Riccio drew his weapon and handcuffed him. Riccio advised of having a person with a gun and requested back-up support. Officers Devasto and Ferguson reached the scene while Riccio's attention was on the man with the gun - and while people were still screaming - and immediately pursued a person who was fleeing into a wooded area. Riccio followed and saw the officers escorting the defendant - "kind of holding onto him" - out of the woods where he had been hiding with another person - both were covered in blood. The defendant was intoxicated and asking not to be tazed. When the defendant reached the parking lot, he broke loose and began running toward the rear of the Back Nine Bar. Devasto and Ferguson attempted to stop him. (ROA. pp. 9-13;

p. 21, lines 2-5; p. 36, lines 2-11). The defendant was very belligerent, very intoxicated, and not cooperative while the officers attempted to tell him that they needed to investigate. Officer Ferguson got a handcuff only on the defendant's left hand, and the defendant began swinging the attached cuff - a potential weapon. The encounter turned from an investigative stop to an assault on the police. When the defendant [successfully] physically resisted two officers, Riccio was concerned for their safety and twice applied pepper spray. The defendant said that his military training had prepared him to get out of the situation, and he required an uncommon number - at least three - pepper sprays to get him on the ground and to stop fighting. (ROA. pp. 14-16; p. 24, lines 20-25). Riccio testified, in sum, the police were trying to make an investigative stop since, in part, the blood on the defendant indicated his probable involvement in the reported fight. The agitated, intoxicated defendant escalated the investigative stop by fighting the police and apparently wanting to harm someone; he committed a crime in the presence of the officers. (ROA. p. 21, lines 14-22; pp. 24 - 25, line 2).

Similarly, Officers Ferguson and Devasto responded to the call about an assault, person with firearm, and physical activity in progress. On arrival, persons at the scene advised that two people involved in the physical activity had fled to the rear of the business. When they went behind the building and into a wooded area, the officers announced that they were police and said, "Don't move." The defendant asked the officers not to taze him, and the officers saw two people "actually covered in blood." (ROA. pp. 44-46, line 1; p. 60). The officers wanted to assess the situation and directed the blood covered people out of the woods to a parking area for an investigative stop. The defendant was not cooperative and ignored Ferguson's asking - commanding - him to stop and attempted to leave the scene.

The defendant knew that he was being detained. Ferguson smelled alcohol about the defendant, and the defendant began using foul language and became very belligerent and disorderly. The people at the front of the business could have heard the defendant. Ferguson, other involved persons, and everybody in the area knew that the defendant was being arrested. After Ferguson put the handcuff on his left arm, the defendant began swinging the other "really sharp" open part of the handcuff so aggressively that Ferguson feared for her life. (ROA. p. 46-47; p. 57, lines 2-10; p. 58, line 10 -p. 59; p. 63; p. 69, line 13 - p. 70, line 2).

The defendant testified. He was trying to get Robert Morris out of harm's way by taking him around back and away from Jason Ayers. Walking out of the woods, he made a smart remark but used no foul language. He put out his arms and explained to officers that he was not doing anything. He indicated who they were looking for, announced that he was going to the front of the building, and took some three or four steps. The defendant anticipated getting to the front of the bar, and police would question everyone. Instead, a female officer grabbed him. Officers put a handcuff on one wrist, and Riccio pepper sprayed him. (ROA. pp. 127-131; p. 138; pp. 144-145). He absolutely did not flail a handcuff at the officers. (ROA. p. 135). He did not threaten any police officer and did not try to hurt anybody. (ROA. p. 138). People told the police that he was the wrong person. (ROA. p. 136).

