

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Cherokee County

J. Derham Cole, Circuit Court Judge

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SEP 11 2014

S.C. Supreme Court

DONALD SCOTT JONES,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000670

APPENDIX

LARA M. CAUDY
Appellate Defender

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

ATTORNEY FOR PETITIONER

ALAN WILSON
Attorney General

SUZANNE H. WHITE
Assistant Attorney General
P. O. Box 11549
Columbia, SC 29211

ATTORNEYS FOR RESPONDENT

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1 STATE OF SOUTH CAROLINA)
 2 COUNTY OF CHEROKEE) IN THE COURT OF GENERAL SESSIONS

3
 4 THE STATE)
 5 -vs-) TRANSCRIPT OF RECORD
 6 DONALD SCOTT JONES,) 2009-GS-11-924
 7 DEFENDANT.) SEPTEMBER 14, 2009
) GAFFNEY, SOUTH CAROLINA

8 (VOLUME I)
 9

10 B E F O R E:
 11

12 THE HONORABLE J. MARK HAYES, II, JUDGE. ; And a Jury.
 13

14 A P P E A R A N C E S:
 15

16 KIMBERLY L. LESKANIC, ASSISTANT SOLICITOR
 ATTORNEY FOR THE STATE

17 THOMAS SHEALY, ASSISTANT PUBLIC DEFENDER
 ATTORNEY FOR THE DEFENDANT
 18

19 MICHAEL R. WATTS
 20 CIRCUIT COURT REPORTER
 21
 22
 23
 24
 25

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(SEPTEMBER 14, 2009)

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1 (PROCEEDINGS, SEPTEMBER 14, 2009)

2 THE COURT: Ladies and gentlemen, we are now about
3 to begin the trial of the case of the State versus Donald
4 Scott Jones.

5 Now, before we begin the actual jury selection in
6 this case there will be several questions that I will need
7 to ask you. And as it was with the jury qualification
8 process, we need to be sure that your answers are truthful
9 and honest, and in that regards I need for you to please
10 stand, because the Clerk of Court needs to swear you in
11 once again. Please stand and raise your right hand.

12 THE CLERK: Please raise your right hand.

13 Do you solemnly swear that the information that
14 you give this court will be the truth, the whole truth, and
15 nothing but the truth, so help you God?

16 JURY VENIRE PANEL: (Collectively said I do.)

17 THE CLERK: You may be seated.

18 THE COURT: Again, ladies and gentlemen, we are
19 now going to begin the case of the State versus Donald Scott
20 Jones.

21 I'll let you know that Mr. Donald Scott Jones is
22 charged with assault and battery with intent to kill
23 concerning an event that occurred back on May 27th, 2006,
24 that involved a victim by the -- an alleged victim by the
25 name of Jerry Wayne Emery.

1 Now, ladies and gentlemen, I am now going to ask
2 Mr. Donald Scott Jones to please stand and face the ladies
3 and gentlemen of the jury.

4 And also is Mr. Jerry Wayne Emery present? Please
5 stand and face the ladies and gentlemen of the jury.

6 Now, ladies and gentlemen, is there any member of
7 the jury panel who is related by blood or marriage to either
8 of these two gentlemen? If so, please stand at this time.

9 (No response)

10 THE COURT: Does any member of the jury panel have
11 a close personal or social relationship with either of these
12 two gentlemen? If so, please stand at this time.

13 (No response)

14 THE COURT: Thank you, gentlemen, you may be
15 seated.

16 Now, I need to ask that you please listen to the
17 following list of names that I am going to announce to you.
18 I need you to listen carefully to these names because these
19 names are a list of potential witnesses who may be called
20 during the trial of this case. At the end of reading all
21 the names I'm going to ask that you please stand if you are
22 related by blood or marriage to any of these individuals or
23 if you have a close personal or social relationship with any
24 of these individuals. I need for to you please listen to
25 these names. And, again, you are not standing until after I

1 have called all the names.

2 I would ask that as I call these names, if these
3 individuals are, in fact, present in the courtroom, I'm
4 going to ask that they stand and present themselves to you
5 as well.

6 We have Jonathan Gash of the Cherokee County
7 sheriff's department.

8 Al Phillips.

9 We have Ricky Thomas Long. Mr. Long.

10 Tammy Lynn Byars.

11 Reggie Petty of the Cherokee County 911
12 communications.

13 We have Marcie Queen of the Cherokee County
14 detention center.

15 We have Dennis Scoggins of the Blacksburg Police
16 Department.

17 We have Michelle Willingham, a victims advocate
18 with the solicitor's office.

19 Now, ladies and gentlemen, again, if you are
20 related by blood or marriage to any of these individuals, or
21 if you have a close personal or social relationship with any
22 of these individuals, then I need for you to please stand at
23 this time.

24 Yes, sir, your juror number?

25 JUROR NUMBER 95: 95.

1 THE COURT: You are Mr. Rollins?

2 JUROR NUMBER 95: Yes, sir.

3 THE COURT: And who is it that you know, sir?

4 JUROR NUMBER 95: Marcie Queen.

5 THE COURT: And the fact that you know that
6 individual, would that in any way affect your ability to
7 give both the State and the defense a fair and impartial
8 trial, in the event that you are selected as a member of the
9 jury?

10 JUROR NUMBER 95: No, sir.

11 THE COURT: Thank you, sir.

12 Sir, let ask you this. How is it that you know
13 Ms. Queen?

14 JUROR NUMBER 95: She is my wife's cousin.

15 THE COURT: Okay. Thank you very much.

16 Yes, ma'am, your juror number?

17 JUROR NUMBER 58: 58.

18 THE COURT: You are Ms. Huskey?

19 JUROR NUMBER 58: That's correct.

20 THE COURT: And, ma'am, who is it that you know?

21 JUROR NUMBER 58: Reggie Petty of 911.

22 THE COURT: And how is it that you know him?

23 JUROR NUMBER 58: We attend church together at
24 Macedonia.

25 THE COURT: All right. And the fact that you know

1 that individual, would that in any way affect your ability
2 to give both the State and the defense a fair and impartial
3 trial, in the event that you are selected as a member of the
4 jury?

5 JUROR NUMBER 58: No.

6 THE COURT: Thank you, ma'am. You may be seated.

7 Now, at this time, ladies and gentlemen, I'm going
8 to ask that the attorneys that are involved in the case that
9 is going to be tried in front of you to please stand and for
10 you to -- and they are going to introduce themselves to you.

11 MS. LESKANIC: My name is Kim Leskanic and I'm an
12 assistant solicitor here in Cherokee County.

13 MR. SHEALY: And I'm Tommy Shealy. I'm one of the
14 public defenders here in Cherokee County.

15 THE COURT: Now, ladies and gentlemen, I need for
16 you to please stand if you are related by blood or marriage
17 to any of the attorneys, or if you have a close personal or
18 social relationship with any of the attorney, or if you have
19 ever been represented by any of the attorneys, I need for
20 you to please stand at this time.

21 Yes, sir, your juror number?

22 JUROR NUMBER 104: 104.

23 THE COURT: And you are Mr. Stephens?

24 JUROR NUMBER 104: Yes, sir.

25 THE COURT: And who is it that you know, sir?

1 JUROR NUMBER 104: I know Ms. Leskanic.

2 THE COURT: And the fact that you know her, would
3 that in any way affect your ability to give both the State
4 and the defense a fair and impartial member if you are
5 selected as a member of the jury?

6 JUROR NUMBER 104: No, sir.

7 THE COURT: Thank you, sir. You may be seated.
8 Yes, ma'am, your juror number?

9 JUROR NUMBER 35: 35.

10 THE COURT: And you are Ms. Frazier?

11 JUROR NUMBER 35: Yes.

12 THE COURT: Yes, ma'am, and who is that you know?

13 JUROR NUMBER 35: Ms. Leskanic.

14 THE COURT: And the fact that you know her, would
15 that in any way affect your ability to give both the State
16 and the defense a fair and impartial trial, in the event
17 that you are selected as a member of the jury?

18 JUROR NUMBER 35: No.

19 THE COURT: Thank you, ma'am, you may be seated.

20 Has any member of the jury panel or any member of
21 your immediate family ever been employed by any law
22 enforcement agency, jail, detention center, or correctional
23 facility? If so, please stand at this time.

24 All right, we will start again with -- you are
25 juror number again, sir?

1 JUROR NUMBER 95: 95.

2 THE COURT: And Mr. Rollins, is that you or a
3 member of your family?

4 JUROR NUMBER 95: My wife.

5 THE COURT: All right. And the fact that your
6 wife has been --

7 JUROR NUMBER 95: Her side -- her side of the
8 family is in law enforcement.

9 THE COURT: All right. And the fact that her side
10 of the family has been involved in law enforcement, would
11 that in any way affect your ability to give both the State
12 and the defense a fair and impartial trial?

13 JUROR NUMBER 95: No, sir.

14 THE COURT: Thank you, sir. You may be seated.
15 Yes, ma'am, your juror number?

16 JUROR NUMBER 111: 111.

17 THE COURT: Ms. Wright?

18 JUROR NUMBER 111: Yes, sir.

19 THE COURT: Yes, ma'am, who is it that's employed
20 in --

21 JUROR NUMBER 111: My father is a retired chief of
22 police.

23 THE COURT: All right. And the fact that you have
24 that relative, would that in any way affect your ability to
25 give both the State and the defense a fair and impartial

1 trial, in the event that you are selected as a member of the
2 jury?

3 JUROR NUMBER 111: No, it wouldn't.

4 THE COURT: Thank you, ma'am. You may be seated.

5 JUROR NUMBER 38: Juror 38?

6 THE COURT: 38?

7 JUROR NUMBER 38: Uh-huh.

8 THE COURT: You are Ms. George?

9 JUROR NUMBER 38: Yes, sir.

10 THE COURT: Yes, ma'am. And who is it that's
11 employed?

12 JUROR NUMBER 38: No longer employed. My
13 daughter-in-law worked for Bart Howell. For Bart Howell.

14 THE COURT: And the fact that you have that
15 relative that was employed in that capacity, would that in
16 any way affect your ability to give both the State and the
17 defense a fair and impartial trial?

18 JUROR NUMBER 38: No, sir.

19 THE COURT: Thank you, ma'am. You may be seated.
20 Yes, ma'am, your juror number?

21 JUROR NUMBER 67: 67.

22 THE COURT: You are Ms. Keller?

23 JUROR NUMBER 67: Yes, sir.

24 THE COURT: Yes, ma'am, who is it that's employed
25 in that capacity?

1 JUROR NUMBER 67: My deceased husband. He was an
2 animal control officer in Cherokee County.

3 THE COURT: And the fact that he was employed in
4 that capacity, would that in any way affect your ability to
5 give both the State and defense a fair and impartial trial?

6 JUROR NUMBER 67: No, sir, not at all.

7 THE COURT: Thank you, ma'am, you may be seated.
8 Yes, sir, your juror number?

9 JUROR NUMBER 48: 48.

10 THE COURT: You are Mr. Heintzel?

11 JUROR NUMBER 48: Yes, sir.

12 THE COURT: Yes, sir, who is it that you --

13 JUROR NUMBER 48: My daughter's husband is a
14 deputy with Cherokee County.

15 THE COURT: All right. And the fact that he is
16 employed in that capacity, would that in any way affect your
17 ability to give both the State and the defense a fair and
18 impartial trial?

19 JUROR NUMBER 48: No, sir.

20 THE COURT: Thank you, sir. You may be seated.
21 Yes, ma'am, your juror number?

22 JUROR NUMBER 5: Number 5.

23 THE COURT: And you are Ms. Black?

24 JUROR NUMBER 5: Yes, sir.

25 THE COURT: Yes, ma'am, who is it that you know?

1 JUROR NUMBER 5: I have several relatives in law
2 enforcement.

3 THE COURT: All right. And the fact that they are
4 employed in that capacity, would that in any way affect your
5 ability to give both the State and the defense a fair and
6 impartial trial?

7 JUROR NUMBER 5: No, sir.

8 THE COURT: Thank you, ma'am, you may be seated.
9 Yes, ma'am, your juror number again?

10 JUROR NUMBER 58: 58.

11 THE COURT: 58. And Ms. Huskey, who is it that
12 you know?

13 JUROR NUMBER 58: My husband is currently a
14 Cherokee County reserve deputy for the sheriff's department.

15 THE COURT: All right. And the fact that he is
16 employed in that capacity, would that in any way affect your
17 ability to give both the State and the defense a fair and
18 impartial trial?

19 JUROR NUMBER 58: No, sir.

20 THE COURT: Thank you, ma'am. You may be seated.
21 Yes, sir, your juror number?

22 JUROR NUMBER 3: 3.

23 THE COURT: You are Mr. Barnes?

24 JUROR NUMBER 3: Yes, sir.

25 THE COURT: Yes, sir, who is it that you know?

1 JUROR NUMBER 3: Son-in-law.

2 THE COURT: All right. And he's in law
3 enforcement?

4 JUROR NUMBER 3: Yes, sir.

5 THE COURT: And the fact that he is employed in
6 that capacity, would that in any way affect your ability to
7 give both the State and the defense a fair and impartial
8 trial?

9 JUROR NUMBER 3: No, sir.

10 THE COURT: Thank you, sir. You may be seated.

11 Has any member of the jury panel or of your
12 immediate family ever been a victim of an assault and
13 battery, or a robbery, or have they -- or have you or any
14 member of your immediate family been accused of committing
15 an assault and battery or robbery? If so, please stand at
16 this time.

17 Yes, ma'am, your juror number?

18 JUROR NUMBER 69: 69.

19 THE COURT: 69?

20 JUROR NUMBER 69: Yes.

21 THE COURT: Ms. Littlejohn?

22 JUROR NUMBER 69: Yes.

23 THE COURT: And the fact that that has occurred,
24 would that in any way affect your ability to give both the
25 State and the defense a fair and impartial trial?

1 JUROR NUMBER 69: No, sir.

2 THE COURT: Thank you, ma'am. You may be seated.

3 Yes, ma'am, your juror number?

4 JUROR NUMBER 73: 73.

5 THE COURT: And you are Ms. Lorr?

6 JUROR NUMBER 73: Correct.

7 THE COURT: And the fact that that has occurred,
8 would that in any way affect your ability to give both the
9 State and the defense a fair and impartial trial, in the
10 event that you are selected as a member of the jury?

11 JUROR NUMBER 73: No, sir.

12 THE COURT: Thank you, ma'am. You may be seated.

13 Has any member of the jury panel been a
14 contributor to any political campaign of Solicitor Trey
15 Gowdy? If so, please stand at this time.

16 (No response)

17 THE COURT: Has any member of the jury panel
18 formed or expressed an opinion about any issue or matter
19 involved in this case? If so, please stand at this time.

20 (No response)

21 THE COURT: Is there any member of the jury panel
22 aware of any bias or prejudice towards either the State or
23 the defense in this case? If so, please stand at this time.

24 (No response)

25 THE COURT: Is there any member of the jury panel

1 who has served as a member of the Cherokee County Grand Jury
2 that issued the indictment in this case? If so, please
3 stand at this time.

4 (No response)

5 THE COURT: Is there any member of the jury panel
6 who is a member of or a contributor to any group which has
7 as its primary concern the promotion of law enforcement or
8 victims rights? These groups would include, but not be
9 limited to, such organizations as MADD, SADD, or CAVE,
10 Citizens Against Violent Crime? If so, please stand at this
11 time.

12 (No response)

13 THE COURT: Does any member of the jury panel know
14 of any reason whatsoever why he or she should not serve as a
15 juror in this case with particular emphasis being placed on
16 your ability to be fair and impartial to both the State and
17 the defense? If so, please stand at this time.

18 (No response)

19 THE COURT: Any additional questions from the
20 State or the defense?

21 MS. LESKANIC: Not from the State, Your Honor.

22 MR. SHEALY: Not by the defense, Your Honor.

23 THE COURT: Thank you very much.

24 All right. And we agree that it's five and five,
25 is that correct?

1 MS. LESKANIC: Yes, Your Honor.

2 MR. SHEALY: Yes, Your Honor.

3 THE COURT: All right.

4 What we are now going to do is we are now actually
5 going to proceed with the selection process of the jury.
6 This is a matter of historical perspective. Up until just
7 probably a year or so ago we used to actually have a barrel.
8 Each one of your names would be placed into this barrel and
9 either hand draw out the names. We now progressed a little
10 bit more sophisticated than that, but we now allow a
11 computer to make a random selection of your names, so that's
12 the process we will follow.

13 Now, I will ask that once the Clerk of Court
14 begins the process of calling your name, when your name is
15 called, I'm going to ask that you please come to the front
16 and stand in front of the Clerk of Court, turn around and
17 face both counsel tables. And if you would, if your name is
18 called, please bring with you any personal belongings that
19 you may have with you.

20 THE CLERK: Juror 111, Michele Wright.

21 What says the State?

22 MS. LESKANIC: Please present the juror.

23 THE CLERK: What says the defense?

24 MR. SHEALY: Please excuse the juror for this
25 trial.

1 THE CLERK: You have been excused.
2 Juror 38, Suzanne George.
3 What says the State?
4 MS. LESKANIC: Please present the juror.
5 THE CLERK: What says the defense?
6 MR. SHEALY: Please swear the juror.
7 THE CLERK: Please take a seat in the jury box.
8 Juror 30, Shi Durbin.
9 What says the State?
10 MS. LESKANIC: Please excuse this juror from
11 service in this case.
12 THE CLERK: You have been excused.
13 Juror 102, Arthur Jack Spencer.
14 What says the State?
15 MS. LESKANIC: Please present the juror.
16 THE CLERK: What says the defense?
17 MR. SHEALY: Please swear the juror.
18 THE CLERK: Please take a seat in the jury box.
19 Juror 54, Willie Hollis.
20 What says the State?
21 MS. LESKANIC: Please excuse the juror from
22 service in this case.
23 THE CLERK: You have been excused.
24 Juror 49, Darrell Helton.
25 What says the State?

1 MS. LESKANIC: Please present the juror.

2 THE CLERK: What says the defense?

3 MR. SHEALY: Please swear the juror.

4 THE CLERK: Please take a seat in the jury box.

5 Juror 112, Timothy Rollins.

6 What says the State?

7 MS. LESKANIC: Please present the juror.

8 THE CLERK: What says the defense?

9 MR. SHEALY: Please swear the juror.

10 THE CLERK: Please take a seat in the jury box.

11 Juror 17, Michael Cantrell.

12 What says the State?

13 MS. LESKANIC: Please present the juror.

14 THE CLERK: What says the defense?

15 MR. SHEALY: Please swear the juror.

16 THE CLERK: Please take a seat in the jury box.

17 Juror 73, Peggy Lorr.

18 What says the State?

19 MS. LESKANIC: Please excuse the juror from

20 service in this case.

21 THE CLERK: You have been excused.

22 Juror 11, Wayne Bowyer.

23 What says the State?

24 MS. LESKANIC: Please present the juror.

25 THE CLERK: What says the defense?

1 MR. SHEALY: Please swear the juror.

2 THE CLERK: Please take a seat in the jury box.

3 Juror 9, Bessie Bonds.

4 What says the State?

5 MS. LESKANIC: Please present the juror.

6 THE CLERK: What says the defense?

7 MR. SHEALY: Please swear the juror.

8 THE CLERK: Please take a seat in the jury box.

9 Juror 35, Lisa Frazier.

10 What says the State?

11 MS. LESKANIC: Please present the juror.

12 THE CLERK: What says the defense?

13 MR. SHEALY: Please excuse the juror from this

14 trial.

15 THE CLERK: You have been excused.

16 Juror 69, Alicia Littlejohn.

17 What says the State?

18 MS. LESKANIC: Please excuse the juror from

19 service in this case.

20 THE CLERK: You have been excused.

21 Juror 104, Christopher Stephens.

22 What says the State?

23 MS. LESKANIC: Please present the juror.

24 THE CLERK: What says the defense?

25 MR. SHEALY: Please excuse the juror from this

1 trial.

2 THE CLERK: You have been excused.

3 Juror 98, Libby Sarratt.

4 What says the State?

5 MS. LESKANIC: Please present the juror.

6 THE CLERK: What says the defense?

7 MR. SHEALY: Please swear the juror.

8 THE CLERK: Please take a seat in the jury box.

9 Juror 88, Carolyn Parker.

10 What says the State?

11 MS. LESKANIC: Please present the juror.

12 THE CLERK: What says the defense?

13 MR. SHEALY: Please swear the juror.

14 THE CLERK: Please take a seat in the jury box.

15 Juror 63, Delores Jones.

16 What says the State?

17 MS. LESKANIC: Please present the juror.

18 THE CLERK: What says the defense?

19 MR. SHEALY: Please excuse the juror from this

20 trial.

21 THE CLERK: You have been excused.

22 Juror 5, Constance Black.

23 What says the State?

24 MS. LESKANIC: Please present the juror.

25 THE CLERK: What says the defense?

1 MR. SHEALY: Please excuse the juror from this
2 trial.

3 THE CLERK: You have been excused.

4 Juror 95, Christopher Rollins.

5 What says the State?

6 MS. LESKANIC: Please present the juror.

7 THE CLERK: What says the defense?

8 MR. SHEALY: Please swear the juror.

9 THE COURT: Please take a seat in the jury box.
10 Juror 20, Thomas Cobb.

11 What says the State?

12 MS. LESKANIC: Please present the juror.

13 THE CLERK: What says the defense?

14 MR. SHEALY: Please swear the juror.

15 THE CLERK: Please take a seat in the jury box.
16 Juror 48, James Heintzel.

17 What says the State?

18 MS. LESKANIC: Please present the juror.

19 THE CLERK: What says the defense?

20 MR. SHEALY: Please swear the juror.

21 THE CLERK: Please take a seat in the jury box.
22 Next would be for the alternate.

23 Juror 13, Christopher Broome.

24 What says the State?

25 MS. LESKANIC: Please present the juror.

1 THE CLERK: What says the defense?

2 MR. SHEALY: Please swear the juror.

3 THE CLERK: Please take a seat in the jury box.

4 Anything from either the State or defense
5 concerning the manner and method of selection of the jury?

6 MS. LESKANIC: Not from the State, Your Honor.

7 MR. SHEALY: Nor from the defense, Your Honor.

8 THE COURT: Thank you very much.

9 To the ladies and gentlemen who were not chosen as
10 part of the first jury of the week, I apologize, but the
11 week is not over yet, so we might get you later.

12 I will ask, if you would, to -- you should have
13 received the telephone number from the Clerk of Court that
14 indicates you need to call back after six o'clock. I will
15 ask the best forecast I can give you is simply to telephone
16 that number after six o'clock tonight. You will receive a
17 recording and you will receive instructions as to what you
18 need to do tomorrow or the next day, so I need you to please
19 telephone that number and receive your instructions.

20 I do want to thank you for your time and your
21 patience while we went through this process today.
22 Hopefully it's been a little bit of an educational process
23 for you, but I do want to thank you for your time and your
24 patience.

25 Now, if you would, I'm going to allow you to

1 leave, but I need for you to leave quietly, because we are
2 going to continue to work with these jurors, and so you are
3 free to go for the remainder of the day. Please exit
4 quietly, if you would.

5 (Whereupon, the jury venire panel left the
6 courtroom)

7 THE COURT: Can I see the lawyers for a moment?

8 (Whereupon, the lawyers approached the bench for
9 an off-the-record discussion)

10 THE COURT: Ladies and gentlemen, thank you as
11 well for your time and your patience this morning while we
12 went through this process of selecting the first jury.

13 I have discussed the scheduling of this trial with
14 the attorneys. Given the hour that it is and the fact that
15 I have some pretrial matters to dispose of with the
16 attorneys that have to be done outside of your presence, we
17 are going to ask that you -- I'm going to let you take your
18 lunch break now, but I'm going to ask that you please return
19 back to the jury deliberation room by 2:30 this afternoon.
20 At 2:30 we then will begin the actual trial of this case.

21 Now, I need to let you know you have been selected
22 as the first jury of the week and we have actually started
23 to present to you some information about this case. Having
24 received that information, I have to instruct you and charge
25 you that you are not to have any discussions with anyone

1 about anything that involved this case. The only time that
2 you will ever engage in any discussions with anyone about
3 anything involving this case will be at the end of this case
4 when you begin your deliberations to decide the outcome of
5 this case. Until then you cannot have any discussions with
6 anyone. That includes your loved ones you might see during
7 lunch break or in the afternoon, anybody associated with
8 anything here in the courtroom, as well as among yourselves.
9 The only time that you are to talk to anyone, including
10 amongst yourselves, about anything that involves this case
11 will be at the end of this case when I tell you to do so.

12 I need to also let you know that in the event that
13 you heard something already that has prompted or stimulated
14 your curiosity or interests and you wanted to do some type
15 of independent research, I'll tell you and instruct you as
16 well that you are not to do that also. That includes even
17 if you have heard a word that maybe I have used or maybe one
18 of the lawyers will have used or somebody has used, you
19 cannot even go pull Webster's Dictionary off the shelf or go
20 on the Internet and take a look at anything. The reason for
21 that is that your task in this case is going to be to make
22 decisions based solely on the information that is presented
23 to you as part of this trial and to allow us - the lawyers
24 and me, when I instruct you on the law - allow us to present
25 to you that information that you will use in reaching your

1 deliberations. Do not do any type of independent research
2 or investigation.

3 Again, I know many of you may run into loved ones
4 or friends that may know that you are actually serving on
5 the jury here this week. And when you tell them that you
6 have been picked to be on this jury, they may automatically
7 say "what kind of case is it? What is it about?" Again,
8 just very politely tell them "well, I can't tell you,
9 because the judge has instructed me that I cannot talk to
10 you, or anyone, about anything involved in this case." Now
11 after it's over, you can talk with them as much or as little
12 as you like, but until then you are not to have any
13 discussions with anyone about anything involving the case.

14 I'm going to allow you to go with the bailiff. He
15 is going to show you where the jury deliberation room is and
16 how to reach the jury deliberation room. But, again, I'll
17 remind you, be back in the jury deliberation room by 2:30
18 this afternoon. We will begin the actual trial of this
19 case. Thank you very much for your time this morning and
20 you may go with the bailiff.

21 (The following takes place outside the presence of
22 the jury panel)

23 THE COURT: Yes, ma'am.

24 MS. LESKANIC: Your Honor, the State versus Donald
25 Scott Jones, the State has prepared a direct indictment that

1 has been sent to the Grand Jury and has been True Billed by
2 the Grand Jury. However, Mr. Jones, although he's been
3 served with a copy of that, as well as his attorney Mr.
4 Shealy, he has not yet been arraigned on that charge, and we
5 would request that the court take care of that arraignment
6 prior to swearing the jury and beginning the trial.

7 THE COURT: All right. Mr. Shealy, any objection
8 why we can't do that now?

9 MR. SHEALY: No objection, Your Honor.

10 THE COURT: All right. Mr. Jones, will you please
11 stand?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: All right. I have been --

14 Mr. Shealy, you were able to hear the solicitor
15 who wishes me to arraign the defendant. Does he waive the
16 reading of the indictment?

17 MR. SHEALY: He does, Your Honor. He has a copy.

18 THE COURT: All right. And does he wish to at
19 this time enter a formal position or plea to this?

20 MR. SHEALY: Yes, Your Honor.

21 THE COURT: And that would be?

22 MR. SHEALY: Not guilty.

23 THE COURT: All right, then, I thank you very
24 much, sir.

25 Thank you.

1 MS. LESKANIC: Thank you, Your Honor.

2 THE COURT: Anything before we reconvene let's say
3 about 2:15?

4 MS. LESKANIC: Very well, Your Honor.

5 THE COURT: All right. We will stand down on the
6 case of State versus Jones and we will see everyone at 2:15.

7 (Whereupon, proceedings were recessed)

8 (Whereupon, proceedings were reconvened)

9 (911 Tape marked as State's Exhibit No. 1 for
10 identification)

11 (911 Tape marked as State's Exhibit No. 2 for
12 identification)

13 (Photograph marked as State's Exhibit No. 3 for
14 identification)

15 (Photograph marked as State's Exhibit No. 4 for
16 identification)

17 (Photograph marked as State's Exhibit No. 5 for
18 identification)

19 (Photograph marked as State's Exhibit No. 6 for
20 identification)

21 (Stick marked as State's Exhibit No. 7 for
22 identification)

23 (Photograph marked as State's Exhibit No. 8 for
24 identification)

25 (Photograph marked as State's Exhibit No. 9 for

1 identification)

2 (Photograph marked as State's Exhibit No. 10 for
3 identification)

4 (Photograph marked as State's Exhibit No. 11 for
5 identification)

6 (Photograph marked as State's Exhibit No. 12 for
7 identification)

8 (Photograph marked as State's Exhibit No. 13 for
9 identification)

10 (Photograph marked as State's Exhibit No. 14 for
11 identification)

12 THE COURT: We are here on the case of the State
13 versus Donald Scott Jones. I believe that we are here to
14 address a State's motion?

15 MS. LESKANIC: Yes, Your Honor.

16 May it please the court?

17 THE COURT: Yes.

18 MS. LESKANIC: What I am trying to do is limit the
19 defense's ability to mention that the defendant was
20 originally arrested on a charge of assault and battery of a
21 high and aggravated nature. That's what the warrant was
22 for. I have since prepared a direct indictment for assault
23 and battery with intent to kill. That has been True Billed
24 by the Grand Jury. Mr. Jones was arraigned on that this
25 morning and certainly notified of that charge prior to this

1 morning. I just don't want there to be any confusion of the
2 issues with the jury to talk about what he was originally
3 arrested for. I believe it's the State's position or the
4 prosecutor's position to determine whether the appropriate
5 charge had been made. Upon review of the file or speaking
6 with witnesses, it was determined that the appropriate
7 charge, in the State's opinion, would be assault and battery
8 with intent to kill. That is in no way to limit the defense
9 on arguing either that he's not guilty or that it should be
10 assault and battery of a high and aggravated nature, but
11 that mentioning that that is what the officer thought was
12 the appropriate charge would be an inappropriate argument to
13 the jury and just lead to confusion of the issues.

14 MR. SHEALY: Your Honor, that's part of the
15 history of this case is -- this happened over three years
16 ago. My client was charged with ABHAN. The magistrate
17 looked at the facts and issued a warrant for ABHAN. Correct
18 me if I'm wrong, but I believe he was subsequently indicted
19 for ABHAN after the solicitor's office had a chance to look
20 at the facts.

21 THE COURT: Three years ago?

22 MR. SHEALY: Three years ago, yes, sir, and
23 nothing in the facts has changed.

24 THE COURT: He didn't want to take that, a plea to
25 it?

1 MR. SHEALY: No, Your Honor.

2 Now, since then -- this has always been ABHAN up
3 until a couple weeks ago. Now, I knew that they were going
4 to upgrade it to ABWIK because the solicitor told me that
5 they were going to, so I wasn't surprised with the direct
6 indictment, but there has not been any change in facts. And
7 the last term of court we were going to trial, but that was
8 held back in order to re-indict him. That would have been
9 on the ABHAN charge.

10 Since then the charge against my client has been
11 elevated from ABHAN, which is a nonviolent offense, carries
12 ten years, to an ABWIK, which is not only a violent offense
13 but a most serious offense and the facts haven't changed.

14 I believe that the jury is entitled to know the
15 history of the charging of my client. As -- I don't think
16 there is any prejudice to the State and there is no real
17 reason not to tell them, because that's a fact of the case.

18 THE COURT: Anything in reply? Oh, I'm sorry.

19 MR. SHEALY: One other thing, Your Honor, and this
20 is -- so I can explain for the record why I have not brought
21 a motion for prosecutorial misconduct, because I don't think
22 it's there, but in this particular case it's our belief that
23 the reason this is happening is to brand him with a most
24 serious offense so that he can subsequently be prosecuted on
25 another most serious offense.

1 I have talked to my boss, Mr. Thompson, and we
2 both agree that this very well could be -- the facts very
3 well could support conviction for ABWIK, so there is no
4 prosecutorial misconduct here. There is a basis in fact for
5 the charge.

6 Thank you, Your Honor.

7 THE COURT: Yes, ma'am.

8 MS. LESKANIC: A couple of points, Your Honor.

9 The case was originally indicted by Mr. Gray, who
10 was here before I was. I was not the one who signed the
11 original indictment. I have certainly had time to change it
12 since then, so I'm not going to avoid that, but as most
13 attorneys know when you are actually preparing for trial,
14 you tend to look at things a little more closely.

15 He was originally charged with armed robbery, and
16 this can go to the prosecutorial misconduct, and just the
17 State just looking at the case I have decided not to go
18 forward on the armed robbery charge, which is a violent,
19 most serious offense, because upon reviewing the case, I
20 have some questions about that. And I feel like doing the
21 right thing, which is not to proceed on the charge that I
22 don't feel a hundred percent confident in.

23 I do, however, feel a hundred percent confident in
24 going forward with assault and battery with intent to kill.

25 I believe the best course of action is to limit

1 the defense in talking about what he was originally charged
2 with. If the court doesn't agree with that, then I would
3 ask for some leeway in explaining how the State makes these
4 decisions, because I think the jury is then going to need to
5 know why are we here on this charge, if the police arrested
6 him on that. I want to say because here is what I do as a
7 prosecutor. I look at these cases, and based on the facts
8 and witnesses and knowing the law, here is the way we make
9 our decisions. And I just think the best way to avoid that
10 is to go forward on the charging document that is before
11 Your Honor, that has been True Billed by the Grand Jury and
12 that he has been arraigned on it.

13 MR. SHEALY: Your Honor, if it please the court,
14 obviously if we brought this information out, I think the
15 State would have a right to explain why they did what they
16 did, but that -- the problem with that would be that Ms.
17 Leskanic would become a witness in the case. I mean, she's
18 entitled to become a witness, but we need another solicitor.

19 THE COURT: So Mr. Morin would try the case?

20 MR. SHEALY: I don't know. I don't know. And the
21 problem I have got right now with her becoming a witness is
22 that because she started the case, that this jury -- and
23 selected the jury, that the jury may put more credence in
24 her testimony as a witness than anybody else.

25 THE COURT: All right. My thoughts and

1 observations, I hear in most trials there is some testimony
2 that talks about the development of a case and the charges
3 and usually it's just peripheral information that really I
4 wonder why the State really goes into that, other than they
5 must see some value with the jury understanding the big
6 picture.

7 I can see situations where -- well, I can't see.
8 I can imagine situations where the defense might need to
9 talk about it, but I don't know that, because I know nothing
10 about the facts of this case. So it's difficult for me to
11 sit up here, if you are asking me to do a prejudicial versus
12 probative value analysis of a piece of evidence and I don't
13 know anything about the case, that's difficult for me to do.

14 My initial reaction is that the State's request is
15 not that unreasonable, because it does seem to go into a
16 collateral issue, to which you actually reenforce my belief
17 that the collateral issue may very well open the door to a
18 lot of other facts that really are not important or really
19 not determinative to the outcome of the case, so my
20 inclination is to rule in the State's favor. But
21 if there -- but if -- but if the defense feels like there is
22 some particular reason about the nature of the
23 cross-examination that you feel needs -- that the jury needs
24 to hear that, I would be more than happy to hear you, but
25 I'm not hearing it yet, and it could be because y'all have

1 not shared anything with me about the facts of the case.

2 MR. SHEALY: Your Honor, that information probably
3 wouldn't come out. I don't think anybody can testify to it,
4 except possibly police officers, unless, and until, my
5 client took the stand. So could we revisit that issue then
6 if it's -- by that time you will have a lot more information
7 as to the facts.

8 THE COURT: You mean you would not elicit that
9 type of testimony until your client took the stand?

10 MR. SHEALY: I don't think I could elicit that
11 kind of information.

12 And, what -- just as a practical matter, let's say
13 a police officer gets up and testifies that he arrested my
14 client. Well, the natural thing to do would be to ask him:

15 "Well, why did you arrest him?

16 "I arrested him for ABHAN and armed robbery."

17 THE COURT: Uh-huh.

18 MR. SHEALY: Then we are right back to -- I mean,
19 even though it's inadvertent, or whatever, we are right back
20 to where we are now.

21 THE COURT: And I would wonder why in the world
22 would you want the jury to know your client was arrested for
23 armed robbery.

24 MR. SHEALY: I can't keep everything away from the
25 jury. We have to deal with the facts as they are.

1 THE COURT: All right. Well, I would -- the
2 defense -- I don't want to hamstring the State by telling
3 Mr. Shealy, okay, don't bring it up, unless your client
4 actually testifies, because then I think the State really
5 could be prejudiced by the State acting under some ruling I
6 had made in their favor and they didn't bring it up.

7 I don't think it's -- I have not heard how the
8 fact that he was charged with assault and battery of a high
9 and aggravated nature is significant at all in this case,
10 when -- but, again, y'all haven't shared anything with me
11 about the facts of the case, but my inclination is to keep
12 that out. If the State objects to it, he brings it up --
13 during cross-examination of one of the State's witnesses and
14 he objects -- the State needs to object to it, my
15 inclination of it is not to let it in, because it does -- to
16 me those are collateral issues. And if you think that -- if
17 your position is that then Ms. -- is that I'm going to
18 disqualify a State's attorney, due to the fact that they
19 have exercised prosecutorial discretion in increasing a
20 charge, I -- no, I'm not going to do that.

21 MR. SHEALY: Your Honor, I don't think she's
22 exercised any discretion.

23 THE COURT: It's not the prosecutorial discretion.
24 It's any discretion, prosecutorial discretion, in wanting to
25 review matters, because I like to encourage the prosecutors

1 to exercise their discretion and review more cases, because
2 if this one went -- if she increased the charge, usually
3 it's going to help move this along.

4 MR. SHEALY: She did dismiss the armed robbery.

5 THE COURT: She did dismiss the armed robbery.

6 MR. SHEALY: Yes.

7 THE COURT: Okay. If it comes in, it's coming in
8 through enhancement purpose, and I probably would entertain
9 an argument that -- an argument from the State and sustain
10 the argument that you couldn't argue the fact that the
11 solicitor chose to increase the charge from assault and
12 battery of a high and aggravated nature to assault and
13 battery with intent to kill as some evidence from which they
14 can infer that you didn't commit this assault and battery
15 with intent to kill. I just don't think that's a proper
16 ruling.

17 So the best thing I could tell you is that if he
18 brings it up during the trial and object to it, I would
19 probably rule in the State's favor. And the reason I'm just
20 not making an actual ruling now that way is because I have
21 not heard the facts and I would not want the defense to have
22 an argument on appeal that I excluded information or
23 evidence from the trial in this case without actually
24 knowing what the facts are of this case. But to me the fact
25 that the State exercised the prosecutorial discretion and

1 chose to increase the charges does not -- standing alone I
2 don't think can properly be argued to a jury if that is an
3 inference that he's not guilty of the charge to which he's
4 charged. The fact the State chooses to increase the charge
5 to me is more of an inference that he is guilty. And with
6 you not being able to say that she did -- that the State
7 acted in a manner that was inconsistent with their duty, as
8 I understand it on the ethical code, I don't see -- I don't
9 see any need to have that as an issue.

10 MR. SHEALY: That's not an issue, but what I said
11 there was to protect myself from a PCR attorney, because I'm
12 making an argument here and that's what the argument sounds
13 like is going to and I wanted to make sure --

14 THE COURT: Right.

15 MR. SHEALY: -- everybody knew that I looked into
16 that.

17 THE COURT: And I appreciate that, but absent you
18 wanting to make an inference that the State was motivated
19 for some improper reason, I don't think then you can argue
20 that the fact that the State increased the charge is an
21 inference that is he's not guilty of it. You need to want
22 to back it up with something, i.e., that there is some
23 jailhouse deal, or there is, you know, some bad motive on
24 the part of the State that it's improper illegal, unethical,
25 something of that nature, and I'm not seeing that. I mean,

1 that's --

2 MR. SHEALY: Your Honor, I have do have another
3 matter that I need to bring to your attention. I assume we
4 are done with that.

5 Your Honor, the solicitor's office has a guy named
6 Ricky Long, who is a co-defendant to my client --

7 THE COURT: In this case?

8 MR. SHEALY: Yes.

9 -- under subpoena. I also have been endeavoring
10 to get him subpoenaed as well. The -- and I would like to
11 tell you our efforts. We finally got us a secretary over at
12 the Public Defender's office.

13 THE COURT: You are doing better than me.

14 MR. SHEALY: I took her -- well, actually she took
15 me to the witness' home and we were unable to serve the
16 subpoena.

17 I also took the subpoena Friday to the sheriff's
18 office. And one of the places I was -- the reason I wasn't
19 answering the phone when everybody was calling me was I had
20 driven over to the sheriff's office to find out if that
21 subpoena had been served and let them know that the case is
22 still going on and we still needed it served. So they are
23 still endeavoring to serve it.

24 I brought another subpoena with me today to hope
25 to get one of the officers to serve Mr. Long here, but I

1 didn't know Mr. Long. And although my client said he
2 thought he saw him when we went to look for him, we couldn't
3 find him. So tomorrow I may be asking the court for
4 assistance in getting Mr. Long.

5 THE COURT: Do y'all have any problem with the
6 State?

7 MS. LESKANIC: We do, Your Honor. He is -- I
8 don't know that I plan on calling him as a witness. It just
9 depends upon how the case goes, but he has answered a plea.
10 He's not yet been sentenced and he's represented by Keith
11 Kelly. I have provided that information to Mr. Shealy. Mr.
12 Kelly was here this morning. Mr. Long was here this
13 morning, and I have also given him Mr. Long's telephone
14 number. And I believe he has Mr. Kelly's telephone number,
15 so --

16 THE COURT: You can always call Mr. Kelly.

17 MR. SHEALY: Oh, I have talked to Mr. Kelly. Mr.
18 Kelly told me he was supposed to be here, but he didn't know
19 where he was. And Mr. Kelly is of the opinion he doesn't
20 have to be here when he testifies, since he's already pled
21 guilty and all that's left is the sentencing, so -- but I
22 have tried to get him through Mr. Kelly as well.

23 THE COURT: Okay.

24 MR. SHEALY: And this might be moot. They might
25 have already served him right now. I don't know.

1 THE COURT: You mean your process server?

2 MR. SHEALY: No, the sheriff's department. My --
3 unfortunately my secretary is out sick today, so otherwise
4 she would have been doing that.

5 THE COURT: Do you have Mr. Long's address?

6 MR. SHEALY: Yes.

7 THE COURT: Did you give it to the sheriff's
8 people?

9 MR. SHEALY: They have got a copy of the subpoena
10 and it has the address on it.

11 THE COURT: Okay. Is he in Cherokee County?

12 MR. SHEALY: Yes, Your Honor.

13 I think they have tried to serve him. He just
14 hasn't been there.

15 THE COURT: He's probably working.

16 MR. SHEALY: You can only hope.

17 THE COURT: Okay. All right, well, you have place
18 me on notice.

19 All right, anything else?

20 MR. SHEALY: Not by the defense, Your Honor.

21 MS. LESKANIC: No, Your Honor.

22 THE COURT: And we anticipate the State, they
23 think the State is going to call how many witnesses?

24 MS. LESKANIC: Approximately five witnesses, I
25 think, Your Honor.

1 THE COURT: And do y'all feel comfortable that --
2 you don't know yet whether you are going to call the
3 defendant?

4 MR. SHEALY: I probably will.

5 THE COURT: Okay.

6 MR. SHEALY: Assuming he agrees to testify.

7 THE COURT: Assuming you do call the defendant, do
8 you have any other witnesses?

9 MR. SHEALY: Depending on whether the State calls
10 Mr. Long, I may have him.

11 THE COURT: So you think -- if you call witnesses,
12 do you think today that you would call your client and Mr.
13 Long?

14 MR. SHEALY: Right.

15 THE COURT: And that would mean the State would
16 not have called Mr. Long, and so do y'all feel like you can
17 give a comfortable opinion we could finish the case
18 tomorrow?

19 MR. SHEALY: I stand by what I said this morning,
20 Your Honor. I think if we get started at nine o'clock, 9:30
21 in the morning, whatever time we are supposed to be here,
22 Ms. Leskanic and I fairly efficient in dealing with
23 witnesses so --

24 THE COURT: You are. I noticed that about you.
25 All right. How long do you want for opening? Fifteen?

1 MS. LESKANIC: I won't need that long.

2 MR. SHEALY: My -- typically my openings are very
3 short. It's just my closings put people to sleep.

4 THE COURT: We will work on it.

5 Okay. Then we will try to get it done.

6 Madam Clerk, we told the jury to come back at what
7 time?

8 THE CLERK: 9:30.

9 THE COURT: 9:30?

10 THE CLERK: Yes, sir.

11 THE COURT: I will see y'all at 9:30.

12 MS. LESKANIC: Thank you, Your Honor.

13 MR. SHEALY: Thank you.

14 THE COURT: Thank you all.

15 (Whereupon, proceedings were adjourned to
16 September 15, 2009)

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHEROKEE) IN THE COURT OF GENERAL SESSIONS

3
4 THE STATE)
5 -vs-) TRANSCRIPT OF RECORD
6 DONALD SCOTT JONES,) 2009-GS-11-924
7 DEFENDANT.) SEPTEMBER 15, 2009
8) GAFFNEY, SOUTH CAROLINA

9 (VOLUME II)

10 B E F O R E:

11 THE HONORABLE J. MARK HAYES, II, JUDGE. ; And a Jury.
12

13
14 A P P E A R A N C E S:

15 KIMBERLY L. LESKANIC, ASSISTANT SOLICITOR
16 ATTORNEY FOR THE STATE

17 THOMAS SHEALY, ASSISTANT PUBLIC DEFENDER
18 ATTORNEY FOR THE DEFENDANT

19
20 MICHAEL R. WATTS
21 CIRCUIT COURT REPORTER
22
23
24
25

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2				
3	S-1	911 TAPE		75
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5	S-3	PHOTOGRAPH		90
6	S-4	PHOTOGRAPH		90
7	S-5	PHOTOGRAPH		90
8	S-6	PHOTOGRAPH	30	
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1 (PROCEEDINGS, SEPTEMBER 15, 2009)

2 THE COURT: Yes, sir.

3 MR. SHEALY: Thank you, Your Honor.

4 Your Honor, there are two 911 tapes in this case
5 and we are going to move to suppress the first --
6 chronologically the first one in time on the grounds that,
7 one, that it's hearsay; and the second is that it mentions
8 the word robbery, which we believe is highly prejudicial to
9 my client.