Discussion

The right of the police to detain an individual based upon reasonable suspicion of criminal activity cannot be seriously challenged. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968); *Michigan v. Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d

340 and n. 12 (1981)(circumstances determine reasonable length of investigatory detention) citing 3 W. LaFave, Search and Seizure § 9.2, pp. 36-37 (1978)(interrogation is the most common investigative technique utilized in a Terry type stop and may include both a request for identification and inquiry addressing suspicious conduct of person detained; officer may communicate with others to verify an explanation or to confirm identification); State v. Brannon, 388 S.C. 498, 697 S.E.2d 593 (2010)(observing that under Terry v. Ohio an individual can be seized under the Fourth Amendment without being arrested under state law, and an individual is seized under the Fourth Amendment when a reasonable person, in view of all the circumstances of a particular case, would not believe he was free to leave).

A defendant is entitled to a directed verdict when the State fails to produce evidence of the offense charged. In reviewing a motion for directed verdict, the trial judge is concerned with the existence of the evidence, not with its weight. On appeal from the denial of a directed verdict, an appellate court must view the evidence in the light most favorable to the State. If there is any direct evidence or substantial circumstantial evidence reasonably tending to prove the guilt of the accused, we must find the case was properly submitted to the jury.

State v. McHoney, 344 S.C. 85, 544 S.E.2d 30 (2001)(internal citation omitted). According to the state's evidence, the defendant quickly escalated the investigative stop by refusing to be detained, fighting the police, and placing at least one officer in fear. During the affray, the defendant committed a number of offenses in the officers' presence, including public disorderly conduct and assault, which supported his arrest, and the defendant resisted the officers' lawful arrest.

II.

The trial judge correctly charged the jury.

On appeal the defendant asks whether the court made an error of law in failing to define "lawful arrest" for the jury when lawful arrest was a necessary element of an [unidentified] offense. (Appellant's Statement of Issues on Appeal 2). After the jury charge the defendant thought that "lawful arrest" needed to be explained. The court found that the instructions were sufficient. ROA. p. 195).

The jury charge included the state's burden of proving the defendant's criminal intent and knowingly and willfully resisting a lawful arrest by a person the defendant knew or should have known was a law enforcement officer, merely fleeing an officer's demand to stop was not resisting arrest, and the defendant was not required to submit to an illegal arrest and could use as much force as reasonably necessary to resist an unlawful arrest. (ROA. p. 189, line 15 - p. 192, line 3). A trial judge is constitutionally required to "explain so much of the criminal law as is applicable to the issues made by the evidence adduced at trial." State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985). The evidence adduced at trial established: In the state's view, the police had reasonable suspicion to temporarily detain the defendant for investigation into his possible involvement in the bar fight, and the defendant suddenly escalated the officers' attempted temporary seizure by assaulting the officers. In the defendant's view, he was helping someone when the police arrived and during the course of cooperating with their investigation, the police handcuffed and pepper sprayed him. (Please see facts in Argument I). The record demonstrates the sufficiency of the court's jury instruction, and further instruction could only reasonably have confused the jury. Even if the defendant had proposed an instruction, the trial judge has no obligation to grant a requested

charge which may confuse or mislead the jury. State v. Simmons, 269 S.C. 649, 239 S.E.2d 656 (1977).

III.

The trial judge correctly charged the jury.

The defendant asks whether the court made an error of law in failing to charge his proposed jury instructions 1-4 and 6 but states no ground or basis for the trial court's purported error. (Appellant's Statement of Issues on Appeal 3). The substance of the defendant's argument on appeal is that there is a "stricter application of disorderly conduct when dealing with police officers, as opposed to the general public." (IBOA p. 7). In light of the defendant's account of the incident - his attempting to help a man, and his denying both assaulting the police and using foul language (ROA. pp. 127-131; p. 135; p. 138; pp. 144-145) - his assignment of error is difficult to understand.