10 The reason I say that this is hearsay, the person
11 calling 911 is not the victim and it's -- in fact, I think
12 it's the victim's father-in-law, or father, or someone like
13 that, and he's relating what the victim has told him from --
14 as I understand it from the solicitor, from a phone call
15 from the victim.

16 The second 911 tape is 911 actually calling the
17 victim and talking to the victim, and I don't see any
18 objection to that case. He does not mention being robbed or
19 anything like that.

20 THE COURT: Okay. Yes, ma'am.

21 MS. LESKANIC: May it please the court, Your
22 Honor, the 911 calls are business or government records.
23 Therefore, the content of those would not be hearsay.

24 The facts of the case is this was a robbery. We
25 are not going forward with that. Mr. Jones is the one that

1 committed the armed robbery, but there is a co-defendant
2 that's charged with armed robbery and the victim's wallet
3 was stolen. So those facts are consistent. No one on the
4 tape says that it is Mr. Jones that committed the robbery.
5 It just says that a robbery was committed and also says that
6 an assault was committed, so it would not be hearsay and it
7 would not be inconsistent with the facts of the case or
8 inconsistent with the charges that we are going forward with
9 regarding Mr. Jones.

10 THE COURT: Well, what's the purpose for the 911
11 tape, the first 911 tape?

12 MS. LESKANIC: It confirms what the victim did,
13 Your Honor, as far as after he had been struck in the head.
14 He had made a phone call. The last person he had spoken
15 with was a relative of his. He called that relative, gave
16 them information that he needed help. And then that
17 relative made a call to 911, and then 911 calls Mr. Emery
18 back. That relative gives 911 Mr. Emery's telephone number,
19 and it just -- for a complete understanding of the case,
20 that second call doesn't make much sense why 911 called Mr.
21 Emery without the first one. It's really a continuous
22 course with the same 911 operator, even though it's on two
23 tapes. They were just recorded for us at different times.

24 THE COURT: And the State does not contend that
25 this defendant committed a robbery or committed a robbery

1 referenced on the 911 tape?

2 MS. LESKANIC: That is correct, Your Honor. We
3 are not going forward on that charge. There was a robbery
4 committed at the same time this assault and battery with
5 intent to kill occurred, but there is another defendant who
6 we believe actually stole the wallet and we are pursuing the
7 armed robbery charge against that defendant.

8 THE COURT: Can the State state to the jury that,
9 in fact, they will hear the term robbery and we're not
10 contending that the defendant committed any type of robbery
11 as part of this case?

12 MS. LESKANIC: I would rather the defense have to
13 make that statement instead of the State, Your Honor.

14 THE COURT: Well, if you are offering it and it
15 made reference of a robbery and you are not contending that
16 this defendant committed the robbery, I would be inclined to
17 let the tape in, if there would be some statement to the
18 jury about, you know, "you are going to hear the term
19 robbery, but we do not contend as part of this case the
20 defendant committed the robbery."

21 MS. LESKANIC: What I am planning to do, Your
22 Honor, is the defendant that actually committed the robbery
23 is going to be a State's witness and she is going to testify
24 that she is the one -- I believe she is going to testify
25 that she is the one that took the wallet, and then the

1 charge itself will not be alleged against Mr. Jones.

2 THE COURT: And just -- you know, the State would
3 be offering it as evidence. I would not want the jury to
4 infer that the same victim, if the victim is the same, or a
5 911 call is being made, which very well could be -- or it
6 could be an excited utterance made by the father of the
7 victim in response to a complaint made by the victim, to
8 think that that type of statement inferred guilt of the
9 robbery on the defendant. So they are just asking for a
10 clarification that, you know, throwing that word out there
11 in this type trial would be a little bit prejudicially
12 inflammatory. It would be the same as if, you know, it was
13 the victim in a child molestation case, you know, those
14 types of allegations are very serious, even though we
15 wouldn't have -- you know, we're not on trial in that type
16 of case.

17 If the State can come up with a way of just
18 saying, you know, "you are going to hear" -- or ask the
19 witness -- or somehow let the State clarify to the jury that
20 the statement that a robbery is being committed, or has been
21 committed, somehow clarify that that is not an allegation of
22 robbery that involved this defendant, or something like
23 that, just to clarify.

24 MR. SHEALY: Your Honor, if that's -- first off I
25 object to --

1 THE COURT: Let me hear from the State.

2 MR. SHEALY: Oh, I think that she had already --

3 MS. LESKANIC: The only concern, Your Honor, is I
4 think at this point in time my evidence for the armed
5 robbery is weak, which is the reason that I chose not to go
6 forward with that charge.

7 Do I personally still believe he may have been
8 involved in that armed robbery? Yes, but I don't think I
9 have enough evidence to present that and go forward to a
10 jury, so I don't know if the defendant is going to testify,
11 what that testimony is going to be, and I don't want to set
12 out "ladies and gentlemen, he definitely had nothing to do
13 with this," because I don't know if that's the way the facts
14 are going to play out or not.

15 THE COURT: Well, if you could come up with some
16 way to let the jury know that you're not making the
17 allegations that a robbery is this defendant's part of this
18 case. Otherwise, I'm not going to let the tape in, because
19 it is -- to say on the 911 tape as part of this trial, to
20 say this tape is relevant to this trial and it has
21 allegations that the defendant committed -- from which a
22 jury could infer that the defendant committed a crime for
23 which he is not on trial for, introduce it as part of this
24 case a collateral issue to which then the defendant would
25 have to present cross-examination or evidence to disprove

1 the robbery allegation.

2 MS. LESKANIC: May I tell the jury that there is
3 another defendant that is charged with the taking of the
4 wallet? I mean, would that be sufficient? I want to make
5 sure that I word it correctly to comply with your --

6 THE COURT: I mean, I -- you know, you could say
7 that. I would think that to -- where I'm headed is that
8 simply state to the jury "we are not contending as part of
9 this trial that the defendant committed any type of robbery,
10 or committed on robbery that's referenced in the 911 tape."
11 That tells the jury that as part of this trial -- it doesn't
12 mean that there might not be another trial, but as part of
13 this trial you're not contending or that they should not
14 infer the defendant committed a robbery because it's
15 referenced on the 911 tape. Something of that nature.
16 Otherwise, you know, I can appreciate the State's wanting to
17 paint the broad picture, but painting the broad picture, it
18 would be the same as if the caller had said, you know, "he's
19 committed -- you know, "I call them. There has been a
20 robbery. There has been a terrorist attack. There has been
21 a child molestation. There has been a murder. There has
22 been" -- you know, that caller could say any number of
23 things to which the State would want to infer that this 911
24 tape, this 911 call, is part of this case, but not to really
25 what's said on the tape. Well, that begins to get the jury

1 thinking in ways that are not permissible to infer guilt on
2 the part of this trial. So if you can state that, I'll be
3 more than happy to let it in.

4 MS. LESKANIC: Okay.

5 THE COURT: Yes, sir.

6 MR. SHEALY: Your Honor, I would like to back the
7 train up a little bit. I submit it is hearsay. This is not
8 a business record. It's a tape recording. That, if
9 anything, it's a public record as a report. We are not in
10 the business of the 911. They are serving the public. So
11 if you look at the public records and reports, certain
12 things are not admissible, such as police reports, opinions
13 of police officers.

14 In this particular case we are submitting that the
15 tape originally is hearsay and all it does is it records
16 hearsay, and you can't get around the hearsay by saying it's
17 a public record or a business record, because it's hearsay.
18 Otherwise, every time we go to arrest somebody for a crime,
19 all we have to do is call 911 and make crazy allegations and
20 it would be admissible in court, and it's not.

21 THE COURT: That's why I have asked -- one of the
22 reasons I'm asking that the State to make that
23 clarification --

24 MR. SHEALY: Thank you, Your Honor.

25 THE COURT: -- so that the jury does not -- so

1 that the jury does not improperly infer any type of guilt,
2 whether it be guilt of this crime or guilt of an unindicted
3 and uncharged crime, to look negatively upon the defendant,
4 but the State's intending, if I understand it correctly, is
5 that they simply wish to present to the jury a full picture
6 of what was going on from the victim's standpoint.

7 MR. SHEALY: Your Honor, I want to preserve my
8 objection, but also offer a suggestion out of the box.

9 THE COURT: I always take them suggestions.

10 MR. SHEALY: As long as my objection is preserved.

11 THE COURT: Okay.

12 MR. SHEALY: The defense would prefer if you would
13 instruct the jury after they have heard the tape not in
14 regards to the allegations of armed robbery, they are not
15 relevant here and that those allegations have no application
16 to the defendant. Tell them to disregard it. I think it
17 would --

18 THE COURT: That's not an unreasonable request.
19 What I would like to do, though, is let's -- if the State
20 chooses to present the 911 tape, let the State present it.
21 Then after the State does their presentation, and whatever
22 it is that you do on your cross-examination, let me decide
23 at that time whether or not it's necessary.

24 MR. SHEALY: Thank you, Your Honor.

25 THE COURT: Because I definitely would look for

1 ways that -- even if I am in error in allowing the tape in,
2 on how I would cure that error, and it could be that a
3 curative instruction might cure that.

4 Anything else?

5 MS. LESKANIC: Nothing from the State, Your Honor.

6 MR. SHEALY: No, Your Honor.

7 THE COURT: We have just the one indictment for
8 assault and battery with intent to kill?

9 MS. LESKANIC: Yes, Your Honor.

10 MR. SHEALY: Your Honor, may I approach the
11 solicitor?

12 THE COURT: Yes.

13 All right. I'm going to -- just for y'all's
14 records, I'm going to ask juror number 95, Mr. Rollins, to
15 serve as the foreperson.

16 So if you will have Mr. Rollins, juror number 95,
17 to take the foreperson's seat.

18 All right, we will go ahead and bring them on in.

19 (The following takes place in the presence of the
20 jury panel)

21 THE COURT: Good morning, ladies and gentlemen.
22 Thank you for your patience while we handled a few matters
23 of law for me to be raised outside of your presence. We are
24 now ready to begin the trial of this case.

25 Mr. Rollins, as the bailiff has informed you, I'm

1 requesting that you serve as the foreperson of this jury. I
2 will provide you with further instructions later as to your
3 duties and responsibilities, but at this time, ladies and
4 gentlemen, I need for you to please stand and raise your
5 right hand and the Clerk of Court can swear you in.

6 THE CLERK: Please raise your right hand.

7 (Whereupon, the Jury Panel was sworn)

8 THE CLERK: You may be seated.

9 THE COURT: Thank you, ladies and gentlemen.

10 Before we begin this trial I want to tell you that
11 this trial probably will be different from what many of you
12 might expect. Many people do not have the privilege of
13 actually serving in a court session, such as you are doing
14 now. You may think from watching television or movies or
15 reading books that trials are always full of high drama or
16 intense action or riveting circumstances. Now, while all of
17 these things may be true at times, I need to let you know
18 that this trial is not for entertainment purposes. This
19 trial is a fundamental part of our democracy. It is a
20 search for the truth in an effort to make sure that justice
21 is done between the parties presently before you. Searching
22 for the truth, unfortunately, and making sure that justice
23 is done is often slow, deliberative, and repetitive. It is
24 just the opposite of what you may have seen on television or
25 in movies or read about in books.

1 This courtroom is a place of honor and it's
2 dedicated to the protection and preservation of citizen's
3 rights through what many have called the greatest justice
4 system ever created.

5 The attorneys appearing before you are advocates
6 for the parties they represent, but first and foremost they
7 are also officers of the court. They are sworn to uphold
8 the integrity and the fairness of our judicial system and to
9 help you in the search for the truth. You should expect
10 them to be professional, competent and ethical in the
11 representation of their client's interests.

12 Remember that you have taken an oath to try this
13 case and reach a fair and just verdict, and you are also
14 expected to be professional, reasonable and ethical, but I
15 do want to thank you for accepting this important
16 responsibility of jury service and for your contribution
17 today to our justice system.

18 Now, what I will say now is intended to serve as
19 an instruction to the trial of this case. These remarks are
20 not a charge on the law in the case. I will instruct you on
21 the law applicable to this case at the end of the trial
22 before you retire to consider your verdict. This is merely
23 an explanation of the procedures that we will follow in this
24 trial so that you may better understand what is happening.

25 The defendant is charged by way of an indictment,

1 and he's charged with the crime in this indictment of
2 assault and battery with intent to kill. The elements of
3 assault and battery with intent to kill I will explain to
4 you later.

5 I need to let you know that the indictment is
6 simply the charge by which the case is brought into court
7 and it is not in any sense evidence of any of the
8 allegations contained in the indictment.

9 The defendant has pled not guilty to the
10 indictment. The State, therefore, has the burden of proving
11 each of the elements of the indictment beyond a reasonable
12 doubt. And it will be your duty, ladies and gentlemen, to
13 decide whether or not the State has met that burden of
14 proof.

15 Your purpose as jurors is to find and determine
16 the facts. You are the sole judge of the facts. If at any
17 time I make any comment regarding the facts, you must
18 disregard those comments. You are to determine the facts
19 from the testimony that you hear and the other evidence that
20 is introduced during this trial. It is up to you to
21 determine the inferences which you may feel may properly be
22 drawn from the evidence that's presented during this trial.

23 It is especially important that you perform your
24 duty of determining the facts diligently and
25 conscientiously, because ordinarily there is no way to

1 correct an erroneous decision of fact that is made by a
2 jury.

3 On the other hand and with equal importance and
4 emphasis, the same law that makes you the judge of the facts
5 in this case makes me the judge of the law in this case.
6 The law as given by the court is the only law that you may
7 consider. You must accept and follow it, even though you
8 may disagree with it. I cannot tell you what the facts are
9 in this case and you cannot disagree with me as to what the
10 law is or what the law should be.

11 Your job is to take the law as I will give it to
12 you and apply it to the facts as you find them from the
13 testimony of the witnesses and any other evidence that is
14 introduced during this trial. After you do that, you will
15 render what is called a verdict, a true and just verdict
16 under the solemn oath that you just took as jurors.

17 As I told you yesterday, until I advise you to
18 begin your deliberations, you must not discuss this case
19 with anyone, including your fellow jurors, friends, family
20 members, and anyone that is involved with this case. This
21 includes discussions face to face or by telephone, e-mail,
22 text, blogs, or any other method of communication. After
23 the case is submitted to you, you must discuss it only in
24 the jury room with your fellow jurors.

25 The attorneys and the parties in this case have

1 also been advised that they are not to talk to you at all.
2 So if you see anyone involved in this case and they do not
3 even say hello to you, they are not being rude or impolite.
4 They are simply following instructions that I have given
5 them.

6 Now, in the event that there is some type of news
7 coverage of this case during this trial, I instruct you do
8 not read, listen to, or watch any of those news reports
9 about this case. You must not consider anything you may
10 have heard or read about this case before this case is
11 actually started, because you cannot consider anything that
12 goes on outside this courtroom in deciding the facts of this
13 case.

14 It is important that you keep an open mind and not
15 decide any issue in this case until all of the evidence has
16 been presented to you, the parties have made their closing
17 argument and I have instructed you on the law applicable to
18 this case.

19 Now, it is your solemn responsibility to determine
20 the guilt or innocence of the defendant, and your verdict
21 must be based solely on the evidence presented to you during
22 this trial and on the law that I will instruct you during
23 and at the close of this case.

24 Now, in just a moment the solicitor is going to
25 make what is called an opening statement in which the

1 solicitor will explain to you the issues in this case, or at
2 least what she thinks the issues are in this case.

3 Now, the attorney for the defendant may also make
4 an opening statement, although he is not obligated to do so,
5 but I need to instruct you that what the attorneys may tell
6 you during their opening statement is not evidence in this
7 case. It is only their contention as to what the issues are
8 in this case. The evidence and the facts of this case will
9 be presented to you by sworn testimony of witnesses and/or
10 any exhibits that may be introduced during the course of
11 this trial.

12 From time to time, ladies and gentlemen, you may
13 hear me say something like, or you may hear one of the
14 lawyers say "Your Honor, I believe I have a question of law
15 or a matter of law to discuss with you," or, "Your Honor,"
16 they might say "may we approach the bench?" Or sometimes
17 during the trial I myself might find it necessary to excuse
18 you from the courtroom for a short while so that I can
19 discuss what is called a matter of law with the attorneys.
20 Now, the reason that I do this outside of your presence is
21 that frequently I am required to make comments about the
22 facts of the case in determining if a particular rule of law
23 applies to a case. So that you will not be influenced by
24 anything that I say during the course of this trial
25 concerning the facts, I need to have those discussions

1 outside of your presence. So in advance I apologize if I
2 exclude you from the courtroom while the attorneys and I
3 discuss what's called matters of law.

4 Now, ladies and gentlemen, in determining what the
5 true facts are in this case, you must decide whether or not
6 the testimony of a witness and the witnesses is believable.
7 It will be my responsibility to rule whether or not a
8 witness or evidence is admissible or not, but whether or not
9 you believe the testimony and evidence is solely up to you.

10 In determining whether to believe a witness, you
11 have the right to consider the interest of any witness, the
12 bias of any witness, the prejudice of any witness, the
13 opportunity for the witness to have seen the matters and
14 things about which the witness may testify, and the way the
15 witness acts on the witness stand. You have the right to
16 consider anything that is in the record that will help you
17 evaluate the testimony of the witness. Now, that means that
18 it is your duty to pay close attention to the witnesses, to
19 observe them, to listen to them, and to pay close attention
20 to the attorneys and to the court. Do not let your thoughts
21 wander, but give strict attention to the testimony in this
22 case, so that at the end of the testimony, after the
23 arguments of the counsel and the charge on the law by me,
24 you will then be in a position to determine what the true
25 facts are and to apply the law to those facts and thus

1 render a true and just verdict in this case.

2 Now, Mr. Foreman, it is your added duty to preside
3 in the jury room and to be the jury spokesperson here in
4 this court. It will also be your duty to write the verdict
5 for the jury at the end of this case, but I will give you
6 further instructions as to that duty at the conclusion of
7 this case.

8 Now, in order to preserve everyone's rights, I
9 will give either party an opportunity to now object to
10 anything that I have just now instructed you or told you.

11 Any objection from the State?

12 MS. LESKANIC: No, Your Honor.

13 THE COURT: Any from the defense?

14 MR. SHEALY: No, Your Honor.

15 THE COURT: Ladies and gentlemen, we will now
16 receive opening statement.

17 MS. LESKANIC: May it please the court?

18 THE COURT: Yes, ma'am.

19 MS. LESKANIC: Good morning, ladies and gentlemen.
20 I introduced myself to you yesterday. My name is Kim
21 Leskanic and I'm one of the assistant solicitors here in
22 Cherokee County.

23 The reason that you all are here today is that the
24 defendant, Donald Scott Jones, has been charged with
25 committing the crime of assault and battery with intent to

1 kill.

2 Now, as Judge Hayes told you during his
3 introduction, he's going to go over the law with you at the
4 conclusion of the case, and I'm going to let him do that,
5 and in my closing I will touch more on exactly what assault
6 and battery with intent to kill means, what the elements you
7 have to find under the law, but what I want to do now in my
8 opening is just tell you a little bit about what happened on
9 May 27th of 2006, which is when this incident occurred to
10 bring us all into this courtroom.

11 The victim in this case is Jerry Emery. He's
12 seated behind my table in the black shirt. He lives in
13 Blacksburg on [REDACTED], and that's where he lived back in
14 2006, when this happened. There was a female by the name of
15 Tammy Byars who Mr. Emery used to date. They had a
16 relationship a few years before this incident. They had
17 broken it off. They still saw each other every once in a
18 while.

19 On this particular day Mr. Emery and Ms. Byars get
20 back together. They are going to spend some time together
21 that evening. She's in need of some money. He wants some
22 company and he says "come spend some time with me. I will
23 give you some money, and, you know, we will have a nice
24 evening." So she comes over. They hang out together for
25 awhile at his house. He has given her some money. I think

1 they had been drinking a little bit, and maybe even smoking
2 some marijuana.

3 Now, what happens next is Ricky Long and Donald
4 Scott Jones, who have dropped Tammy off for Mr. Emery to
5 pick her up and go back to the house. They had been with
6 her that night. They come back to Mr. Emery's house to pick
7 up Ms. Byars. Mr. Emery doesn't know these two individuals,
8 doesn't know Mr. Jones and doesn't know Mr. Long, but they
9 come into his home. He's a little uncomfortable with that,
10 but they sit around and they are taking. He offers them a
11 drink and everything seems to be going okay. Mr. Emery has
12 a couch in his house and he had a chair in his house. Mr.
13 Long was sitting in chair. Mr. Emery and Ms. Byars were
14 sitting on the couch, and Mr. Jones was sitting on the
15 couch.

16 Now, Mr. Emery will tell you about the things that
17 were going on inside the house, but at one point Mr. Jones
18 asked to use the bathroom. Mr. Emery says that's fine.
19 Well, Mr. Emery has a large walking stick that he keeps in
20 his bedroom, which is right near the bathroom, almost like a
21 tree. It is a big stick. You will see it. Mr. Emery is
22 still sitting on his couch talking to Ms. Byars. Ricky Long
23 is sitting in the chair, and out of nowhere Mr. Jones picked
24 up this stick and comes up behind Mr. Emery and wails him in
25 the head. Splits his head open. You are going to see the

1 photographs of the injuries and you are going to hear about
2 the injuries, but he had a huge laceration on the right side
3 of his head. He's struck again. He has a laceration on the
4 back side of his head where his head is split open. He's
5 hurt along his back and he has a broken arm, and never saw
6 it coming.

7 Mr. Jones leaves the house, Mr. Long leaves the
8 house, and Ms. Byars leaves the house. And I believe we
9 will show that when Ms. Byars left the house, she also took
10 Mr. Emery's wallet. You are going to have a reference -- we
11 have got the 911 calls. After everyone left, the last
12 person that Mr. Emery had spoken to on the telephone was a
13 relative of his. He has blood pouring down his face. He
14 can't even see to call 911, so he just hits the talk button,
15 which calls the last person he has spoken to, which is a
16 relative and he says he needs some help. So his relative
17 calls 911 and reports as much as he can to the 911 operator,
18 saying that there has been an assault and battery and there
19 has been a robbery.

20 Mr. Jones is not on trial for the robbery. I
21 believe the testimony is going to show that it was Ms. Byars
22 that actually took the wallet when she left after he had
23 been assaulted.

24 You are going to hear that 911 call. And then the
25 911 operator actually calls Mr. Emery back to check on him

1 and let him know that EMS is on their way. You will hear
2 that call also.

3 But we will show you through testimony, through
4 photos, and the weapon that was used that on this particular
5 night Donald Scott Jones committed the crime of assault and
6 battery with intent to kill by striking Mr. Emery. Thank
7 you.

8 THE COURT: Yes, sir, Mr. Shealy.

9 MR. SHEALY: Thank you, Your Honor.

10 Yesterday I introduced myself to you. I'm Tommy
11 Shealy. I'm one of the public defenders here in Cherokee
12 County and I represent Donald Scott Jones.

13 Donald Scott Jones is an innocent man sitting here
14 in front of you today. He's going to remain that way,
15 unless, and until, you decide that his guilt has been proven
16 beyond a reasonable doubt.

17 Now, assault and battery with intent to kill is
18 the highest level of assault and battery there is. We have
19 simple assault and battery. We have assault and battery of
20 a high and aggravated nature, and then we have with intent
21 to kill.

22 The State must prove to you beyond a reasonable
23 doubt that there is an assault, that there is a battery, and
24 that there is an intent to kill.

25 Now, this is a -- the State has been very sure as

1 to what facts that you are going to hear. I have learned
2 not to promise you what facts you are going to hear.

3 In this particular case it's a little bit
4 stranger, because usually when we have a case, we have a
5 written statement, all the witnesses written statements, or
6 the victim. Someone has written down what has happened, and
7 they do that to refresh their memory later down the road,
8 but that also gives us an idea of what that witness or
9 victim is going to say. If there is a confession, we have
10 the confession. Here we don't have a confession. We have
11 always denied this. Here we don't have a written statement
12 of the witnesses. And oddly we don't have a written
13 statement from the victim. Now, why is this significant?
14 To describe this, take any significant act or incident that
15 happens to you in May of 2006, and try to recall all the
16 details. You may recall some, but over time your memory is
17 going to change. And I don't know how it will change, but
18 it's just not going to be that accurate.

19 Now, you as members of the jury, both the
20 solicitor and I selected each one of you. You heard us
21 excuse other jurors. We selected each one of you because of
22 your background, because of who you are. At the same time
23 you are an individual juror and you are a corporate jury.
24 It's important that each of you listen to this information,
25 that each of you take into the deliberation room your

1 experiences. You know whenever somebody is not telling the
2 truth, and it's important that each of you contribute to the
3 deliberations of whether or not his guilt has been proven
4 beyond a reasonable doubt.

5 Now, what I ask for you to do is look for
6 indicators of truthfulness, things that indicate a person is
7 telling the truth or indicates that he's not telling the
8 truth. You know, does he maintain eye contact? Does he
9 slouch in his chair, things such as that?

10 Donald Scott Jones denies this charge against him,
11 the assault and battery with intent to kill. We will see
12 what the evidence produces when the people testify, but I
13 urge you to pay very, very close attention to this
14 testimony. Thank you.

15 THE COURT: Is the State ready to proceed?

16 MS. LESKANIC: Yes, Your Honor.

17 THE COURT: Yes, ma'am.

18 MS. LESKANIC: The State calls Reggie Petty.

19 THE COURT: Mr. Petty, come around.

20 REGGIE PETTY, having been first duly sworn,
21 testified as follows:

22 MS. LESKANIC: If it please the court?

23 THE COURT: Yes, ma'am.

24 DIRECT EXAMINATION BY MS. LESKANIC:

25 Q. Would you please state your name for the ladies and

1 gentlemen of the jury?

2 A. My name is Reggie Petty. I'm the dispatch captain,
3 Cherokee County 911.

4 Q. And how long have you been employed as the dispatch
5 captain?

6 A. Four years.

7 Q. And what was your employment prior to that?

8 A. I have been with Cherokee County for seven years.

9 Q. And what are your duties with 911?

10 A. Take care of the tapes, in charge of the radio room,
11 quality control type.

12 Q. When calls come into 911, are they automatically
13 recorded, any calls that are made either to 911 or by 911
14 operator?

15 A. Yes, ma'am, they are recorded.

16 Q. And how are these calls kept, per say?

17 A. They are kept on C.D. and it's recorded.

18 Q. How long are those records kept?

19 A. We have them from 2003.

20 Q. Did you make copies of two calls related to this case?

21 A. Yes, ma'am.

22 Q. Let me show you, if you may, what's been marked State's
23 Exhibit 1 and State's Exhibit 2. If you would take a look
24 at these and tell me if you recognize that?

25 A. Yes, ma'am.

1 Q. What are they?

2 A. These are tapes that have been requested by the
3 solicitor's office.

4 Q. Okay. And those are copies that you made for us --

5 A. Right.

6 Q. -- relating to this incident?

7 A. Yes, ma'am.

8 Q. Did you alter or change the recording in any way?

9 A. No, ma'am.

10 MS. LESKANIC: Your Honor, at this time the State
11 would offer State's Exhibit 1 and 2 for admission as
12 evidence.

13 MR. SHEALY: Your Honor, the defense would object
14 to the first tape on the grounds that we have already
15 discussed.

16 THE COURT: All right. You are -- based on what
17 was articulated by the court during pretrial I'm going to
18 allow them both in.

19 MS. LESKANIC: All right. Thank you, Your Honor.
20 May I publish to the jury?

21 THE COURT: Yes, ma'am.

22 MS. LESKANIC: Thank you.

23 We will open Exhibit 1.

24 (Whereupon, State's Exhibit 1 was played to the
25 jury panel)

1 MS. LESKANIC: Your Honor, now we will play
2 State's Exhibit 2.

3 THE COURT: Yes, ma'am.

4 (Whereupon, State's Exhibit 2 was played to the
5 jury panel)

6 MS. LESKANIC: Those are all the questions that I
7 have for this witness.

8 Please answer any questions that Mr. Shealy may
9 have.

10 MR. SHEALY: No questions, Your Honor.

11 THE COURT: All right. Thank you.

12 Ladies and gentlemen, I just want to instruct you,
13 as the State stated during their opening statement, you
14 heard the term robbery used in one of those 911 tapes. I
15 would instruct you that this is not about this trial. This
16 is not about a robbery. Therefore, because that term is
17 used in the first 911 tape, you should not use it as an
18 inference of any guilt on the part of the defendant as part
19 of this trial.

20 Thank you very much, sir. You may step down.

21 MS. LESKANIC: The State calls Jerry Emery.

22 Your Honor, may I ask Mr. Petty be excused?

23 THE COURT: Any objection to Mr. Petty being
24 excused?

25 MR. SHEALY: No objection.

1 THE COURT: Thank you for coming, sir.

2 JERRY WAYNE EMERY, having been first duly sworn,
3 testified as follows:

4 DIRECT EXAMINATION BY MS. LESKANIC:

5 Q. Would you please state your name to those ladies and
6 gentlemen of the jury?

7 A. My name is Jerry Emery.

8 Q. Where do you live, Mr. Emery?

9 A. Blacksburg, South Carolina.

10 Q. How long have you lived in Blacksburg?

11 A. I have been there for probably about five and a half
12 years.

13 Q. Are you employed now?

14 A. Ma'am?

15 Q. Do you work?

16 A. Yes, ma'am.

17 Q. Where do you work?

18 A. I'm a meat cutter at Food Lion.

19 Q. How long have you been employed there?

20 A. I have there be for over a year now.

21 Q. Okay. Do you know an individual by the name of Tammy
22 Byars?

23 A. Yes, ma'am, I do.

24 Q. Would you tell the jury how you know Ms. Byars?

25 A. I have known her throughout the past. We had kind of

1 a -- couldn't really say relationship, but we hung together
2 for maybe a couple weeks at one time.

3 Q. Have you stayed in touch with her through the years?

4 A. Go two or three years. I hadn't heard from her that
5 time for probably a couple of years before I heard of her
6 that day.

7 Q. All right. Well, tell the jury about when you heard
8 from her that day and what happened at the beginning of the
9 day, the first time that you heard from Tammy?

10 A. I can't really remember everything. It was just I
11 called -- one conversation I had and then another, you know.
12 I called her that weekend and I was the only one -- I called
13 her in coming and spending some time with me.

14 Q. Okay. So you wanted Tammy to come spend some time with
15 you?

16 A. Yeah, I called her that weekend. I didn't have no
17 friends or nothing going on. Everybody I know was going out
18 the town, so I just --

19 Q. Well, did you meet up with her earlier this day?

20 A. Yes, I did.

21 Q. All right. What happened then?

22 A. We went riding. I thought I was going to be going back
23 to Blacksburg. She wanted a few dollars. She said let her
24 out. I let her out, and the next thing, you know, she told
25 me to come back, so I went to Blacksburg.

1 Q. Where did you pick her up or how did you get with her
2 that day?

3 A. I picked her up there at a little house near Limestone
4 somewhere, near that Little Cricket down there near
5 Limestone.

6 Q. Somewhere in Gaffney?

7 A. Yes, ma'am.

8 Q. And then she asked for some money and wanted to be let
9 out somewhere?

10 A. (Shaking head yes).

11 Q. Did you give her some money?

12 A. Yes, ma'am.

13 Q. About how much?

14 A. Probably \$18, \$19.

15 Q. Did she come back?

16 A. No.

17 Q. And then you went on home?

18 A. Yes, ma'am. I took and went to the house.

19 Q. And your house is located where?

20 A. Blacksburg.

21 Q. Is that on [REDACTED], [REDACTED]?

22 A. Yes, ma'am.

23 Q. Is that located in Cherokee County?

24 A. Yes, ma'am.

25 Q. All right. Now, did you meet up with Tammy later on in

1 the day?

2 A. No, she kept calling, kept calling, and later on that
3 evening I told her I wasn't coming back to Gaffney. I done,
4 you know, been took once and I wasn't coming back to
5 Gaffney. And she said "well, if you meet me half way, I can
6 get somebody to bring me, will you meet me?" I said on this
7 side of the river where I live at in Blacksburg I said "yes,
8 I will come and meet you, but I ain't coming back across the
9 river at night."

10 Q. Okay. So she says she will get a ride, she will meet
11 you half way or meet you somewhere in Blacksburg?

12 A. (Shaking head yes).

13 Q. And you were going to pick her up and go back to your
14 house?

15 A. Yes, ma'am.

16 Q. So do you have any idea what time that was?

17 A. I -- I ain't going to tell no lie. I don't really
18 remember. It was later in the evening.

19 Q. Okay. All right. So do you see anybody dropping her
20 off, or where do you pick Tammy up?

21 A. There was a vehicle there. I think it was a van, I'm
22 pretty sure, but she's already been walked out halfway
23 across the parking lot and got in the car and left, is the
24 best I can remember.

25 Q. So she is coming across the parking lot and she gets in

1 the car with you?

2 A. Yes, ma'am.

3 Q. And where do y'all go?

4 A. I went to Blacksburg to my house.

5 Q. All right. Do y'all spend how much time together at
6 your house?

7 A. I can't possibly remember. I mean, it was maybe an
8 hour, hour and a half maybe, I don't know. It was -- I
9 don't know try to keep up with time.

10 Q. All right. And I know I'm going to ask some personal
11 questions, but did you and Tammy engage in sex while she was
12 there?

13 A. Yes, ma'am.

14 Q. All right. And did you give her some money while she
15 was there?

16 A. Yes, ma'am, I gave her some more.

17 Q. What's the next thing that you remember happening?

18 A. Somebody beating on the door. She gets up and said
19 "that's got to be my ride," or whatever, but I said "don't
20 open that door. Don't let anybody in my house. I don't
21 know nobody," but they was in my house before I could get
22 into the living room.

23 Q. So she opens the door and how many people come in?

24 A. The best I remember, all three of them. Well, she's
25 already in the house, so the other two.

1 Q. Two men?

2 A. (Shaking head yes).

3 Q. Okay. What happens once they get inside the home?

4 A. Well, it seems she introduced one as her
5 brother-in-law, one as her cousin. You know, I tried to
6 make the best of the situation. I offered drinks and all
7 that, you know, tried to be friendly, hoping they would move
8 along real soon.

9 Q. Okay. And what happened? What's the nature of the
10 conversation or what's going on inside the house?

11 A. I don't know. It was -- it was just, well, BS talk
12 mainly, you know. I talked a little NASCAR. I remember
13 talking just a little bit of NASCAR.

14 Q. And who were you talking NASCAR with?

15 A. I think that was Ricky Long.

16 Q. All right. Where was Ricky Long in your house?

17 A. He sit in the recliner right across from me.

18 Q. Did he ever get up the whole time that he was there
19 until he left?

20 A. The best I remember, I never seen him leave that
21 recliner.

22 Q. So Mr. Long stayed in the recliner the whole time?

23 A. Yes, ma'am.

24 Q. And you was talking a little bit about NASCAR with him.
25 All right, where was Tammy and --

1 A. They was in the living room. We had some
2 conversations. I mean, it might have been the same thing,
3 but they did go into the kitchen there at one time and had
4 their conversation. I didn't think nothing about it.

5 Q. Who went into the kitchen?

6 A. Mr. Jones there and --

7 Q. You are identifying Mr. Jones as who?

8 A. And Tammy Byars?

9 Q. Who was Mr. Jones?

10 A. The one sitting beside the fellow in the suit there, in
11 the green grayish suit.

12 Q. So the one seated at the defense table you identified
13 as Scott Jones, Donald Scott Jones?

14 A. (Shaking head yes).

15 Q. And he went into the kitchen with --

16 THE COURT: Sir, if you would, we are making a
17 recording of everything that happens here.

18 THE WITNESS: Yes.

19 THE COURT: That gentleman right down front, the
20 court reporter. You are nodding and shaking your head and
21 not giving verbal responses sometimes. You have got to
22 really speak your responses.

23 THE WITNESS: I didn't mean to.

24 THE COURT: That's okay. People forget. Just be
25 sure that you give verbal responses.

1 BY MS. LESKANIC:

2 Q. Okay. All right. So the defendant and Tammy Jones at
3 some point go into your kitchen by themselves?

4 A. Yeah, I didn't think nothing about it. I mean, I don't
5 have nothing worth stealing, so, yeah, I didn't -- I figured
6 they was just wanting to talk, didn't want me or anybody
7 else to hear it.

8 Q. What happens when they come out of the kitchen?

9 A. I don't remember. It seemed like it was conversation.
10 The conversation was over, you know, and come back in. The
11 best I can remember, come in, sit down, maybe, for a few
12 minutes, until -- until -- until he asked to use the
13 restroom.

14 Q. Who asked to use the restroom?

15 A. Donald Jones.

16 Q. Okay. The one seated in the courtroom?

17 A. Yes, sir.

18 Q. And what kind of conversation is going on at that
19 point? Who were you talking to or what's going on?

20 A. I was talking to Tammy. I was looking at her. She was
21 sitting over on my left, so I had my back toward the
22 bathroom wall.

23 Q. Okay.

24 A. So I don't -- I can't even remember what the
25 conversation was.

1 Q. All right. And what's the next thing that happened?

2 A. I'm sitting there and the next thing, you know, I'm
3 face down on the floor.

4 Q. Okay. Where is Mr. Long when this happened?

5 A. The last time I seen him before I went to the floor, he
6 was sitting in that chair.

7 Q. So when you were hit, he was in the chair and Tammy was
8 on the couch with you?

9 A. Yes, ma'am.

10 Q. And Mr. Jones was asking to use the bathroom?

11 A. (Shaking head yes).

12 Q. All right. And what do you keep in your bedroom? What
13 did he hit you with?

14 A. He hit me with my stick that I had propped up beside my
15 bedroom post right at the top of the head of my bed. The
16 house is not very big. You can see it from the hallway.

17 Q. Let me show you what's been marked as State's Exhibit

18 7. Do you recognize this?

19 A. Yes, ma'am.

20 Q. All right. What is this?

21 A. It's a stick a friend of mine give to me many years
22 ago.

23 Q. All right. Is this a stick that was in your bedroom on
24 May 25th?

25 A. Yes, ma'am, it sure is.

1 Q. Is this the stick that that defendant struck you with
2 in the head?

3 A. Yes, ma'am, it sure is.

4 Q. Okay.

5 MS. LESKANIC: Your Honor, at this time I would
6 offer State's Exhibit 7 for admission as evidence.

7 MR. SHEALY: No objection, Your Honor.

8 THE COURT: Without objection. State's 7 did you
9 say?

10 MS. LESKANIC: Yes, Your Honor, State's Exhibit 7.

11 THE COURT: Thank you.

12 BY MS. LESKANIC:

13 Q. All right. You get struck in the head while you are
14 sitting on couch talking to Tammy?

15 A. (Shaking head yes).

16 Q. How many times did you get hit?

17 A. That I'm not really sure of. I know I got hit several
18 times. Every time I got up, come up from the ground, they
19 would drive me back down with that stick, and I know it had
20 to be at least four to five times I took blows with, at
21 least.

22 Q. What kind of injuries did you have after this, Mr.
23 Emery?

24 A. I feel like the first hit come, someone hit me on the
25 side here, and that's the one that drove me to the floor and

1 I was stunned. Somehow or another I got another one right
2 back here. And I reckon I kind of blocked. I come up. I
3 reckon my hand got struck by the stick. It fractured my
4 hand across my hand.

5 Q. Is that why you weren't able to give a written
6 statement to the police, because of your injuries?

7 A. I couldn't write. I couldn't. I'm right-handed.

8 Q. Had anybody asked for any money while they were at the
9 house?

10 A. I think I remember her saying a little bit of something
11 about it. I told her "I done give you all the money that I
12 can give you."

13 Q. Okay. Had you had any argument or any upsetting words
14 with anybody in the house that night?

15 A. Not as far as I can remember. I'm not a real hard to
16 get along with. I'm pretty friendly.

17 Q. Okay.

18 A. I don't remember no confrontations whatsoever.

19 Q. And what were you doing when you were struck for the
20 first time?

21 A. I was sitting on the couch facing her talking. She was
22 talking and I was looking right at her.

23 Q. And what did you do --

24 Well, I guess after -- after you were struck with your
25 stick, did anybody stay in the house, or what did Mr. Long,

1 Mr. Jones, and Ms. Byars do?

2 A. I don't know. I just kept -- every time I tried to get
3 up, they would drive me back down. Finally, the time I
4 finally they quit, I reckon, I finally -- by the time I got
5 up, the house was clear. She was still standing there for
6 some dog-gone reason, but she was standing there. And -- I
7 mean, I'm -- blood is squirting everywhere. I can't really
8 see, I can't really focus, and I'm trying to find me
9 something to get the blood with. She said "well, you were
10 beaten bad. What are you going to do?" I said "I'm going
11 to call the law. My wallet is gone and I have been hit in
12 the back of the head." And the next thing, you know, just
13 like that she disappeared to. I never did see her no more.

14 Q. How long was she in the house after --

15 A. I don't -- I mean, after that it was -- like I said, it
16 done -- everything done went turmoil. Like I said, I'm
17 dazed. I don't really know what's going on. You know, I'm
18 pretty well -- I'm pretty well nervous. I was at that time.
19 Blood squirting out of my head and everything. I just -- I
20 have never took a beating like that before.

21 Q. What did you do after they left? Did you make a phone
22 call?

23 A. Yes. I couldn't really see the phone. I wanted to
24 call 911, but everything was bloody and this, that and the
25 other. I know where my call button was and I hit it. It

1 called right back to my stepdad. I told him what had
2 happened and call the ambulance.

3 Q. I'm sorry, is that who we heard on the 911 call?

4 A. Yes, ma'am, that's my stepdad.

5 Q. So you called him and told him what had happened?

6 A. (Shaking head yes).

7 COURT REPORTER: You need to answer yes or no.

8 A. Yes.

9 Repeat the question and make sure I --

10 BY MS. LESKANIC:

11 Q. You called your relative and told him a little bit
12 about what had happened, that you needed some help?

13 A. Yeah, I told him, I said "call me an ambulance." I
14 said "I have been hit in the back of the head and my wallet
15 is gone. I need help."

16 Q. And then a 911 operator called you?

17 A. A few minutes later.

18 Q. The police came out to investigate?

19 A. Yes, ma'am.

20 Q. I'll show you what's been marked State's Exhibit 3, 4,
21 and 5. If you will take a look at these and just tell me if
22 you recognize those?

23 A. That's my home.

24 Q. Okay. Is that the house that you lived in the day that
25 this incident happened?

1 A. Yes, ma'am.

2 Q. And does your house still look essentially the same?

3 A. Yes, ma'am.

4 MS. LESKANIC: Your Honor, at this time I would
5 offer State's Exhibit 3, 4 and 5 for admission.

6 MR. SHEALY: Your Honor, my objection would be
7 that these pictures were taken recently. This incident took
8 place back in 2006.

9 THE COURT: All right. I believe the proper
10 foundation has been laid. I'll allow them in. You may
11 cross-examine them at the point, if you desire.

12 MS. LESKANIC: Thank you, Your Honor.

13 May I publish to the jury?

14 THE COURT: Yes.

15 BY MS. LESKANIC:

16 Q. The first one I want to show is State's Exhibit 3. All
17 right. What are we looking at? If you need to step down --

18 MS. LESKANIC: May the witness step down, Your
19 Honor?

20 A. I can see it right here.

21 THE COURT: Can you move board?

22 BY MS. LESKANIC:

23 Q. Can you tell the jury what we are looking at here on
24 State's Exhibit 3?

25 A. The front door of my house.

1 Q. Okay. Right here?

2 A. Yes, ma'am.

3 Q. All right. And what is this right here?

4 A. That's [REDACTED].

5 Q. Okay. So that's the road on [REDACTED].

6 And then -- I have got my pointer. What is up here
7 this way?

8 A. That's 29.

9 Q. Okay. So you come down 29 and turn on [REDACTED] and
10 your house is the first house that you come to?

11 A. Yes, ma'am.

12 Q. Okay. Is that the door that you use all the time?

13 A. Yes, ma'am.

14 Q. Is that your main door?

15 A. (Shaking head yes).

16 Q. I'll show you State's Exhibit 4. What does this show,
17 Mr. Emery?

18 A. That's my house.

19 Q. Okay. Just another picture of your home? It's just
20 the front door that you would come in and out?

21 Is this the door also that Mr. Long and Mr. Jones
22 entered through?

23 A. Yes, ma'am.

24 Q. Okay. And the door that they exited?

25 A. Yes, ma'am.

1 Q. Okay. And State's Exhibit 5, what is that?

2 A. That's -- there is my side porch. That's the door that
3 faces 29 and my living room.

4 Q. So this door here faces 29, and the door over here is
5 the one that faces [REDACTED]?

6 A. Yes, ma'am.

7 Q. So just another angle of your home, correct?

8 A. Yes, ma'am.

9 Q. And that's where this assault and battery occurred?

10 A. Yes, ma'am.

11 Q. Okay. Now I would like to show you what's been marked
12 State's Exhibit 8, 9, 10, 11, 12, and 13. Take a minute to
13 look through those and tell me if you recognize those.