The defendant offered proposed jury charges including 1-4 and 6. The court noted that it was charging that a person may not be punished for voicing an objection to a police officer where no fighting words are used and, further, the court was charging the substance of most of the defendant's requests. (ROA. pp. 151-156). In fact, the court's jury charge defining "fighting words" and that a person may not be punished for only voicing an objection to the police, and flight from an officer's demand to stop is not resisting arrest were charged and the substance of the defendant's requests 1, 2, 3, 4, and 6. (ROA. p. 191, line 22 - p. 192, line 3). A trial judge is constitutionally required to "explain so much of the criminal law as is applicable to the issues made by the evidence adduced at trial." State v. Stone, 285 S.C. 386, 330 S.E.2d 286 (1985). Accord, State v. Smith, 315 S.C. 547, 446 S.E.2d 411 (1994)(substance of law is what must be instructed to jury). There was no conceivable error.

CONCLUSION

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

Respectfully submitted,

ALAN WILSON
Attorney General

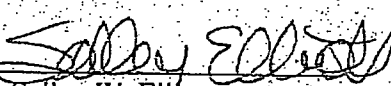
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ATTORNEYS FOR RESPONDENT

August 29, 2012

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No: 2010-180066

THE STATE,

Respondent,

vs.

JASON THOMAS HUSTED,

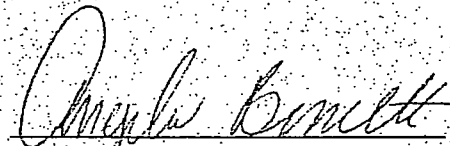
Appellant.

PROOF OF SERVICE

I, Angela Bennett, certify that I have served the within Final Brief of Respondent on Appellant by depositing two copies of the same in the United States mail, postage prepaid, addressed to his attorney of record, J. Joseph Condon, Jr., Esquire, 3842-C Leeds Avenue, N. Charleston, South Carolina 29405.

I further certify that all parties required by Rule to be served have been served.

This 29th day of August, 2012.



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal From Charleston County
Honorable Kristi L. Harrington, Circuit Court Judge

Appellate Case No: 2010-180066

THE STATE,

Respondent,

vs.

JASON THOMAS HUSTED,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR. certifies this Designation contains no matter which is irrelevant to this appeal.

ALAN WILSON
Attorney General

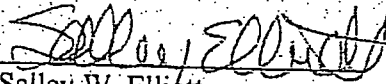
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August 29, 2012

ATTORNEYS FOR RESPONDENT

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of General Sessions

Kristi L. Harrington Circuit Court Judge

Case No. 2010180066

State of South Carolina..... Respondent,

v.

Jason Thomas Husted..... Appellant.

REPLY BRIEF
OF APPELLANT

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ARGUMENT

I. DID THE TRIAL COURT ERR IN FAILING TO GRANT THE APPELLANT'S MOTION FOR A DIRECTED VERDICT?

The trial court failed to grant the Appellant's Motion for a Directed Verdict on the charge of assault on a police officer while resisting arrest. This first issue on appeal may not have been eloquently stated, but the issue is whether the trial court properly denied the Appellant's Motion for a Directed Verdict. The Respondent argues that the Appellant did not specifically state an error for the Appellate Court to review. The error would be that the trial court improperly denied the Appellant's Motion for Directed Verdict because, looking at the evidence in the light most favorably to the State, there was no evidence that the Appellant was disorderly prior to the time when the police officers attempted to detain the Appellant for an investigative stop. Another way of putting that idea, is that there was no probable cause for arresting the Appellant. The trial court did not correctly analyze the situation. The trial court needed to view the evidence presented by the State in various stages as outlined in State v. Brannon, 388 S.C. 498, 697 S.E. 2d 593 (2010). The police admit that they were just investigating the situation and making a investigative stop. The trial court stated that its decision was based on the totality of the circumstances. (R. p. 88, lines 1-22). In State v. Brannon, 388 S.C. 498, 504, 697 S.E. 2d 593, , (2010), the court analyzed the evidence from the point in time of "whether the arresting process was underway at the time..." of Appellant's flight. Prior to the time of the Appellant walking away, there was no evidence that the Appellant had committed any crime. At the time of the encounter, the

subjective intent of the arresting officers was to simply to investigate and there was no intent to arrest. The arresting process was not underway at the time of flight. State v. Brannon 388 S.C. at 504. If the subjective intent is to investigate, and the Appellant is being detained under Terry V. Ohio, it does not follow that the Appellant can be charged with resisting arrest under S.C. Code §16-9-320. S.C. Code § 16-9-320 deals with an arrest for a crime and not for any type of detention. Detention is a distinct seizure under Terry v. Ohio which is separate and apart from an arrest for a crime. The South Carolina statute simply does not address the issue of detention. As a matter of law, the trial court should have granted the Motion for a Directed Verdict.