14 A. Yes, ma'am.

15 Q. And what are those?

16 A. Pictures of my living room in my house; my wallet that
17 was taken; shorts that I was wearing at the time; and my
18 head all busted up.

19 Q. Now, these photographs, specifically State's Exhibit
20 10, 9, and 8, do those accurately reflect the injuries that
21 you sustained when Mr. Jones struck you with your walking
22 stick?

23 A. Yes, ma'am.

24 Q. And State's Exhibits 11 and 12 -- what do we see in
25 State's Exhibit 11?

1 A. That is the shorts that I was wearing at the time. I
2 took them off. I knowed I was going to the hospital and I
3 know how cold the hospital is, so I put me on a wear of
4 shorts.

5 The blood is where I was bleeding all over the place,
6 trying to figure out what was going on.

7 Q. And that blood is shown in State's Exhibit 12?

8 A. Yes, ma'am.

9 Q. All right. And State's Exhibit 13, specifically what
10 does that show?

11 A. That's my wallet that I was carrying at the time.

12 Q. And that was recovered by police?

13 A. Yes, ma'am.

14 Q. Was it returned to you?

15 A. Yes, ma'am.

16 MS. LESKANIC: Your Honor, at this time I would
17 offer State's Exhibit 8, 9, 10, 11, 12 and 13 for admission
18 as evidence.

19 MR. SHEALY: Your Honor, can we discuss this
20 outside the hearing of the jury?

21 THE COURT: All right, ladies and gentlemen, this
22 is one of those times where I have a matter of law to
23 discuss with the attorneys. I will again remind you that
24 you cannot have any discussions among yourselves about
25 anything involved in the case. You may go with the bailiff

1 and we will get you back just shortly.

2 Take them to the jury room.

3 (The following takes place outside the presence of
4 the jury panel)

5 THE COURT: Yes, sir.

6 MR. SHEALY: Your Honor, first as to State's
7 Exhibit 8, 9 and 10, we submit that they are cumulative.
8 Together they are -- the prejudicial value outweighs the
9 probative value and we would ask the State select between
10 them.

11 THE COURT: And they are prejudicial how?

12 MR. SHEALY: They are bloody, Your Honor. They
13 are colored. They are showing different views of the same
14 wound.

15 THE COURT: Okay. All right, I'm going to 8, 9
16 and 10. I believe a proper foundation has been laid. They
17 are not that great of photographs, so -- I say that because
18 if it's just visual aspects of the photograph that's
19 prejudicial, I don't -- I believe the probative value far
20 outweighs that aspect of the prejudice of these photograph,
21 so I'll allow those in..

22 MR. SHEALY: And as to Exhibits 11 and 12, we
23 object to that. What it is is blood stains on the floor,
24 and quite a number of blood stains throughout the house. It
25 looks like down the hallway, through a door, on the couch.

1 And so it -- in viewing those photographs, the jury is
2 invited to believe that that's all blood from the initial
3 blood and that -- I believe the reason blood is over such a
4 large area is because is he has walked around. He went and
5 got his pants to change in and that sort of thing.

6 THE COURT: And so your objection is?

7 MR. SHEALY: Same objection but --

8 THE COURT: The prejudice-probative value
9 analysis?

10 MR. SHEALY: Yes, Your Honor.

11 THE COURT: All right.

12 MR. SHEALY: And I have no objection to 13.

13 THE COURT: All right. Well, given the elements
14 of the offense that the State is attempting to establish in
15 this trial, I can see a very substantial and strong
16 probative value of the photographs.

17 The prejudicial effect that you argue, I'm not
18 seeing that that outweighs the probative value, but if it
19 is -- if it is, as you state, that is definitely information
20 that you may bring out on cross-examination to attack the
21 credibility of that particular evidence, or the State can
22 bring it out themselves.

23 MR. SHEALY: Your Honor, I would like to reverse
24 myself as to State's Exhibit 13. We would object to that as
25 being irrelevant. We have already established there is no

1 robbery here. He's identified everybody in the house.
2 There is -- I don't want them taking that back and being
3 reminded that there was a robbery.

4 THE COURT: Yes, ma'am.

5 MS. LESKANIC: Your Honor, it is an element of the
6 case as a whole. I think I explained to the jury during my
7 opening who we believe took the wallet, that Mr. Jones is
8 not charged with that. You instructed the jury on that as
9 well, but the facts of the case is his wallet was taken and
10 those are the contents of the wallet, and that was
11 located -- this testimony hasn't come out yet, but that was
12 located in the vehicle that these three individuals were
13 found in shortly after this ABWIK took place. So that
14 places Mr. Jones with property that was taken from Mr.
15 Emery's house.

16 THE COURT: All right. I'm going to allow it.
17 The State did argue it, did present that as part of their
18 opening statement that it's not a robbery case. I did
19 instruct the jury not to infer from the fact that the
20 robbery statement was made on the tape to infer guilt.

21 The facts have not been completely developed yet
22 before me, but I don't believe that that is a substantial
23 prejudice to your client. I do see a relevance of it, so
24 probative value I believe exists. Again, the State is not
25 going to argue that this is a robbery trial, you know, but

1 it does, I think, have a sufficient relevancy to this case,
2 given the facts that I have heard so far.

3 MR. SHEALY: And --

4 THE COURT: You are protected on the record.

5 MR. SHEALY: Thank you, Your Honor.

6 Your Honor, this is -- the next thing I have while
7 the jury is out, we have talked about yesterday afternoon
8 where I informed the court that I may need its help in
9 locating Ricky Long. I have been handed a note from Captain
10 Manning -- I have been handed a note from Captain Manning
11 saying that they have not been able to serve the subpoena,
12 that he has moved, and they don't know where he's moved, and
13 he is sorry.

14 THE COURT: All right. And you want me --

15 MR. SHEALY: And -- yes, Your Honor. It's -- I
16 don't know anything about Ricky Long. I have been out to
17 his house. I have tried to find him. I can't find him.
18 The -- I know that the sheriff's office has looked
19 diligently for him, because I was over there yesterday, and
20 Friday I even had another -- talked with one of the
21 deputies, so I know they have tried to find him. We
22 expected him to be here yesterday and today, and I don't
23 know him, but from what I understand he's not here. And I
24 have an extra subpoena here I can serve on him, but I don't
25 know where he's at.

1 MS. LESKANIC: He's in my office.

2 THE COURT: He's in her office.

3 MR. SHEALY: Could I get him served by subpoena?
4 I don't want him to be released.

5 THE COURT: All right. Do you have any objection
6 to him -- for him having somebody issue this -- deliver this
7 subpoena to him?

8 MS. LESKANIC: I don't, Your Honor. That's why I
9 had him here today. Mr. Shealy requested that I not release
10 him through my subpoena.

11 THE COURT: All right.

12 MS. LESKANIC: I'm trying to accommodate him.

13 THE COURT: If you will get somebody to do that
14 but yet be able to continue with the trial so we don't delay
15 the --

16 MR. SHEALY: Yes, Your Honor.

17 THE COURT: -- hostage of taking of the jury in
18 the back?

19 MR. SHEALY: Thank you Your Honor.

20 THE COURT: Anything else before we bring the jury
21 back?

22 MS. LESKANIC: Nothing from the State, Your Honor.

23 THE COURT: How much longer do you have with this
24 witness?

25 MS. LESKANIC: Not too much. I just wanted him to

1 go over the photos in front of the jury, Your Honor, and
2 that should be about it.

3 THE COURT: All right. Do you anticipate your
4 cross-examination to be long?

5 MR. SHEALY: I don't know, Your Honor. I don't
6 expect it to be longer than ten minutes, but no telling
7 where we might go.

8 THE COURT: All right. I'll tell you what we will
9 do. While we are at this point and the jury is already out,
10 let's let the staff take a short break too. That way maybe
11 we can continue on with this witness and go to the next
12 witness without taking a break.

13 Mr. Emery, I need to let you know that you are in
14 the process of giving testimony, since you have been sworn.
15 I tell that you because during this short break you can't
16 talk to anyone about the substance of your testimony. Okay?
17 You can't -- no one can come and talk to you and say testify
18 this way, or testify in this manner, or don't say this, or
19 don't say that. As far as things that you are testifying to
20 in court, you can't talk to anybody about that, okay?

21 THE WITNESS: Yes, sir.

22 THE COURT: All right. Thank you, sir. You can
23 step down and if you need to use the restroom, you can. We
24 are going to take a short break.

25 THE WITNESS: Where is that restroom?

1 (Whereupon, proceedings were recessed)

2 (Whereupon, proceedings were reconvened)

3 THE COURT: All right, let's bring them back.

4 (The following takes place in the presence of the
5 jury panel)

6 THE COURT: Yes, ma'am.

7 MS. LESKANIC: Your Honor, the State will again
8 request that State's Exhibit 8, 9, 10, 11, 12, and 13 be
9 admitted as evidence.

10 THE COURT: Subject to the defendant's objection
11 as has been stated in conference I will admit them as 8, 9,
12 10, 11, 12, and 13 as State's exhibits.

13 MS. LESKANIC: Thank you, Your Honor.

14 BY MS. LESKANIC:

15 Q. Mr. Emery, I would first like to show you what's been
16 marked State's Exhibit 8. Can you tell the ladies and
17 gentlemen of the jury what this is?

18 A. That's my head.

19 Q. All right. Is that before or after you went to the
20 hospital?

21 A. That's before I went to the hospital.

22 Q. And how many lacerations did you have to your head?

23 A. I had two lacerations to my head.

24 Q. Is that a view of one of them? Do you know which one
25 that's showing?

1 A. I believe that's the one on the side. I can't really
2 tell.

3 Q. Okay. Let me show you then State's Exhibit 9.

4 A. That's the one on the side. That other one must have
5 been the back.

6 Q. Now, that's on the side of the head. Is that after you
7 have been to the hospital?

8 A. No, ma'am, that's before I went to the hospital.

9 Q. All right. Let me show you State's -- and that's on
10 the right side of your head?

11 A. Yes, ma'am.

12 Q. Is that where you believe the first blow was struck?

13 A. Yes, ma'am.

14 Q. Let me show you State's Exhibit 10. Tell jury what
15 that is.

16 A. That's the back side of my head.

17 Q. That's after it's been cleaned up a little bit?

18 A. I don't -- I really don't know. I mean, about -- it
19 looked like about what it did when I happened, I reckon. I
20 didn't see the back of my head.

21 Q. Okay. So those are the two lacerations on your head.
22 So you have one on the right side and one in the back of
23 your head?

24 A. Yes, ma'am.

25 Q. Did you go to the hospital for those?

1 A. Yes, ma'am, they called the ambulance, put me in the
2 ambulance and took me to the hospital in the ambulance.

3 Q. What hospital did you go to?

4 A. Gaffney hospital.

5 Q. What did they do for you there?

6 A. Sewed my head up.

7 Q. Both spots?

8 A. Yes, ma'am.

9 Q. Let me show you what's been marked State's Exhibit 11.
10 Tell the jury what we are looking at there.

11 A. That's the shorts that I was wearing. That's the
12 living room. That's probably about where I was sitting at,
13 close to it. That's me holding them, I reckon. That's my
14 feet.

15 Q. Okay. This is you --

16 A. Yes, ma'am.

17 Q. -- standing here, and these are the pants that you were
18 wearing when you were hit?

19 A. Yes, ma'am. I took them over. I knowed I was going to
20 the hospital and I know how cold hospitals is, and go ahead
21 and put me on some long britches.

22 Q. Okay. Is this your couch inside your home?

23 A. Yes, ma'am, that's where I was sitting.

24 Q. So you were sitting approximately where on the couch?

25 A. Right towards the left.

1 Q. Somewhere over in here?

2 A. Yes, ma'am.

3 Q. And where was Ms. Byars seated?

4 A. She was sitting towards the middle.

5 Q. Somewhere in here?

6 A. Yes, ma'am.

7 Q. Okay. And that's when Mr. Jones got up and asked to
8 use your bathroom?

9 MR. SHEALY: Objection, Your Honor. The solicitor
10 has been testifying and he is just saying yes or no.

11 THE COURT: Yes, ma'am.

12 If you would, sir, please listen to the solicitor
13 and answer her questions.

14 You might want to rephrase.

15 MR. SHEALY: Okay.

16 BY MS. LESKANIC:

17 Q. But this is where -- was this where you and Ms. Byars
18 were seated --

19 A. Yes, ma'am.

20 Q. -- when you were hit?

21 A. Yes, ma'am.

22 Q. All right. And where was Mr. Long?

23 A. I don't remember if he was sitting on the end of the
24 couch or he was pacing around on the floor. I don't really
25 remember, but I remember it -- that's where I was sitting at

1 and he was standing over on the other side when he asked me
2 use the restroom.

3 Q. All right. Now, I'm talking about Mr. Long.

4 A. Oh, Mr. Long, he was sitting in the couch. It sat back
5 over that way, in a recliner.

6 Q. Okay. All right. Let me show you what's been marked
7 as State's Exhibit 12. Tell the jury what we are looking at
8 there.

9 A. That corner, the blue -- the part there at the couch
10 where I had been sitting. Back over this way is the hallway
11 that goes towards my bedroom. Straight back is towards the
12 bathroom and my bedroom is right there to the right.

13 Q. Okay.

14 A. And the recliner that Mr. Long had been sitting in
15 would have been over here.

16 Q. Over on this side?

17 A. Yes, ma'am.

18 Q. Okay.

19 THE COURT: Can you identify for the record which
20 side is this side?

21 THE WITNESS: On the recliner?

22 BY MS. LESKANIC:

23 Q. Yes, sir.

24 A. It would be on the left side there. On the left side
25 of that doorway.

1 THE COURT: All right. Thank you.

2 BY MS. LESKANIC:

3 Q. All right. And let me show you --

4 Well, let me clear up. We see a lot of blood on the
5 floor?

6 A. Yes, ma'am.

7 Q. Okay. What did you do after you were hit? You said
8 you did have to get up and change your pants?

9 A. Well, when I first got up off the floor, I was probably
10 just rambling around. I don't know which way I was going.
11 I was pretty well fogged out where I had been hit. I had
12 blood just squirting. I was looking for something to put on
13 my head, this, that, and the other. And Ms. Byars was
14 there. She -- she asked what -- she said "you are bleeding
15 bad." I said "yeah." She said "what have I got to do?" I
16 said "I'm going to call the law. I have been hit in the
17 head, my wallet is gone. Somebody is going to jail and
18 that's -- and she was gone right after that and I positioned
19 around the house trying to call my stepdad. I got ahold of
20 him and I was changing britches all probably at the same
21 time.

22 Q. All right. Now, you said that you went to the hospital
23 for the injuries to your head. Did you also go to the
24 doctor for your injury to your hand?

25 A. Several days later. It kept hurting and it was swollen

1 and somebody said "I think that hand is broken. You need to
2 go to the doctor." So I went there, I think it was Dr.
3 Stroud down on Hyatt Street and he had a specialist next
4 door. He said -- he took x-rays and told me it was
5 fractured, he said, but it was common courtesy for me seeing
6 him, for him to send me over to the specialist which
7 specializes in that.

8 Q. So you did have a fracture of your right hand?

9 A. Yes, ma'am.

10 Q. Let me show you what's been marked State's Exhibit 13.
11 Tell the jury what that is, please.

12 A. That is my wallet and contents.

13 Q. Is that what was taken --

14 A. Yes, ma'am.

15 Q. -- out of your pants.

16 Let me go back to that -- what are the contents in your
17 wallet?

18 A. \$82, my driver's license. And my wallet.

19 Q. Let me look at State's Exhibit 11. These are -- you
20 have already testified these are the pants that you were
21 wearing at the time. Where did you have your wallet?

22 A. In my back pocket of them pants.

23 Q. You don't keep it on the right or left side?

24 A. On the right side.

25 Q. On this side, that's where your wallet would have been?

1 A. Yes, ma'am.

2 Q. Now, prior to you being hit with the stick, was there
3 any conversation about money, or any problems at all? I
4 know we have gone over this, but was there anything -- did
5 anybody ask you for any money, or did you have a
6 disagreement with anybody?

7 A. They were talking about money. She asked for more
8 money. I told her I couldn't give no more money.

9 And I remember one time I heard Mr. Jones over there,
10 he said "well, I can get \$20 back if I can get to an ATM."
11 I told him I didn't have no money to let go of. I have
12 everything else I had left in my wallet.

13 Q. All right. I think that's all the questions that I
14 have for you have.

15 Mr. Emery, if you would, please answer any questions
16 that Mr. Shealy has for you.

17 CROSS EXAMINATION BY MR. SHEALY:

18 Q. Mr. Emery, who told you that this was Donald Scott
19 Jones?

20 A. I have seen him, seen pictures of him and all that in
21 the mug shots.

22 Q. Nobody told you that?

23 A. No, ma'am. I mean, no, sir, I'm sorry.

24 Q. Did you hear me tell the jury that this was Donald
25 Scott Jones?

1 A. I wasn't -- no, sir, I wasn't.

2 Q. You weren't paying attention?

3 A. No, sir.

4 Q. All right. Now, you didn't know Scott Jones, did you?

5 A. No, sir.

6 Q. This is the first time that you have ever laid hands on
7 this incident took place -- laid eyes on him?

8 A. First time I have ever seen him.

9 Q. Right, first time that you have ever seen him.

10 A. (Shaking head yes)

11 THE COURT: Will the witness give a verbal
12 response?

13 THE WITNESS: What was the question again?

14 BY MR. SHEALY:

15 Q. When this incident took place, this was the first time
16 that you had ever seen him, is that correct?

17 A. Yes, sir.

18 Q. And did you ever see him again after that?

19 A. It's a possibility I could have, but I -- you know,
20 I --

21 Q. You don't recall ever seeing him again?

22 A. No, sir.

23 Q. So the only time that you saw him was that one time he
24 came to the house, that you recall?

25 A. Yes, sir.

1 Q. Okay. Now, the -- and that was back in May of 2006?

2 A. Yes, sir.

3 Q. And you didn't even know who he was?

4 A. Not when he come to my house, no, sir.

5 Q. In fact, Tammy told you who were --

6 A. Her brother-in-law.

7 Q. Is her brother-in-law.

8 Now, how much money did you pay Tammy to have sex with
9 her?

10 A. It wasn't really about as much sex as it was just
11 friendship, but it was sex involved, but it wasn't a whole
12 lot. I give her some money earlier that day, and I probably
13 give maybe, I don't know, maybe 15, \$20 more, I don't
14 remember.

15 Q. Okay. So you gave her -- I think your testimony
16 earlier was you gave her about 18 -- 17, \$18?

17 A. At the first time that day.

18 Q. And you let her out?

19 A. Yes, sir.

20 Q. Where did you let her out?

21 A. I let her out down there around McDonald's.

22 Q. And she was supposed to come back?

23 A. Yes, she was supposed to come back. She didn't. I
24 went to Blacksburg.

25 Q. Okay. How long did you wait for her?

1 A. Maybe ten minutes at the most.

2 Q. Why did she say she needed to be let out?

3 A. I didn't know. I figured she was wanting to go buy her
4 something. I didn't --

5 Q. What did you figure she was going to go buy?

6 A. Probably something that would make her happy. Drugs,
7 or something.

8 Q. Okay. So you know Tammy Byars to be a drug user?

9 A. I have known her for a long time, yes.

10 Q. But do you know her as a drug user?

11 A. As drug user?

12 Q. That she is a drug user?

13 A. Yes, sir, I do know she does drugs.

14 Q. What kind of drugs does she normally do?

15 A. Crack cocaine, I reckon, sir.

16 Q. And let's go over -- who called who -- after she didn't
17 show up and you headed to Blacksburg, who called who to set
18 up the meeting?

19 A. She called me.

20 Q. Okay. And you agreed to meet her in Blacksburg?

21 A. Yeah, I wasn't going back to Gaffney that day.

22 Q. Okay. Now, how long was it before -- well, between the
23 time that you picked her up in Blacksburg -- and where in
24 Blacksburg was that?

25 A. It was a little gas station right on this side of the

1 river of Blacksburg. It's not even open no more. It's been
2 boarded up. An old mom and pop's gas station.

3 Q. That's that place that's on the right side of the road
4 right before you get to the bridge?

5 A. Well, if you are going towards Gaffney, or you are
6 coming back?

7 Q. I was going towards Blacksburg.

8 A. Going to Blacksburg. It's on the right after you cross
9 Broad River.

10 Q. Okay. But at that time it was open?

11 A. No, sir, it still boarded up. It --

12 Q. Okay. The -- about how long between the time that you
13 picked her up there and Mr. Long and Mr. Jones showed up?

14 A. I might say an hour, but I really don't know. I was
15 not keeping up with the time.

16 Q. Okay. How much more money did Tammy want?

17 A. I don't know.

18 Q. Did that cause her to yell at you?

19 A. I don't think there was no yelling going on.

20 Q. Okay. Any screaming? Any hollering? Any threats?

21 A. No, sir.

22 Q. Okay. Now, this -- when the incident took place, when
23 the -- when you were attacked, okay, I believe your
24 testimony was is that you were facing Tammy and your back
25 was to --

1 A. My back was toward the bathroom wall, the hallway right
2 in there.

3 Q. But you didn't see who hit you, is that correct?

4 A. No, sir, I did not see who hit me.

5 Q. Okay.

6 A. But I could see Mr. Long sitting on one side of me and
7 Tammy was facing right in front of me.

8 Q. I understand, but you -- when you were being hit, you
9 didn't see who actually hit you?

10 A. No, sir. The first hit threw me to the ground.

11 Q. Okay. In fact, the 911 tape you say that someone
12 blind-sided you, and you didn't say who?

13 A. Well, I didn't really know who except brother-in-law.

14 Q. Well, you knew his name, though, didn't you?

15 A. No, sir.

16 Q. Then how do you know --

17 A. She might have introduced him, but I don't remember.

18 Q. Okay. Now, I'm a little confused about the bathroom
19 and the kitchen, how your house is arranged. Now, do you
20 have to go by the bathroom to get to the kitchen from the
21 room this happened in, or do you have to go past the kitchen
22 to get to the bathroom?

23 A. The kitchen is connected to the living room. It's a
24 doorway right there, and the living room goes to the
25 kitchen. It's right there.

1 Right beside the little blue couch where I was sitting
2 at, if you turn right there at the couch and go back right
3 towards the kitchen. You keep going around where that
4 little hallway is, there is the bathroom and my bedroom is
5 to the right.

6 Q. Do you go through the same door to get to the kitchen
7 that you do --

8 A. No, there's two different doors for that.

9 Q. Can you get to the kitchen from the bathroom without
10 going through that room?

11 A. You have to come back into the living room to go into
12 the kitchen.

13 Q. Okay. And the blood we saw on the floor, that's -- you
14 moved around quite a bit, is that correct?

15 A. Yes, sir.

16 Q. Let's see, you went to the bedroom to get -- to put the
17 long pants on?

18 A. Yes, sir.

19 Q. And you also had to go get your cell phone?

20 A. No, it was in my pocket.

21 Q. Oh, it was in your shorts pocket?

22 A. Yes, sir.

23 Q. Okay. And so that accounts for all the splatters of
24 blood, it's from you walking around?

25 A. Yes, sir.

1 Q. Okay. Now, the pictures of your head, where were those
2 pictures taken?

3 A. Sitting on the front steps of my house. When the law
4 pulled up, he took pictures of it --

5 Q. Okay.

6 A. -- right there then.

7 Q. And you said that those were your feet of the person
8 that was holding the pair of shorts?

9 A. Yes, sir, my flip flops, feet.

10 MR. SHEALY: Excuse me for just a moment, Your
11 Honor.

12 (Off the record)

13 (Back on the record)

14 BY MR. SHEALY:

15 Q. Now, did you and Mr. Jones have any kind of argument?

16 A. No, sir.

17 Q. Any kind of disagreement?

18 A. No, sir, not that I know of. To the best of my memory
19 there was not.

20 Q. And y'all were drinking that night?

21 A. Yes, sir, I offered everybody something to drink.

22 Q. What were y'all drinking?

23 A. I had cold beer and I had a little liquor around the
24 house.

25 Q. But everything between you and Mr. Jones was fine?

1 A. Everything seemed to be fine. Everybody was just nice
2 and polite until all that went down.

3 Q. Now, Tammy was the last one to leave your house?

4 A. Yes, sir.

5 Q. Okay. And she didn't leave until you said that you
6 were going to call the law?

7 A. She said she didn't know what to do. I said "I don't
8 know what you want to do neither." I said just -- "I'm
9 bleeding. My wallet is gone and I'm calling the law. Do
10 what you want to do," and she was gone.

11 Q. Okay.

12 MR. SHEALY: Thank you, Your Honor. That's all I
13 have.

14 THE COURT: Any redirect limited to what he went
15 into?

16 MS. LESKANIC: Yes, Your Honor.

17 REDIRECT EXAMINATION BY MS. LESKANIC:

18 Q. Mr. Emery, were y'all doing any crack cocaine at your
19 house that night?

20 A. No, ma'am.

21 Q. Do you do crack cocaine?

22 A. No, ma'am.

23 Q. What were y'all -- what drugs, if any, did you have at
24 your home that night?

25 A. I did have a joint.

1 Q. Okay. So some marijuana?

2 A. Yes, ma'am.

3 Q. Did everybody in the house --

4 A. That I cannot -- I cannot remember. I know I did. I
5 can't remember who else did.

6 Q. Okay. And when you were struck with that stick, you
7 could see Mr. Long and Ms. Byars?

8 A. From where I was hit with that stick, I could.

9 Q. You could see Mr. Long and Ms. Byars?

10 A. (Shaking head yes)

11 Q. Okay.

12 MS. LESKANIC: Thank you.

13 RECROSS EXAMINATION BY MR. SHEALY:

14 Q. That was before you were hit with the stick?

15 A. That was before I was hit with the stick. After I was
16 hit with the stick, it took a little while to see anything.

17 Q. All right. Got you.

18 MR. SHEALY: Thank you.

19 THE COURT: Thank you, sir. You may step down.

20 THE WITNESS: Yes, sir. Thank you.

21 THE COURT: Is the State ready to call their next
22 witness?

23 MS. LESKANIC: Yes, Your Honor.

24 The State calls Tammy Byars.

25 THE COURT: Come around, Ms. Byars.

1 TAMMY LYNN BYARS, having been first duly sworn,
2 testified as follows:

3 MS. LESKANIC: If it please the court?

4 THE COURT: Yes, ma'am.

5 DIRECT EXAMINATION BY MS. LESKANIC:

6 Q. Would you please introduce yourself to the ladies and
7 gentlemen of the jury?

8 A. My name is Tammy Byars.

9 Q. All right. And where are you currently living?

10 A. In the Cherokee County detention center.

11 Q. Why are you in the Cherokee County detention center?

12 A. For armed robbery.

13 Q. Related to this case?

14 A. Yes, ma'am.

15 Q. I have met with you and your attorney?

16 A. Yes, ma'am.

17 Q. Have you been promised anything to testify today?

18 A. No, ma'am.

19 Q. Have I offered you any kind of deal or any kind of
20 leniency in your case if you testify?

21 A. No, ma'am.

22 Q. Have I threatened you in any way?

23 MR. SHEALY: Objection, Your Honor. The witness
24 hasn't been attacked and she's bolstering. She can't
25 bolster a witness until the witness has been attacked.

1 THE COURT: All right. Well, just proceed and the
2 witness is -- you may go back to that line of questioning.

3 MS. LESKANIC: Thank you, Your Honor.

4 BY MS. LESKANIC:

5 Q. Do you know Jerry Emery?

6 A. Yes, I do.

7 Q. How do you know him?

8 A. I have known him since I was about seventeen years old.

9 Q. Did you and Mr. Emery at one time date or go out
10 several times?

11 A. We at one time lived together.

12 Q. Now, I'm going to take you to May 27th of 2006.

13 A. Yes.

14 Q. Can you tell the jury did you see Mr. Emery that day?

15 A. Yes.

16 Q. Did you come over to his house that night?

17 A. That evening. It was before before. It wasn't dark.

18 Q. Okay. How did you get to his home?

19 A. He paid Rick Long to drive me to Blacksburg, because we
20 had spoke on the phone while I was still in Gaffney and he
21 was still at his house in Blacksburg and said that he had
22 done been drinking, that he couldn't drive to get me. So
23 that is where I met him at the Moss' Mini Mart is what it
24 used to be called in Blacksburg. The first store on the
25 right off of 29.

1 Q. Who dropped you off at Moss' Mini Mart for Mr. Emery to
2 pick you up?

3 A. Rick Long and Scott Jones.

4 Q. Do you see Scott Jones in the courtroom?

5 A. Yes, ma'am.

6 Q. Could you please identify him?

7 A. Right there.

8 Q. Where is he seated? What is he wearing?

9 A. To the right with the gray shirt on in front of
10 Thompson.

11 MS. LESKANIC: Your Honor, I would like the
12 record to reflect --

13 A. Beside Mr. Shealy.

14 MS. LESKANIC: That she has identified the
15 defendant as Scott Jones.

16 THE COURT: All right. Yes, ma'am.

17 BY MS. LESKANIC:

18 Q. Okay. So they drop you off at Mr. Emery's house, and
19 how long are you at Mr. Emery's home?

20 A. I'm wanting to say like three and a half, four hours,
21 because it was right at the -- it was fixing to be dark, but
22 not quite dark yet. It was just like the beginning of the
23 setting, and -- he stated on the phone that he done been
24 drinking so he couldn't drive. It would have been around
25 5:30. Maybe 4:30, 5:00.

1 Q. Okay. What do you do at this time?

2 A. We watched -- I think we watched a movie or we just sat
3 on the couch. We had a couple of drinks. We smoked a
4 couple of joints. We had sex. And to my memory while we
5 were still in the bedroom is when there was a knock at the
6 door.

7 Q. Okay. Did you get -- did you get -- what was the
8 agreement? Why did you go over there?

9 A. Earlier that day before any of this began I think I
10 called Jerry and asked Jerry did he know anybody who had --
11 that wanted to buy some leather chaps, because we were
12 trying to get money, me and Rick.

13 Q. You and Rick Long were trying to get money?

14 A. Yeah.

15 Q. For what?

16 A. For drugs.

17 Q. Okay.

18 A. So I called Jerry and Jerry -- that's when Jerry told
19 me that he couldn't come get me, but that I could come over,
20 that I would have to meet him. So I told Rick and I told --
21 Jerry said that he would pay for Rick to bring me to where
22 he's at, so Jerry did that.

23 Q. Okay.

24 A. When we got to Moss', I got out of Rick's van and got
25 money from Jerry to give to Rick. Then I left with Jerry

1 and went to his house, and Scott and Rick followed in behind
2 us.

3 Q. Did they come into the house then?

4 A. No. They kept going straight as we turned off of 29
5 into his driveway and then an immediate right into his yard.
6 His house faces the -- his front door faces Hill Street.
7 This is Hill Street here. This is like a little -- the road
8 and this is his driveway here.

9 Q. And so y'all pulled into his driveway and Rick Long and
10 Scott Jones continued driving?

11 A. Yes.

12 Q. Who is driving the van?

13 A. Rick Long.

14 Q. Was there an agreement as to when they were supposed to
15 come and pick you back up?

16 A. They were supposed to come and pick me back up when I
17 called them to come and get me and I didn't call him.

18 Q. Okay. So --

19 A. I called Jerry -- okay. I'm sorry.

20 Q. Go ahead.

21 A. I called Jerry from Rick's phone to ask about the
22 leather chaps, and then he called me right back like maybe
23 twenty minutes later to ask me if I wanted to come over. I
24 think it was Memorial Day weekend, or something.

25 Q. Okay. When you hear a knock at the door, you go to the

1 door?

2 A. At first Jerry went to the door and I come in right
3 behind him to the door.

4 Q. Who was at the door?

5 A. Scott Jones.

6 Q. All right. And what happened when you opened the door
7 or when the door was opened?

8 A. Scott asked could him and Rick come in to smoke a
9 joint. And Jerry turns around at me and I'm like -- so
10 Jerry says yeah, and they come in. And if you will put that
11 picture where he's holding the pants back up?

12 Q. State's Exhibit 11.

13 A. On the right side of his pants underneath the couch --

14 MR. SHEALY: Objection, Your Honor. She's giving
15 a -- she's not being questioned. She's not being responsive
16 to any question by the solicitor.

17 THE COURT: If you would, ask a question of the
18 witness.

19 MS. LESKANIC: Okay. We will come back to that,
20 Your Honor.

21 BY MS. LESKANIC:

22 Q. Ms. Byars, let me just go over this. Scott is at the
23 door -- when you hear a knock at the door, it's the
24 defendant that's standing at the door?

25 A. Yes, ma'am.

1 Q. Now, did Mr. Emery know him?

2 A. No.

3 Q. Okay. So what conversation takes place for him to let
4 a stranger into his house to smoke a joint?

5 A. Because he seen him in the van when he let me out at
6 the store.

7 Q. So he knew that these guys would be coming back to pick
8 you up?

9 A. Yeah.

10 Q. Okay. So he comes in, and does Mr. Long come in?

11 A. He does.

12 Q. Where is everyone inside the house?

13 A. Where at?

14 Q. Yes.

15 A. That's what I was going to show you as Mr. --

16 Q. Well, just tell me where everyone was seated.

17 A. Rick Long was in the recliner chair. Me, Scott, and
18 Jerry were on that couch.

19 Q. Okay. And then what happened when they were inside the
20 home? What is going on?

21 A. Jerry offered everybody a drink. I went in the kitchen
22 and I made my drink and I got -- I think I got Jerry a beer
23 and I got Scott a beer or made him a drink, one or the
24 other, because Rick was driving, he wasn't drinking.

25 Q. All right. Did anybody go into the kitchen with you?

1 A. Scott came in behind me, yes, ma'am.

2 Q. All right. Were y'all smoking any marijuana?

3 A. Me and Scott in the kitchen?

4 Q. No, just anybody in the house.

5 A. We were, the four of us.

6 Q. So everybody was smoking pot?

7 A. Right. We rolled one joint. One joint was smoked.

8 Q. Was everyone except Mr. Long was drinking?

9 A. Yes.

10 Q. But he was smoking pot with you?

11 A. Yes, ma'am.

12 Q. And what happens next? What's the nature -- what are
13 you y'all talking about? What's going on inside the house?

14 A. I really don't recall conversation-wise what was talked
15 about. I think I was just sitting there kind of like in --
16 well, not in shock, but kind of worried or wondering if
17 Jerry was mad at me because they just showed up on their
18 own, because I'm sure that Jerry knew and thought he knew
19 that I was to call them from his phone, and that call was
20 never made, because me and Jerry were for three hours
21 straight I know right up each other's noses.

22 Q. Okay. Well, was there any -- did anybody ask for any
23 money?

24 A. I did earlier in the day on the phone, on -- that day
25 on the phone. I said "well, if I come over, will you give

1 me a little bit of money after I leave," and he said "yeah."

2 The question about money was not asked in person. The
3 question about my money that I thought that I was getting
4 was not asked in person. It was asked over the phone.

5 Q. All right. And Mr. Emery gave you some money --

6 A. And he gave me --

7 Q. -- before they got there?

8 A. Yes.

9 Q. Okay.

10 A. At the store he gave Rick a ten dollar bill, or I think
11 it was a ten dollar bill. It could have been five or ten,
12 I'm not sure of the amount, but I know that he gave me money
13 to give to Rick and I gave that money to Rick, got back into
14 Jerry's vehicle and me and Jerry left.

15 Q. All right. So what happens? Everybody except Ricky
16 Long has a drink and everybody is passing around --

17 A. A joint.

18 Q. -- a joint and what happens next?

19 A. Scott asked to use the bathroom.

20 Q. Scott, being the defendant?

21 A. The defendant, Scott Jones, asked to use the bathroom.

22 Q. Okay.

23 A. And Jerry said, "sure, man, it's right there," pointing
24 in the direction of the bathroom.

25 Q. Okay.

1 A. When he got up and came around the coffee table that
2 sits in front of the blue couch, he acts as if he's going to
3 the left to the bathroom, but he does a quick right and
4 grabs the core of an oak tree that Jerry had treated just as
5 a souvenir and he kept it in the corner of his -- it's kind
6 of like the foyer. It's the -- the end of the living room
7 wall is connected to the beginning of the kitchen wall. So
8 you have the living room wall and the start of the entrance
9 to the kitchen. To the left of the kitchen is like the
10 bathroom, and to the right of just like diagonally across
11 from the bathroom is Jerry's bedroom.

12 Q. Okay. So the defendant grabs --

13 MR. SHEALY: Objection, Your Honor, the solicitor
14 is testifying.

15 THE COURT: All right. Well, sustain the
16 objection.

17 BY MS. LESKANIC:

18 Q. I show you State's Exhibit 7 that's been admitted into
19 evidence. Do you have recognize this?

20 A. Yes, ma'am, I do.

21 Q. What is this?

22 A. That's the core of an oak tree.

23 Q. All right. Did you see someone with this that night?

24 A. Yes, ma'am, I did.

25 Q. Who did you see with this?

1 A. The defendant Scott Jones.

2 Q. And what did he do with it?

3 A. He hit -- Jerry was kneeled down by the couch to put
4 his tray where he -- the Tupperware tray where he kept his
5 pot. He kneeled down to put it underneath the couch where
6 it came from and that's when Scott grabbed that stick and
7 hit him.

8 Q. How many time did he hit Jerry with it?

9 A. Two times.

10 MR. SHEALY: I'm sorry, Your Honor, I didn't hear
11 that.

12 A. Two times.

13 THE COURT: Thank you.

14 BY MS. LESKANIC:

15 Q. Where did he hit him with it?

16 A. The first hit was from behind when Jerry was kneeled
17 down to slide his tray back under the couch, so Jerry would
18 have been like this to Scott, and slid the tray under. That
19 is why Jerry was on his knees to begin with, was to slide
20 the tray back under it.

21 Q. All right. And then you saw the defendant strike him
22 again with it?

23 A. Yes.

24 Q. What was going on right before that happened?

25 A. Right before that happened is when Scott asked that

1 could he use the bathroom.

2 Q. Were they arguing about anything?

3 A. No, not a word was spoken.

4 Q. Were you and Mr. Emery arguing about anything?

5 A. No, it wasn't an argument. It was just a simple "no, I
6 can't give you more money." No, I didn't argue. I didn't
7 scream any or do nothing.

8 Q. Did Mr. Emery?

9 A. No.

10 Q. Okay. So now you are saying you did ask for more
11 money?

12 A. I'm not saying I asked for more money. I asked for
13 money, yeah, but at that time I don't recall asking for any
14 more money.

15 Q. Okay. I just asked you what was going on and you said
16 y'all weren't arguing, you had just asked for more money. I
17 think I can have the court reporter play it back, if we need
18 to.

19 A. We were sitting on the couch. Scott asked to use the
20 bathroom. Scott got up. Jerry is pushing the tray under
21 the couch. I think maybe when Scott came back in --

22 I don't recall asking for any money a second time. And
23 now that I heard Jerry, I do remember that Scott did ask if
24 he could hold \$20 until he got to an ATM. I mean, it's been
25 three years, so some things started to come back as the case

1 has came up.

2 Q. All right. After the defendant struck Mr. Emery in the
3 head with the stick, what did you do next?

4 A. I'm standing there like duh, like I don't know what to
5 do, because Scott hit him two times and ran out the door.

6 Rick got up out of the recliner and he ran out behind
7 Scott.

8 I was still in there. I want to say that I put a towel
9 on Jerry's head. Then he said "my wallet is gone, my wallet
10 is gone." I don't recall what he had on, if he had shorts
11 or pants, but I thought he had black jeans on.

12 Q. Who got his wallet?

13 A. I got his wallet.

14 Q. When did you get his wallet?

15 A. After Scott and Rick were gone out of the house.

16 Q. And where is Jerry when you get his wallet?

17 A. Standing up.

18 Q. How did you get his wallet with him standing up?

19 A. Out of his back pocket.

20 Q. And he didn't know it?

21 A. I don't guess he felt me at the time getting it, no,
22 until he did reach around to feel his wallet.

23 Q. And that's when you decided -- is that when you decided
24 it's time to leave?

25 A. When he said he was calling the law.

1 Q. And how did you leave his home? Where did you go when
2 you walked out the door?

3 A. In the van. Scott and -- I got in the van with Scott
4 and Rick.

5 Rick had left out behind Scott, and Scott had started
6 to walk and Rick went and picked him up. I think -- I think
7 he was walking and went to pick him up, and then they came
8 back to get me and that's when I -- I ran out as he was
9 saying to go to his house, to -- victim Jerry was telling me
10 to leave.

11 Q. All right. So where did they pick you up?

12 A. They picked me up, I was on Jerry's front porch.

13 Q. Okay. And you had taken his wallet?

14 A. Yeah.

15 Q. And you got in the car? They were both already in the
16 van?

17 A. Yes, ma'am.

18 Q. Or did you go with Rick to pick the defendant up while
19 he was walking down the road?

20 A. Yes, ma'am, we did. Rick went and picked me up first
21 on the porch, because Rick -- Rick was like "come on, Tammy.
22 Come on." And so Scott was walking down the road and, yeah,
23 we did pick him up.

24 Q. Then what did you do?

25 A. We was coming to Gaffney and we got where Stouffer's is

1 where Mr. Al, a narcotics detective pulled us over, and a
2 couple of county cars pulled us over and from there we went
3 to jail. I went to jail.

4 Q. All right. Did anybody else hit Mr. Emery?

5 A. No, ma'am.

6 Q. Just Mr. Jones?

7 A. Just Mr. Jones.

8 Q. That's all the questions that I have for you. If you
9 would, please answer any questions this Mr. Shealy has.

10 THE COURT: Yes, sir, Mr. Shealy.

11 MR. SHEALY: Thank you, Your Honor.

12 CROSS EXAMINATION BY MR. SHEALY:

13 Q. Ms. Byars, I'm confused. When the solicitor was asking
14 you questions, she asked you about an argument, if I recall
15 correctly, either that, or you brought it up on your own.
16 You said something along the lines of "there was no
17 argument. I was just asking for more money." And then when
18 the solicitor asked you about that, you said that you never
19 asked for more money. Which is it? Did you ask for more
20 money or did you not ask for more money?

21 A. I asked for more money.

22 Q. So why did you say you didn't ask for more money? You
23 said that about three, maybe four times.

24 A. Because I don't remember it.

25 Q. So you don't know if you asked for more money or not,

1 is that correct?

2 A. Yeah, I don't.

3 Q. Okay. Now, I noticed your testimony -- you originally
4 testified that Mr. Jones left and was walking down the
5 street and then Mr. Long went and picked him up and came
6 back and picked you up on the front porch.

7 Then the solicitor gave you two different fact
8 scenarios and had you pick between them. One was that Mr.
9 Long went and picked Mr. Jones up and then picked you up, or
10 did he pick you up first and then pick Mr. Jones up. Do you
11 remember that?

12 A. Yes, I do remember that.

13 Q. And then at that point you changed your story, is that
14 correct?

15 A. I may have said something -- I may have said something
16 that I didn't say the first time, but that's not to say
17 that --

18 Q. Well, you directly contradicted yourself. You said
19 that Mr. Long picked you up first, not Mr. Jones, so which
20 is it?

21 A. We would have picked Scott Jones up last, because I
22 recall opening the van door for him.

23 Q. I didn't ask you what would you have done. I asked you
24 what did you do.

25 A. We picked Scott Jones up last and he got in the van.

1 Q. So this stuff about them coming back for you, that's
2 not true?

3 A. No, that is true.

4 Q. I'm talking about after the incident took place, Mr.
5 Long picked you up first, not second?

6 A. When this -- when Jerry was hit, Rick ran out the door
7 and got in his van, which is parked in Jerry Emery's
8 driveway, waits for me I think a minute or two. I'm telling
9 Jerry that he's hurt real bad and he says "well, my wallet
10 is gone and I'm bleeding and I'm going -- "somebody is going
11 to jail like that," like he stated he did, and -- all I was
12 doing -- I think -- didn't I -- I went and got a towel and
13 put on Jerry's head.

14 Q. All right, that's not my question. Listen to my
15 question.

16 Isn't it true that your testimony is that you were
17 picked up second and that you were picked up first? You
18 testified both ways at the very end of this, isn't that
19 true?

20 A. I don't know.

21 Q. You don't know how you testified?

22 A. No, because I'm real nervous.

23 Q. Okay. And you have had been smoking marijuana at that
24 time?

25 A. Yeah.

1 Q. Okay. And drinking beer?

2 A. Yeah.

3 Q. And wanting money?

4 A. Which was already established. Yeah, he knew I was
5 wanting money, but it's not something that just happened out
6 of the spur of the moment.