RESPONSE TO SUMMARY OF PERTINENT TESTIMONY

A video of the incident in the back parking lot of the strip mall is included in the designation of material for the record. (R. p. 197, Appellant's Exhibit #3). Officer Riccio was initially in the front of the strip mall. Officer Riccio was dealing with a different individual in the front of the strip mall. Officers Devasto and Ferguson arrived later and went to the back of the strip mall to investigate other possible persons involved. Officer Devasto and Ferguson did not immediately pursue a fleeing person into the wooded area, but went into the back to investigate whether other people were possibly involved. On the video, the Appellant did not break loose and did not run. The video does not show that the Appellant was belligerent, but was merely walking away. The encounter in the back of the strip mall turned from an investigative stop to an unlawful arrest.

DISCUSSION RESPONSE

In response to the discussion, the police do have a right to detain someone under Terry v. Ohio, in order to investigate whether a crime has been committed, but they do not have the right to arrest them for a crime under Terry v. Ohio. An investigative stop is distinct from the arrest on charges of disorderly conduct and resisting arrest. Resistance to an investigative stop cannot give rise to resisting an arrest under S.C Code §16-9-320. That statute clearly does not address detention by police for an investigative stop.

ARGUMENT

II. THAT THE TRIAL COURT FAILED TO DEFINE WHAT A LAWFUL ARREST WAS AND THAT A LAWFUL ARREST IS A NECESSARY ELEMENT OF RESISTING ARREST.

The court is charged with stating to the jury what the law is. South Carolina Constitution Article V, Section 21. In dealing with the charge of assault on a police officer while resisting arrest or the lesser included offense of resisting arrest, one of the key elements is that there has to be a lawful arrest. In the court's charge, there was no definition of what a lawful arrest was. If there is no lawful arrest, then it follows that there cannot be resistance to the arrest or even an assault on a police officer. The trial court needed to charge the jury that a lawful arrest was a condition precedent to the charge of assault on a police officer while effecting an arrest. There needed to be an explanation that before any lawful arrest could be made, the police needed to have probable cause that the Appellant had committed a crime.

Even if the police are doing an investigative stop, the court still needed to explain

that the police can make a Terry stop and detain a person for a brief period of time to investigate. Even with an investigative stop, there needed to be an explanation to the jury what is involved in an investigative stop. The statute, S.C. Code § 16-9-320, does not encompass or address the issue of an investigative stop. The statute merely addresses an arrest. Thus, the jury needed to know that the Appellant must have committed a crime prior to any arrest. That clarification was not made to the jury.

The Appellant was also charged with disorderly conduct which is the supposed basis of the arrest and that charge was still pending at the time of this trial. The Appellant is prejudiced by the failure to charge the jury of the requirement of a lawful arrest. The jury is left to assume the arrest was legal. The only issue for the jury then becomes, did the Appellant assault a police officer or resist the police officer while the police were making the arrest. The jury's focus unfairly narrows to the issues of assault or resistance. The jury struggled with the charge because the jury requested that the charge on resisting arrest be read to them again. (R. p. 206, Court's Exhibit #2).

The jury should have been instructed that the Appellant needed to have committed the crime of disorderly conduct prior to the arrest. Then the issues would have been properly framed. First, were the police justified in arresting the Appellant? Second, did the Appellant assault a police during this lawful arrest or did he just resist this lawful arrest? The Appellant was unfairly prejudiced by the failure to properly instruct the jury that a lawful arrest was a condition precedent to the charge of assault on a police officer while effecting an arrest.