7 Q. But you were wanting money to go buy some crack
8 cocaine?

9 A. Yes, I was, and he knew that.

10 Q. Okay.

11 A. We all knew that.

12 Q. Now, did you meet with Mr. Emery earlier in Gaffney?

13 A. After I had gotten to Blacksburg with Jerry?

14 Q. No.

15 A. Wait. Can I please --

16 Q. No, it's my question. I get to ask it.

17 A. Okay.

18 Q. Earlier that day --

19 A. Jerry took me to Gaffney.

20 Q. Earlier that day were you with Mr. Emery --

21 A. Yes, I was, at his house.

22 Q. -- in Gaffney?

23 A. Yes, I was, but prior --

24 Q. Where were you?

25 A. Prior to being in Gaffney, I was at his house in

1 Blacksburg, which is where I asked him "please, baby, please
2 baby, take me to Gaffney," and he knew what I wanted to go
3 to Gaffney for. That is where he first gave me the \$18 that
4 I spent on Leadmine and got me a \$20 rock. I didn't come
5 back out, because I didn't -- I knew I wouldn't have any
6 more money, I knew I wouldn't have any more crack, so I
7 didn't come back out to meet him, until later I called him
8 on the phone and told him I was going to find a way to come
9 to Blacksburg. He paid for a cab for me to come to
10 Blacksburg.

11 Q. Okay. Apparently you didn't hear my question.

12 A. I'm telling you the truth. I'm telling you what you
13 want to know.

14 Q. No, I want to know where in Gaffney did he let you out?

15 A. He let me out at Leadmine School.

16 Q. Leadmine School, where is that?

17 A. Limestone, whatever it is called. It's down on Indian
18 Hill Road. It's a school where they have adult education
19 now.

20 Q. Okay.

21 A. It's a closed school.

22 Q. So he didn't -- did he let you out at McDonald's down
23 there?

24 A. He let me out around about McDonald's.

25 Q. Okay.

1 A. When he said McDonald's, he let me out in the vicinity
2 of McDonald's.

3 Q. And then didn't you tell him that you were coming right
4 back?

5 A. I did tell him I was coming back.

6 Q. And why didn't you come right back?

7 A. Because I knew I didn't have any more money to get no
8 more dope.

9 Q. Did you get dope?

10 A. I did, and I smoked it in the woods.

11 Q. You didn't want to share it with --

12 A. Jerry Emery doesn't smoke crack.

13 Q. Okay.

14 A. Never has.

15 Q. Okay. So I still don't understand why you didn't go
16 back to him.

17 A. I did a couple hours later.

18 Q. The money situation hadn't changed, is that true?

19 A. Right.

20 Q. Okay. He hadn't gotten a paycheck since you left him
21 in Gaffney?

22 A. Right.

23 Q. You already said the reason you didn't go back to him
24 is because there was no money coming from him, is that
25 right?

1 A. Right.

2 Q. So why would you call him for more money in Blacksburg?

3 A. At that time I didn't call him for more money. I just
4 called him to be with -- to be -- to do what I said I was
5 going to do and that's why I got back.

6 Q. Did he tell you he was going to give you money for sex?

7 A. No.

8 Q. Did he tell you he was going to give you some money?

9 A. Yeah, but not for sex.

10 Q. Why did you want more money?

11 A. Because I wanted more dope.

12 Q. Did he pay you when you were in Blacksburg?

13 A. The money he gave me was spent in Gaffney --

14 Q. Okay.

15 A. -- when I convinced him to drive to Gaffney.

16 If you will remember the whole thing, he paid Rick to
17 bring me there, because he had been drinking, but I
18 convinced him to take me to Gaffney to get the dope.

19 Q. Listen to my question.

20 When you went back to Blacksburg --

21 A. Uh-huh.

22 Q. -- and you talked to him over the phone about getting
23 some more money, did he pay you the money he promised you?

24 A. No, because he said he didn't have it. He had just
25 enough to get by for the week.

1 Q. All right. So he promised you money. He gave you \$10
2 to pay Rick, and then you get over there --

3 A. I didn't have that \$10. Rick and Scott had that \$10.

4 Q. I understand. You took the \$10 and gave it to Rick,
5 right?

6 A. Right.

7 Q. Now --

8 A. What they done after they left and I was at Jerry's for
9 three and a half hours, I don't know.

10 Q. Okay. I'm not the worried about them right now. I'm
11 worried about you.

12 So you go to Jerry's house, right?

13 A. Right.

14 Q. He's promised to give you money, right?

15 A. He didn't promise to give me money, no.

16 Q. Over the phone you have testified that he did.

17 A. Okay, it wasn't a promise, though. He -- I asked for
18 money and he said "yeah, I'll give you what I got on me."

19 Q. Okay.

20 A. And he done that.

21 Q. And did he ever give you that money after you got to
22 Blacksburg?

23 A. No.

24 Q. Then why did you ask for more money? Why didn't you
25 ask for the money that --

1 A. I don't guess I'm understanding, because originally he
2 gave me money, took me to Gaffney and I got a \$20 rock.
3 That was my money.

4 I didn't come back out because I knew I was wasn't
5 getting any more money. When I went and purchased the dope
6 from Leadmine, I didn't come back out. I watched him ride
7 around a couple of times until finally he decided, okay,
8 she's not coming back out, so he left.

9 So then I called him back later on, probably an hour
10 and a half later and I said "I'm still where you let me out
11 at. I'm finding a way to you," because I didn't want him to
12 think that I had just left him like that. So that's when I
13 got a cab and he paid the \$13 cab fee for me to come to [REDACTED]
14 [REDACTED]. And that's all the money that was given to me.
15 So from the \$18 to the \$13 for the cab fee and the liquor
16 and the pot and whatever else.

17 Q. What's your relationship to Scott?

18 A. I met Scott Jones through Rick Long.

19 Q. Is Scott Jones your brother-in-law?

20 A. No, he's not, and I don't recall saying that to Jerry.

21 Q. Did you tell Jerry that Scott was your brother-in-law?

22 A. I don't remember saying that.

23 Q. Did you tell that Ricky was your cousin?

24 A. No, I did not.

25 Q. You are absolute on that?

1 A. I'm absolutely.

2 Q. Okay. And when you got back to Blacksburg the second
3 time --

4 A. Uh-huh.

5 Q. -- it's your testimony that you were there for three to
6 three and a half hours?

7 A. Uh-huh.

8 Q. No doubt in your mind?

9 A. No doubt in my mind.

10 I wasn't that messed up. I remember.

11 Q. I didn't ask you any question.

12 You said that you were in shock that you were worried
13 about why Scott showed up. Why were you in shock and why
14 were you worried?

15 A. Because I didn't call them. Why would they come when I
16 didn't call them?

17 Jerry knew that I was to call him and they knew that I
18 was to call them when I was finished at Jerry's house. I
19 never made that call.

20 Q. Were you angry at Scott?

21 A. I had no reason to be angry at Scott.

22 Q. Was he angry at you?

23 A. No, he wasn't.

24 Q. Were you angry at Mr. Long?

25 A. No, I wasn't.

1 Q. Was he angry at you?

2 A. No, he wasn't.

3 Q. So you just got two friends coming to pick you up. Why
4 would you be shocked?

5 A. Because I didn't call them.

6 Q. I understand you didn't call them, but they showed up
7 anyway. There's no reason to --

8 A. I'm asking myself a question "why are y'all here? I
9 ain't called y'all."

10 Q. But -- I understand that question. My question is the
11 fear that you are feeling.

12 A. There was no fear. There was a question of concern
13 "why are y'all knocking at this man's door when I haven't
14 called y'all yet?"

15 Q. Your testimony was that you were in shock.

16 A. Well, I'll take the shock back. I wasn't in shock. I
17 was concerned "why in the heck are y'all knocking at this
18 door?"

19 Q. So you weren't in shock? That was a lie?

20 A. No, that wasn't a lie. It was an older statement.

21 Q. When Jerry got hit, what did you do?

22 A. Ugh? What anybody would do.

23 Q. And after he went ugh, what did you do?

24 A. I ran to the closet I think to get a towel. I ran
25 somewhere to get something to put on his head. Where I went

1 in the house I don't recall.

2 Q. All right. The first hit -- you testified how many
3 hits?

4 A. Two.

5 Q. And in the past have you ever said it was three or
6 four?

7 A. No.

8 Q. Are you sure?

9 A. Yes.

10 Q. So there is two hits. He comes in, he hits him once,
11 and you go ah, right?

12 A. Right.

13 Q. Okay.

14 A. Because he's supposed to be going to the bathroom.

15 Q. Okay.

16 A. He gets up to go to the bathroom and makes a quick
17 right instead of the left to go to the bathroom.

18 Q. All right, I understand that. I understand your
19 reaction to the left blow.

20 The second blow he's got to reload. He's got to bring
21 his arms right back and get in position. What did you do
22 then?

23 A. I was behind Jerry.

24 Q. Okay. That's where you were. Now, what did you do?

25 A. I didn't do nothing, because I was behind Jerry. Jerry

1 was in front of me. That's where he threw his arms up and
2 Scott hit him again.

3 Q. Well, what did you do?

4 A. I stood there.

5 Q. Did nothing?

6 A. What could I do? That stick and me?

7 Q. Now, Rick long, what did he do?

8 A. He ran out the door.

9 Q. Before Scott?

10 A. No, after Scott.

11 Q. Okay. So he just stayed seated in his chair?

12 A. He may have stood up out of the recliner.

13 Q. But nobody grabbed Scott?

14 A. Nobody grabbed Scott, no.

15 Q. Nobody tried to stop Scott?

16 A. Nobody tried to stop Scott.

17 MR. SHEALY: If I may just have a moment, Your
18 Honor.

19 (Off the record)

20 (Back on the record)

21 BY MR. SHEALY:

22 Q. Ms. Byars, isn't it true that after Scott ran out the
23 door, that Ricky Long ran out the door right behind him?

24 A. Is it true?

25 Q. Yes.

1 A. I believe that's what I stated, that --

2 Q. I'm asking you is it true?

3 A. I don't remember.

4 Q. So everything that you have testified today you really
5 don't remember?

6 A. I know what I'm testifying to and I know what I'm
7 doing.

8 Q. Then why are you changing it?

9 A. I'm not changing -- I'm not changing it.

10 Q. Who left first?

11 A. Scott Jones left first.

12 Q. And he was walking on down Highway 29?

13 A. Right.

14 Q. Who left second?

15 A. As a matter of fact, he was at the speed limit sign
16 that sits on the right of the road.

17 Q. Who left second?

18 A. Rick. Maybe not right away, but he did -- he did
19 leave.

20 Q. Okay. And you were alone with Jerry in that house and
21 he was down on the floor bleeding, is that correct?

22 A. Jerry never hit the floor. After two blows to the head
23 with that stick and Jerry never went to the floor. He was
24 on the floor on his knees to slide the Tupperware tray back
25 under his couch where his marijuana was.

1 Q. Isn't it true --

2 A. That's the only time he was on the floor.

3 Q. Isn't it true that after Scott and after Mr. Long left,
4 you picked up that stick and began to wail on him?

5 A. No, it's not true.

6 Q. Isn't it true that you are the one that inflicted those
7 injuries on Jerry?

8 A. No, it's not. No, sir, it's not. I have done some
9 hard things and I have done some things that I regret
10 because of the crack cocaine, but to hit an ex-lover in the
11 head, no, it's not in me.

12 Q. Okay. But the ex-lover you left in Gaffney, promising
13 him to come back.

14 So far in your testimony you have admitted telling
15 lies; admitted to testifying to things that you don't
16 remember. You have admitted to changing your story.

17 A. It's not lies. I feel under pressure right now. I
18 have never been in -- I have never been in this deep in
19 anything.

20 MR. SHEALY: Thank you, Your Honor.

21 THE COURT: Any redirect?

22 MS. LESKANIC: No, Your Honor.

23 MR. SHEALY: Your Honor, she made a statement I
24 would like to explore a little bit just now when I tried to
25 cut her off.

1 THE COURT: Briefly.

2 MR. SHEALY: Thank you, Your Honor.

3 BY MR. SHEALY:

4 Q. As I was sitting down, you said "I have never been in
5 this deep before." What does that mean?

6 A. It means I have never done anything like this to get
7 any -- to do any drugs.

8 Q. It means that you know that you are in a heck of a lot
9 of trouble, is that right?

10 A. I don't feel as I am.

11 Q. Then what -- what do you mean by being in this deep?
12 What does that mean?

13 A. This is not my character, even though I do what I do.

14 Q. So you admit you do things that are not in your
15 character?

16 A. Things that I'm -- yeah, which is having sex with
17 people for money. Not bashing people in the head with a
18 stick.

19 MR. SHEALY: Thank you, Your Honor.

20 THE COURT: Any redirect?

21 MS. LESKANIC: No, Your Honor.

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

23 THE WITNESS: Thank you.

24 THE COURT: Is the State ready to call the next
25 witness?

1 MS. LESKANIC: Yes, Your Honor.

2 The State calls Officer Jonathan Gash.

3 (Photograph marked as State's Exhibit No. 14 for
4 identification)

5 DEPUTY JONATHAN GASH, having been first duly
6 sworn, testified as follows:

7 DIRECT EXAMINATION BY MS. LESKANIC:

8 Q. Could you please introduce yourself to the jury?

9 A. My name is Deputy Jonathan Gash. I work for the
10 Cherokee County sheriff's department.

11 Q. How long have you been in law enforcement?

12 A. December will be seven years.

13 Q. And where were you working in May of 2006?

14 A. The Blacksburg police department.

15 Q. What position did you hold at that time, Deputy Gash?

16 A. Patrolman.

17 Q. Were you called out to [REDACTED], which is
18 located in Blacksburg, on May 27th of 2006?

19 A. Yes, ma'am.

20 Q. What was the nature of that call?

21 A. It was armed robbery that just occurred.

22 Q. Okay. What did you do?

23 A. I arrived at the scene. The victim was sitting on the
24 porch holding his head with a towel. I asked him what
25 happened. He said he was assaulted and robbed, pretty much.

1 Q. Did you know what time you were dispatched out to the
2 home?

3 A. No, ma'am, I can't.

4 Q. Is that home located in Cherokee County?

5 A. Yes, ma'am.

6 Q. All right. You find him, the victim, is that Mr.
7 Emery?

8 A. Yes, ma'am.

9 Q. That's testified?

10 A. Black shirt.

11 Q. All right. So what do you do when you get there?

12 A. I asked him who done it. You know, just simple facts
13 like that, so I put it over the radio so we can try to get
14 some suspects. And I cleared the house to make sure there
15 was nobody else in there.

16 Q. Okay. What type of information was he able to give
17 you?

18 MR. SHEALY: Objection, Your Honor. That would be
19 hearsay. He could say what he did as a result of the
20 information he was given.

21 THE COURT: I'm going to allow it. The witness is
22 in the courtroom.

23 MS. LESKANIC: Thank you.

24 BY MS. LESKANIC:

25 Q. What type of information did he give you that you --

1 A. He gave me the description of the van and the female's
2 name.

3 Q. Did you know how many occupants would be in the van?

4 A. Three.

5 Q. And that was --

6 A. I didn't know how many occupants was in the van. I
7 just -- I know how many people was at the scene, the crime
8 scene.

9 Q. All right. And what else did you do while you were at
10 the home? You cleared the house and then what?

11 A. I called for medics. I called for the medics to check
12 him out. I took pictures right. After that I became I
13 will.

14 Q. Okay. Why did you become ill?

15 A. I'm allergic to fire ants and I stepped in a fire ant
16 bed and it stung me. That was the reaction.

17 Q. So where did you have to go that night?

18 A. The ER.

19 Q. Now, when you did meet with Mr. Emery at his home, did
20 he appear to be under the influence?

21 A. You could see beer cans in the house, around the house,
22 but he didn't appear to be under the influence.

23 Q. Where his -- did you ask him any questions?

24 A. Uh-uh.

25 Q. Were his answers responsive to your questions?

1 A. Yes, ma'am.

2 Q. All right. Do you know if a stop was made of that van?

3 A. Yes, ma'am, I know there was a stop made.

4 Q. Were you present during that?

5 A. I drove up there and then that's where the ER medic
6 picked me up at.

7 Q. So you were part of the original traffic stop?

8 A. I was just -- they stopped it and I drove up there.

9 Q. Okay.

10 A. That was probably about 15 miles from Blacksburg I want
11 to say.

12 Q. Okay. And this is -- did you get a call -- where were
13 you when you received the call that they had pulled --

14 A. I was still on the crime scene.

15 Q. So you were -- a short time later they made a stop?

16 A. That's right.

17 Q. Now, was Mr. Emery able to give you a written
18 statement?

19 A. No, ma'am.

20 Q. And why not?

21 A. Because he said his hand was hurting.

22 Q. Let me show you what's been marked as State's Exhibit

23 14. Tell me if you recognize that.

24 A. Yes, ma'am.

25 Q. And --

1 A. That's the stick Mr. Emery gave me.

2 Q. Where did you recover that?

3 A. From the house.

4 Q. And this is a photograph showing --

5 A. That's on my patrol car.

6 MS. LESKANIC: Your Honor, at this time we would
7 offer State's Exhibit 14 for admission as evidence.

8 MR. SHEALY: No objection, Your Honor, other than
9 it's cumulative.

10 THE COURT: All right. We'll --

11 MR. SHEALY: I mean, we have got the stick in
12 evidence.

13 THE COURT: You don't have to argue in front of
14 the jury.

15 All right, I'll allow it as State's 14.

16 MS. LESKANIC: Thank you, Your Honor.

17 BY MS. LESKANIC:

18 Q. What injuries, if any, did you see on Mr. Emery?

19 A. Two lacerations on the head and the arm was kind of
20 swollen up. That's about it.

21 Q. All right. That's all I have for you. If you would,
22 answer any questions that Mr. Shealy has.

23 THE COURT: Yes, sir, Mr. Shealy.

24 CROSS EXAMINATION BY MR. SHEALY:

25 Q. Did you arrest Scott?

1 A. No, sir.

2 MR. SHEALY: Thank you. That's all I have.

3 THE COURT: Any redirect?

4 MS. LESKANIC: No, Your Honor.

5 THE COURT: Thank you, sir. You may step down.

6 Is the State ready to call their next witness?

7 MS. LESKANIC: Yes, Your Honor.

8 The State calls Al Phillips.

9 AL PHILLIPS, having been first duly sworn,
10 testified as follows:

11 DIRECT EXAMINATION BY MS. LESKANIC:

12 Q. Would you please state your name for the jury?

13 A. Al Phillips.

14 Q. Where are you employed?

15 A. I own a physical fitness center in Blacksburg, Total
16 Definitions.

17 Q. And how long were you in law enforcement?

18 A. Ten years.

19 Q. Okay. Were you working with Blacksburg in May of 2006?

20 A. It was with the metro narcotics division.

21 Q. With Blacksburg or Cherokee County?

22 A. Cherokee County.

23 Q. How did you become involved in this case?

24 A. Deputy Gash gave a BOLO. That stands for be out on the
25 lookout for a certain vehicle, which was a van, that's

1 occupied three times or three subjects. And then he gave a
2 name of one of the subjects and I was familiar with that
3 subject.

4 Q. And what did you do?

5 A. On my route I noticed the description of the van and I
6 pulled that van over. And once I approached the vehicle, I
7 noticed that subject that was named on the passenger's side
8 of the vehicle, passenger front seat.

9 Q. Who was that?

10 A. Tammy. Ms. Tammy.

11 Q. Okay. Tammy Byars?

12 A. Yes, ma'am.

13 Q. Were there any other individuals in the van?

14 A. Yes, there was a male driver and there was another male
15 in the back of the van appearing like he was trying to hide.
16 It looked like a work van, a lot of stuff in the back of the
17 van, and he was in the back of the van.

18 Q. Okay. So what happens next?

19 A. After that I asked the subject to exit the vehicle and
20 then they did. And I read them their rights. And then Ms.
21 Byars started attempting to tell me something. She started
22 to talk to me, but the male in the back -- that was in the
23 back of the van, he stepped out and -- well, he started
24 talking and tried to prevent her from talking to me.

25 Q. What, if anything, was said?

1 A. She was very upset, crying, and she stated that --

2 MR. SHEALY: Objection, Your Honor, that would be
3 hearsay.

4 THE COURT: All right, I'll sustain the objection.

5 MS. LESKANIC: Your Honor, may we approach?

6 THE COURT: Yes.

7 (Whereupon, the lawyers approached the bench for
8 an off-the-record discussion)

9 THE COURT: Ladies and gentlemen, this is one of
10 those times when I'm going to need to ask you to retire back
11 to the jury deliberation room. Again, I'll instruct you not
12 to have any discussions among yourselves about anything and
13 we will get you back just shortly.

14 (The following takes place outside the presence of
15 the jury panel)

16 THE COURT: The reason I asked the jury to leave
17 is that I had asked the lawyers during the bench conference
18 statements about what the witness was going to testify,
19 realizing that I'm not making a record exactly what they are
20 arguing, and so I wanted to just let us put this on the
21 record.

22 All right. Defense says it's not an excited
23 utterance. The State says that it is now. I'm going to
24 re-ask the state a question. What is it that he's going to
25 testify to?

1 MS. LESKANIC: I believe he's going to testify
2 that she made a statement something like "I don't know what
3 made him go crazy," or "why he went crazy." I would be glad
4 to --

5 THE COURT: Why don't you ask that.

6 MS. LESKANIC: -- proffer that testimony.

7 BY MS. LESKANIC:

8 Q. If you would, Mr. Phillips, tell the court what
9 statements were made and by whom when you pulled the van
10 over.

11 A. Okay. Ms. Byars, once I got her outside the vehicle,
12 she was upset, she was crying, and she kept saying that "I
13 don't know why he did it, why he did it." And then I asked
14 her "he, who? Who did what? He who?" And then she looked
15 back towards the guy that was in the back of the van, okay.
16 And by then that guy came and started talking to me to
17 divert my attention from her, and then I spoke with him.

18 Q. Did you determine who that was?

19 A. She didn't say a name.

20 Q. But, I mean, once you took everybody in, did you
21 determine who was driving and who was the one hiding in the
22 back of the van?

23 A. Yes.

24 Q. Who was the one in the back of the van?

25 A. Mr. Scott.

1 Q. Okay.

2 A. Mr. Scott, he was in the back of the van, and the Rick
3 subject, the other guy was driving.

4 Q. Okay.

5 A. He was driving, and she was the passenger.

6 Q. Okay.

7 A. And then on another occasion, once I separated the
8 three, and then -- and then she kind of pulled me to the
9 side again and tried to tell me again. And then, once
10 again, the subject in the back, that was in the back of the
11 van, he came and interfered again.