ARGUMENT

III THAT THE TRIAL COURT FAILED TO CHARGE THE APPELLANT'S REQUEST TO CHARGE ONE THROUGH SIX.

The jury charges one through six were important because they clearly stated that the disorderly conduct is different when dealing directly with police officers as opposed to dealing with the public. For example, Appellant's Requests To Charge No. 1, deals with the fact that police officers are specially trained and should have a higher degree of restraint. This incident occurred in the back of a strip mall. Except for a single individual, only the Appellant and several police officers were in the back of the strip mall. The concept of disorderly conduct is more narrowly defined when dealing with police officer. The trial court should have charged the jury on all of these requested jury charges. The complexion of the situation would have been properly portrayed to the jury if the trial court had properly charged the jury.

CONCLUSION

The Appellant prays that the Judgement be reversed; the sentence set aside and a new trial granted.

Respectfully Submitted,



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Attorney for Appellant Jason Thomas Husted

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Jason Thomas Husted, Appellant.

Appellate Case No. 2010-180066

Appeal From Charleston County
Kristi Lea Harrington, Circuit Court Judge

Unpublished Opinion No. 2013-UP-294
Heard March 5, 2013 – Filed June 26, 2013

AFFIRMED

J. Joseph Condon, Jr., of N. Charleston, for Appellant.

Attorney General Alan McCrory Wilson, Chief Deputy
Attorney General John W. McIntosh, Senior Assistant
Deputy Attorney General Salley W. Elliott, and Assistant
Attorney General Julie Kate Keeney, all of Columbia;
and Solicitor Scarlett Anne Wilson, of Charleston, for
Respondent.

597. Husted's remaining request to charge was not a correct statement of the law when this matter came to trial,⁴ and the trial court committed no abuse of discretion in refusing to include it. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion.").

AFFIRMED.

SHORT, THOMAS, and PIEPER, JJ., concur.

⁴ The Supreme Court issued its opinion in *Brannon* on August 9, 2010, and Husted's trial took place on December 8, 2010.

PER CURIAM: Jason Thomas Husted appeals his conviction for resisting arrest. He argues the trial court erred in refusing to include various instructions in the jury charge and should have directed a verdict of acquittal. We affirm.

1. Husted first argues he should have been granted a directed verdict because the State failed to prove there was probable cause for the arrest that formed the basis of the charge against him. He contends the evidence at best, showed only that the officers were conducting an investigative stop. The evidence, however, when considered in the light most favorable to the State, was sufficient to support the findings that (1) the officers had probable cause to arrest Husted, (2) they were in the process of arresting Husted on the underlying offense, and (3) Husted's acts of resistance were directed toward both the officers' efforts to detain him as well as their attempt to arrest him.

In his brief, Husted correctly points out that when the officers first approached him, they were only investigating the incident that prompted the call to the Charleston Police Department. However, we disagree with Husted's statement that his "pre-restraint conduct" was "merely walking pas[t] the officers and not responding to their commands." The State presented testimony that when the officers arrived at the scene, they were informed that bystanders had seen "two white males that were possibly involved in the altercation run into the woods" and "[b]oth of them had blood on them." The officers went to the wooded area, where they met Husted and the other man and noticed both men were highly intoxicated and covered in blood. These observations, along with the information the officers received upon their arrival, justified the officers' decision to detain Husted and their exercise of reasonable force in doing so. *See Graham v. Connor*, 490 U.S. 386, 396 (1989) ("Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."); *State v. Burton*, 349 S.C. 430, 438, 562 S.E.2d 668, 671 (Ct. App. 2002) (indicating that even without probable cause, a police officer may elevate an encounter with a citizen into an investigatory stop or detention if the officer has a reasonable suspicion of criminal activity supported by articulable facts), *rev'd on other grounds*, 356 S.C. 259, 589 S.E.2d 6 (2003). One of the officers testified that when Husted attempted to run away, she grabbed one of his arms in an attempt to restrict his movement, at which time Husted became combative; therefore, evidence was presented that the officers witnessed Husted behaving in a disorderly manner, as apparent from his public intoxication and belligerent refusal to cooperate with their investigation. *See S.C. Code Ann. § 16-17-530* (2003)

(stating that any person found "at any public place . . . in a grossly intoxicated condition or otherwise conducting himself in a disorderly or boisterous manner" "shall be deemed guilty of a misdemeanor").¹ Unlike the defendant in *State v. Brannon*, 388 S.C. 498, 697 S.E.2d 593 (2010), which Husted cites in support of his position, Husted was not merely attempting to evade an attempt by the police to detain him for questioning. Rather, his intoxication and his unruly behavior toward the officers when they tried to prevent him from leaving the scene justified the officers' subsequent attempt to handcuff him and place him under arrest. After Husted was partially handcuffed, he swung his cuffed arm in an aggressive manner, exposing the attending officer to injury from the unattached cuff. This subsequent attempt to injure the officer was evidence that Husted willfully resisted the arrest.

2. Husted next argues the trial court erred in failing to include in its jury instructions a definition of a lawful arrest and a charge that a lawful arrest is a necessary element of resisting arrest. We find no error.

We note first section 16-9-320 of the South Carolina Code (2003), the statute under which Husted was charged, no longer expressly requires a showing that the defendant resisted a "lawful arrest."² See *Brannon*, 388 S.C. at 504, 697 S.E.2d at

¹ Husted did not argue at trial or on appeal that the events leading to his arrest did not occur in a public place.

² In 1980, when section 16-9-320 was added to Chapter 9 of Title 16 of the South Carolina Code, it read in pertinent part as follows:

Section 16-9-320. Any person who knowingly and wilfully[sic]:

(a) Opposes or resists any law enforcement officer in serving, executing or attempting to serve or execute any legal writ or process or who resists any lawful arrest, whether under process or not, shall be deemed guilty of a misdemeanor

(b) Assaults, beats or wounds any law enforcement officer engaged in serving, executing or attempting to

597 (declining to determine whether police officers intended to arrest the defendant based on objective inquiry as to whether they had probable cause and stating that "[u]nder the plain language of section 16-9-320(A), we are only focused on determining whether an arrest was being made at the time of Brannon's flight").

To the extent, however, that such a showing was necessary here,³ we hold the jury charge imparted this information to the jury by including instructions that (1) the State had to prove beyond a reasonable doubt that Husted "knowingly and willfully resisted a lawful arrest," (2) "[a] citizen is not required to submit to an illegal arrest," and (3) "a person who flees a police officer's demand to stop is not committing resisting arrest." See *State v. Stone*, 285 S.C. 386, 387, 330 S.E.2d 286, 287 (1985) (stating the South Carolina Constitution requires a trial judge to "explain so much of the criminal law as is applicable to the issues made by the evidence adduced at trial") (quoting *State v. White*, 211 S.C. 276, 281-82, 44 S.E.2d 741, 743 (1947) (*abrogation recognized by State v. Salisbury*, 343 S.C. 520, 523, 541 S.E.2d 247, 248 (2001)); *State v. Gibson*, 390 S.C. 347, 356, 701 S.E.2d 766, 770-71 (Ct. App. 2010). ("In order to amount to reversible error, the failure to

serve or execute any legal writ or process or who assaults, beats or wounds such officer where such person is resisting any lawful arrest, whether under process or not, shall be guilty of a misdemeanor

1980 S.C. Acts 511.

In 1990, this statute was amended to change the phrase "lawful arrest" in both paragraphs to "arrest." The amended version included in both paragraphs a requirement that the arrest be "made by one whom the person knows or reasonably should know is a law enforcement officer." 1990 S.C. Acts 598. In contrast, the current version of section 16-3-625 of the South Carolina Code (2003), which was also enacted in 1980 and concerns resisting arrest with a deadly weapon, has retained the requirement that one charged with this offense must "resist[] the lawful efforts of a law enforcement officer to arrest him or another person"

³ Although Husted correctly notes the indictment mentioned a lawful arrest, a variance between the charge and the proof "is not material if it is not an element of the offense." *State v. Evans*, 322 S.C. 78, 81, 470 S.E.2d 97, 99 (1996).

give a requested charge must be both erroneous and prejudicial."), *cert. dismissed as improvidently granted*, 401 S.C. 569, 737 S.E.2d 853 (2013).

3. Finally, Husted complains the trial court erred in declining to include five other instructions that he requested to be included in the jury charge. We find no reversible error.

We first question whether Husted has adequately preserved the omission of these requests to charge for our review. The argument he presents in his brief is of a summary nature and includes no supporting authority. *See State v. Jones*, 344 S.C. 48, 58-59, 543 S.E.2d 541, 546 (2001) (declining to address an issue on appeal because the supporting argument was "so conclusory that it has been abandoned"). We also note the absence of any indication in the record that Husted, though he objected to the omission in the charge regarding the absence of the instruction he requested on lawful arrest, never argued after the charge was read to the jury that the other instructions were erroneously omitted. *See* Rule 20(b), SCRCrimP (allowing the parties in a criminal trial to "object to the giving or omission of an instruction" "[n]otwithstanding any request for legal instructions" and providing that "[f]ailure to object in accordance with this rule shall constitute a waiver of objection").

In any event, we hold the jury charge was adequate. Four of the instructions at issue here concerned the necessity of proving a defendant used fighting words as opposed to mere profanity toward a police officer to convict that defendant of disorderly conduct. The substance of these requested charges was included in the trial court's instructions that "[t]he State may not punish a person for voicing an objection to a police officer where no fighting words are used" and that "[f]ighting words are words which by their very utterance inflict injury or tend to incite an immediate breach of the peace." The fifth requested instruction, that a person who flees a police officer's "simple demand to stop" is not resisting arrest, was ostensibly taken from this court's opinion in *State v. Brannon*, 379 S.C. 487, 508, 666 S.E.2d 272, 283 (Ct. App. 2008). The Supreme Court of South Carolina, however, has issued its own opinion in *Brannon* indicating that even in the absence of any physical contact between a police officer and a suspect, an arrest could be found to be in progress upon a showing of "intent on the part of the officer to arrest the suspect, and intent on the part of the suspect to submit to the arrest, under the belief that submission was necessary." *Brannon*, 388 S.C. at 504, 697 S.E.2d at

597. Husted's remaining request to charge was not a correct statement of the law when this matter came to trial,⁴ and the trial court committed no abuse of discretion in refusing to include it. *See Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008) ("An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion.").

AFFIRMED.

SHORT, THOMAS, and PIEPER, JJ., concur.

⁴ The Supreme Court issued its opinion in *Brannon* on August 9, 2010, and Husted's trial took place on December 8, 2010.



The South Carolina Court of Appeals

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September 27, 2013

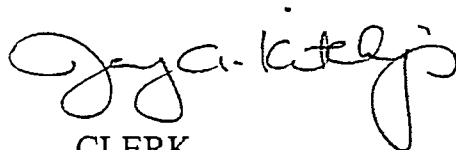
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Re: The State v. Husted, Jason Thomas
Appellate Case No. 2010-180066

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,


CLERK

cc: Julie Kate Keeney

The South Carolina Court of Appeals

The State, Respondent,

v.

Jason Thomas Husted, Appellant.

Appellate Case No. 2010-180066

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul G. Short, Jr. J.

Paul C. Thomas J.

Daniel G. Pieper J.

Columbia, South Carolina

cc:

J. Joseph Condon, Jr.

Julie Kate Keeney

FILED

27 Sept 2013