12 Q. All right. What, if anything, was he saying?

13 A. He was saying "don't talk to him." And, you know, "she
14 don't know what she's talking about. Don't talk to him.
15 You better close your mouth."

16 And then I kept asking him, I said "why are you so
17 upset, sir? Why are you so upset?" And he kept saying the
18 same thing, "don't talk to him. We didn't do nothing."
19 And -- because by then I didn't realize all this had
20 occurred. I just started with just an armed robbery, you
21 know.

22 THE COURT: Any cross on that issue?

23 MR. SHEALY: No, Your Honor, although I would
24 object to him saying about armed robbery.

25 THE COURT: Well, the jury is not here, so --

1 MR. SHEALY: I'm talking about whenever he --

2 THE COURT: Okay.

3 MR. SHEALY: And I still assert it's not an
4 excited utterance. The testimony was that the stop was
5 about fifteen miles outside of Blacksburg. Time had passed
6 since the incident. It's not in proximity of time or place
7 of the incident, and so, therefore, it's not an excited
8 utterance.

9 People can be upset and say stuff. That doesn't
10 necessarily qualify as excited utterance.

11 MS. LESKANIC: I think, based on his testimony,
12 that she was clearly crying and still upset about this. It
13 appears she was still under the stress of the event that had
14 just happened. She had just witnessed someone getting beat
15 over the head. She has taken a wallet. I don't think you
16 get over that in fifteen miles down the road.

17 MR. SHEALY: Your Honor, I submit to you that
18 she's upset and she's crying because she thinks she's about
19 ready to get arrested for armed robbery and she's trying to
20 put it on somebody else --

21 THE COURT: All right.

22 MR. SHEALY: -- about the incident.

23 THE COURT: All right. I'm going to allow the
24 witness to testify as to, what appears to the court, based
25 upon the testimony that's been presented, the observation

1 the witness and the way that he presented it, the
2 spontaneous statement made by Ms. Byars, the first one.

3 I would not allow him to testify as to the second
4 statement where the witness stated "that time later she
5 pulled me aside and made statements to me." I would not
6 allow him to testify as to that.

7 Anything else?

8 MS. LESKANIC: No.

9 THE COURT: Okay. And plus, Ms. Byars is still --
10 my information that I have, Ms. Byars is still available, in
11 the event that she's to be recalled as well, and she has
12 testified already as part of this case. Okay.

13 MR. SHEALY: Your Honor, can I take up a matter of
14 housekeeping?

15 THE COURT: What is that?

16 MR. SHEALY: As we found out, Ricky Long is here.
17 I have not had a chance to meet him or interview him.

18 My understanding is that he's pled guilty. He's
19 awaiting sentencing. The solicitor gave me a thumbnail
20 sketch of what he's going to testify to. I need to talk to
21 him prior to his testifying to find out if he's going to
22 testify consistent with that or sink my client in hopes of
23 getting a better sentence.

24 THE COURT: And your housekeeping matter is what?

25 MR. SHEALY: I would like to have an opportunity

1 to talk to him before defense goes forward.

2 THE COURT: I don't know. I mean, we are on Mr.
3 Phillips right now.

4 MR. SHEALY: Right. I mean -- I meant when the
5 State rests. This is just an opportunity to ask for that.

6 THE COURT: Does the State -- does the State know
7 yet whether they are going to call Mr. Long?

8 MS. LESKANIC: I don't believe we are, Your Honor.
9 I believe Mr. Phillips would be our list witness.

10 THE COURT: Okay.

11 All right. Well, the State has apparently decided
12 not to call him.

13 MR. SHEALY: So may I speak with him before? I
14 mean, we can finish the State's case, but then if I could
15 have a moment to talk with Mr. Long.

16 THE COURT: How long do you need to talk to Mr.
17 Long?

18 MR. SHEALY: Five minutes.

19 THE COURT: All right. Well, since the jury is
20 already out, let's let Mr. Shealy go ahead and speak with
21 Mr. Long and maybe he can make a decision on whether he
22 intends to call Mr. Long.

23 MR. SHEALY: Thank you, Your Honor.

24 THE COURT: Mr. Phillips, I need to remind you
25 that you are under oath in the process of giving your

1 testimony. You cannot talk to anyone about the substance of
2 your testimony. I'm going to allow you to step down. I
3 won't hold you hostage on the witness stand while the
4 defense goes and speaks with the witness.

5 All right, then we will step down.

6 (Whereupon, proceedings were recessed)

7 (Whereupon, proceedings were reconvened)

8 THE COURT: Do y'all want to approach a moment?

9 (Whereupon, the lawyers approached the bench for
10 an off-the-record discussion)

11 THE COURT: Mr. Phillips, do you want to come back
12 up. Mr. Phillips, I'll remind you that you remain under
13 oath.

14 THE WITNESS: Yes, sir.

15 THE COURT: All right. Let's bring the jury back.

16 (The following takes place in the presence of the
17 jury panel)

18 THE COURT: Yes, ma'am.

19 BY MS. LESKANIC:

20 Q. After you made the traffic stop of the vehicle, were
21 you able to determine who was in the vehicle and where they
22 were seated?

23 A. Yes, ma'am.

24 Q. And can you tell the jury?

25 A. Yes. Ms. Byars was, Tammy Byars, she was a passenger,

1 front passenger. The Rick subject was the driver. And in
2 the back there was Mr. Scott, in the back of the van.

3 Q. The defendant Scott Jones?

4 A. Yes, ma'am.

5 Q. And when you got them out, you said that you read them
6 their rights?

7 A. Yes, ma'am.

8 Q. And then Ms. Byars started to make a statement to you?

9 A. Yes, she -- she was very upset. She was crying. She
10 said "I don't know why he did that. I don't know why he did
11 that." And then -- then I asked her who, and then by that
12 time we were interrupted.

13 Q. By who?

14 A. By Mr. Scott.

15 Q. Okay. Scott Jones?

16 A. Scott Jones, yes.

17 Q. And what did he do?

18 A. He interfered with me speaking with her and her
19 speaking with me by telling her not to talk to me, "we
20 didn't do anything." You know, "don't talk to him." He
21 kept saying repeatedly over and over.

22 Q. Thank you. If you would, please answer any questions
23 that Mr. Shealy would have.

24 A. Yes, ma'am.

25

1 CROSS EXAMINATION BY MR. SHEALY:

2 Q. Now, you said that Scott was trying to hide in the back
3 of a van?

4 A. I said it appeared to be like he was hiding.

5 Q. Okay. How did he look?

6 A. I didn't see him at first. And once I got the driver
7 and passenger out and I was talking to them and I heard
8 something move in the back. That's when I looked in and saw
9 him.

10 Q. Wasn't he sitting on a seat back there?

11 A. No, from -- it -- I don't think there was any seats in
12 the back of the van. I mean, from what I can remember, it
13 was like a bunch of tools.

14 Q. Was he sitting on the floor of the van?

15 A. There was no seats. He was sitting, yeah, in the back
16 of the van, just kind of like laying back there.

17 Q. Okay. And Tammy, did she have a seizure whenever you
18 stopped beside the police car? Do you recall anything like
19 that?

20 A. No. No, sir, I didn't notice that.

21 MR. SHEALY: Thank you, Your Honor. That's all I
22 have.

23 THE COURT: Any redirect into what he went into?

24 MS. LESKANIC: No, Your Honor.

25 THE COURT: Thank you, sir. You may step down.

1 Is the State ready to call its next witness?

2 MS. LESKANIC: The State rests, Your Honor.

3 THE COURT: Thank you, ma'am.

4 Ladies and gentlemen, the State has now concluded
5 its presentation of their case. Given the hour that it is,
6 I would like for you to now take your lunch break. You will
7 probably be leaving the courthouse area. So, again, I need
8 to instruct you and really stress to you my instruction that
9 you not have any discussions about anything involving this
10 case with anyone.

11 You probably heard testimony that identified
12 locations. In the event it stimulated your curiosity and
13 you think you would like to go by the location, I'll
14 instruct you don't. Again, that would constitute
15 independent research or investigation on your part and you
16 are not to supposed to do that. Because, again, you are
17 supposed to make the decisions that you will in this case
18 based upon the evidence and information as part of this
19 trial. So I just want to remind you of those instructions.

20 I thank you for your time and attention this
21 morning. If you would, I'm going to ask that you please be
22 back in the jury deliberation room by, according to that
23 clock, let's say 2:15. I have got some matters of law that
24 I already know I have to take up with the lawyers and that
25 will give me some time to hopefully get through with those

1 matters and allow everyone here in the courtroom as well to
2 have their lunch break. So if you will, go with the bailiff
3 and well see you back at 2:15.

4 (The following takes place outside the presence of
5 the jury panel)

6 MS. LESKANIC: Your Honor, may I request that Mr.
7 Phillips be excused? I believe he's got to return to work.

8 THE COURT: Any objection?

9 MR. SHEALY: No objection, Your Honor.

10 THE COURT: Thank you, Mr. Phillips.

11 THE WITNESS: Thank you.

12 THE COURT: You may be excused.

13 Any matters of law?

14 MR. SHEALY: Your Honor, we would move for a
15 directed verdict on the grounds that there is insufficient
16 evidence to show assault and battery with intent to kill.
17 There is sufficient evidence for ABHAN, but we would ask
18 that you find that there is -- direct a verdict as to ABWIK.

19 THE COURT: Yes, ma'am.

20 MS. LESKANIC: Your Honor, there was testimony
21 that he was struck several times with State's Exhibit 7.
22 The only difference in ABHAN and ABWIK is the element of
23 malice. I believe that's an issue for the jury to decide.

24 In the light most favorable to the State, I
25 believe we have provided sufficient evidence that a jury

1 could return a verdict for assault and battery with intent
2 to kill, due to the weapon that was used and the nature of
3 the injury sustained.

4 THE COURT: Any reply?

5 MR. SHEALY: No, Your Honor.

6 THE COURT: I would have to agree with the State's
7 position. Given the rules that this court has to apply in
8 viewing the evidence at this juncture, I feel that I would
9 have to deny the motion.

10 Is the defense ready to proceed with their case?

11 MR. SHEALY: We are, Your Honor.

12 THE COURT: Has the -- do you know yet whether the
13 defendant intends to testify or not?

14 MR. SHEALY: My understanding from the last time
15 we discussed it, he does intend to testify.

16 THE COURT: All right. Does the defendant have a
17 record for impeachment purposes?

18 MR. SHEALY: No, Your Honor, I don't believe so.

19 MS. LESKANIC: He does not.

20 THE COURT: All right. So that's -- the reason I
21 asked is I just want to be sure that's been covered with
22 him.

23 All right. So, Mr. Jones, I need you to please
24 stand. Raise your right hand and allow the clerk to swear
25 you in.

1 DONALD SCOTT JONES, having been first duly sworn,
2 testified as follows:

3 THE COURT: All right, Mr. Jones, I need to remind
4 you that we are making a recording of everything that
5 happens here. I know that you are some distance away from
6 the court reporter, who is sitting on this side of the
7 courtroom. I have just a few questions to ask you at this
8 juncture concerning your right to testify. In responding to
9 my questions, I need for you to please speak up loud enough
10 so that the court reporter and I both can hear you.

11 THE DEFENDANT: Yes.

12 THE COURT: And also if ever during this process
13 you can't hear me, let me know and I'll speak up as well.

14 Now, Mr. Jones, again at this time I'm going to
15 explain to you certain of your rights. If you do not
16 understand anything that I say, please let me know. If you
17 want me to explain anything in more detail, please let me
18 know that. Now, do you understand that, sir?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: All right. Sir, we have now reached
21 the stage of the trial where you may present your defense.

22 You have the right to claim the protections given
23 to you by the Fifth Amendment to the Constitution of the
24 United States. Now, that Amendment states, in part, that no
25 person shall be compelled in any criminal case to be a

1 witness against himself. This means that you cannot be
2 required to testify in this case. You have the right to
3 testify on your own behalf. However, no one can make you
4 testify. This is a personal right and no one can waive this
5 right except you.

6 If you decide to testify, you will be subject to
7 the same rules that govern other witnesses and you may be
8 examined and cross-examined on any relevant issue in this
9 case.

10 In addition, if you have any convictions involving
11 dishonesty or false statement or for crimes punishable by
12 imprisonment for more than one year and this court
13 determines that the probative value of admitting this
14 evidence outweighs its prejudicial effect on you, then the
15 solicitor will be able to introduce your record to attack
16 your credibility.

17 If you decide to testify, this decision on your
18 part must be freely, voluntarily, and intelligently made,
19 with knowledge of the protections given to you by the Fifth
20 Amendment and the consequences of your decision that you
21 testify.

22 If you decide not to testify, I will instruct the
23 jurors that they cannot give the fact that you did not
24 testify any consideration whatsoever and that there is to be
25 absolutely no prejudice to you because you did not testify.

1 It is left entirely up to you whether or not you
2 testify in this case. You may talk with your attorney, your
3 family, your friends, or anyone else, but the final decision
4 will be left entirely up to you.

5 Now, do you understand what I have just explained
6 to you?

7 THE DEFENDANT: Yes, sir, I do.

8 THE COURT: Do you have any questions about what I
9 have explained to you?

10 THE DEFENDANT: No, sir, I don't.

11 THE COURT: Have you been able to hear all of my
12 statements and questions to you concerning your right to
13 testify?

14 THE DEFENDANT: Yes, sir, I have.

15 THE COURT: Have you discussed with your lawyer
16 whether or not you should or should not testify as part of
17 this trial?

18 THE DEFENDANT: Yes, sir, I have.

19 THE COURT: Do you need to or wish to talk to your
20 lawyer any further?

21 THE DEFENDANT: Yes, sir, I do.

22 THE COURT: All right. Yes, sir, please feel free
23 to talk to your lawyer.

24 (Off the record)

25 (Back on the record)

1 MR. SHEALY: Thank you, Your Honor.

2 THE COURT: You have consulted with your lawyer as
3 to this, as to your right to testify?

4 THE DEFENDANT: Yes, sir, I have.

5 THE COURT: Have you made the decision whether you
6 will or will not testify as part of this trial?

7 THE DEFENDANT: Yes, sir, I have.

8 THE COURT: And what is that decision?

9 THE DEFENDANT: I will.

10 THE COURT: All right. Are you satisfied with the
11 work that your lawyer has given you?

12 THE DEFENDANT: Yes, sir, I am.

13 THE COURT: Has anybody come to you, threatened
14 you in any way, or made you any promises in order to get you
15 to make the decision to testify as part of this case?

16 THE DEFENDANT: No, sir, they haven't.

17 THE COURT: This decision by you to testify has
18 been made freely and voluntarily?

19 THE DEFENDANT: Yes, sir, it has.

20 THE COURT: All right. Then I will find that the
21 decision by the defendant to testify in this case has been
22 made freely, voluntarily, knowingly, and intellectually by
23 him, with knowledge of the protections given to him by the
24 Fifth Amendment, and that he has received advice on that
25 topic from an attorney that he's indicated to the court he's

1 satisfied with with the representation provided thus far.

2 All right, sir. We are going to take a lunch
3 break. If you change your mind from now until any time to
4 when your attorney calls you to the stand, you are free to
5 make that decision to change your mind. Do you understand
6 that?

7 THE DEFENDANT: Yes, sir, I do.

8 THE COURT: All you have to do is indicate to your
9 lawyer and I'm sure he will advise the court as well. All
10 right.

11 Thank you, sir. You may be seated.

12 And the defense has indicated at side bar that he
13 intends to call Ricky Thomas Long, is that correct?

14 MR. SHEALY: Yes, sir, Your Honor.

15 THE COURT: And Mr. Long's is in the solicitor's
16 office. So if someone will remind Mr. Long that he is under
17 subpoena and is required to be here, so that he just doesn't
18 leave the courthouse area and does not return.

19 I will see everyone back about -- let's shoot for
20 at least by ten minutes after two.

21 If y'all have any charges that you think I need to
22 instruct the jury of, other than my general charge, let me
23 know, or my customary charges. All right.

24 Thank you. We will step down.

25 (Whereupon, proceedings were recessed)

1 (Whereupon, proceedings were reconvened)

2 THE COURT: Is the defense ready to proceed?

3 MR. SHEALY: Yes, Your Honor.

4 THE COURT: Do you intend to call as your first
5 witness that other person?

6 MR. SHEALY: No, Your Honor, I intend to call
7 Donald Jones.

8 THE COURT: All right. Mr. Jones, it is still
9 your desire and intent to want to proceed with by testifying
10 in this case?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: All right. And you can you continue
13 to be -- this continues to be a free and voluntary act on
14 your part?

15 THE DEFENDANT: (Shaking head yes).

16 THE COURT: Okay. Just have a seat, sir, and we
17 will bring the jury back and we will proceed.

18 (The following takes place in the presence of the
19 jury panel)

20 THE COURT: All right. Ladies and gentlemen,
21 thank you for your patience while we reconvened. We are now
22 ready to proceed with the continued presentation of the
23 evidence in this case.

24 Is the defense ready?

25 MR. SHEALY: Defense is ready, Your Honor.

1 THE COURT: Yes, sir, you may call your first
2 witness.

3 MR. SHEALY: Your Honor, the defense would call
4 Donald Scott Jones.

5 THE COURT: Mr. Jones, come on around.

6 DONALD SCOTT JONES, having been first duly sworn,
7 testified as follows:

8 DIRECT EXAMINATION BY MR. SHEALY:

9 Q. Would you tell the judge and the jury your full name,
10 please?

11 A. Donald Scott Jones.

12 Q. And you are the defendant in this case?

13 A. Yes, sir.

14 Q. How old --

15 THE COURT: Thank you, sir. If you would, sir,
16 really speak up. We are also dealing with ambulances and
17 sirens and trains today.

18 THE WITNESS: Yes, sir.

19 THE COURT: Thank you.

20 BY MR. SHEALY:

21 Q. And how old are you?

22 A. Forty years old.

23 Q. And Mr. Jones, do you know Tammy Byars?

24 A. No, I don't know her. I have met her.

25 Q. When did you meet her?

1 A. Three years ago, in the summer.

2 Q. Did you meet her prior to this incident?

3 A. No.

4 Q. Okay. Now, do you know Jerry?

5 A. No, sir.

6 Q. When -- do you recall meeting him about three years
7 ago?

8 A. Yeah, at his house when this incident occurred.

9 Q. Had you ever met him before then?

10 A. No, sir, I didn't.

11 Q. Had you ever met him since then?

12 A. No, sir, I haven't.

13 Q. Other than in this courthouse?

14 A. No, sir.

15 Q. Now, have you had a conversation with Ms. Byars about
16 Jerry?

17 A. Yeah, on the way to meet him at that little store they
18 are talking about.

19 MS. LESKANIC: Objection. Hearsay, Your Honor.

20 MR. SHEALY: Your Honor, if I may approach the
21 bench?

22 THE COURT: All right, approach the bench.

23 (Whereupon, the lawyers approached the bench for
24 an off-the-record discussion)

25 THE COURT: If you would just try to rephrase the

1 question.

2 MR. SHEALY: Yes, sir.

3 BY MR. SHEALY:

4 Q. After having a talk with Tammy Byars, what did you
5 think about Jerry and his attitude towards Tammy?

6 A. I was sort of afraid for her and anybody that got
7 around him, from what she said.

8 Q. Okay.

9 A. She -- she had told me that he had just gotten out of
10 jail for beating her.

11 Q. For beating her?

12 A. Yeah, and she was going over to his house to clean his
13 house. She was not afraid, but she needed to go make some
14 money.

15 Q. Okay. So you were concerned that he might beat her?

16 A. Yes.

17 Q. And why was she going over to his house?

18 A. To make money, to the clean the house.

19 Q. To clean the house?

20 A. That's what she had told me.

21 Q. That's what she told you.

22 Okay. And where did you take her -- or who was driving
23 the van?

24 A. Rick and I took her to that place in Blacksburg at that
25 little store on the right.

1 Q. And what happened next?

2 A. She got out of the van. I got into the front seat and
3 she got into Emery's car and left.

4 Q. Did she pay Ricky any money?

5 A. I didn't see no money exchanged.

6 Q. So you don't know if she did or not?

7 A. No, sir.

8 Q. All right. And how did you find out where Mr. Emery
9 lived?

10 A. We followed them into Blacksburg and we kept going
11 straight to a different destination.

12 Q. And when did you come back?

13 A. It was probably about two and a half hours later.

14 Q. And why did you come back?

15 A. Ricky was needing to be somewhere. The way he put it,
16 he was needing to be somewhere, so he was going to go ahead
17 and pick her up.

18 Q. Did she call you and tell you to come and pick her up?

19 A. No, sir.

20 Q. Did she call Rick, do you know?

21 A. Not that I know of she didn't.

22 Q. So that's why you showed up at the house?

23 A. Yes.

24 Q. All right. When you got to the house, who was driving
25 the van?

1 A. Ricky.

2 Q. Who got out of the van?

3 A. I did. He asked me to. He asked me to.

4 Q. Where did you go?

5 A. He asked me to go to the door --

6 Q. Okay.

7 A. -- to get her.

8 Q. And what was Rick doing in the van?

9 A. He was waiting on us to get back to the van.

10 Q. And y'all had no -- did you have any intention of going

11 in the house?

12 A. No, not at that time.

13 Q. Okay. And what did you do then?

14 A. She invited us in.

15 Q. Did you knock on the door?

16 A. Yes, sir. After I knocked on the door she invited us

17 in.

18 Q. How did she introduce you?

19 A. I was her cousin and Rick was her brother-in-law.

20 Q. Did you understand why she said that?

21 A. No, sir, but she acted as if there was something wrong.

22 Q. All right. Tell me about the visit. How did that go?

23 A. We went into the house, and, like I said, she

24 introduced us as those people. I was trying to figure out

25 what was going on. He -- he told us to make ourselves

1 comfortable, offered us a drink. I went to the kitchen and
2 she followed me and she told me "you won't believe what he
3 done to me." And I asked her what he had done to her and
4 she said --

5 MS. LESKANIC: Objection, Your Honor. Hearsay.

6 THE COURT: I sustain the objection.

7 MR. SHEALY: Your Honor, if I could?

8 THE COURT: Do you want to try to rephrase?

9 MR. SHEALY: Well, Your Honor, may we approach?

10 THE COURT: Yes.

11 (Whereupon, the lawyers approached the bench for
12 an off-the-record discussion)

13 THE COURT: If you would rephrase the question,
14 Mr. Shealy.

15 BY MR. SHEALY:

16 Q. After talking to Tammy, what was your concern?

17 A. Of her well-being and mine as well.

18 Q. And did you fear physical harm to Tammy or you?

19 A. Both of us.

20 Q. All right. Now, when you walked into the kitchen, did
21 you notice anything, any objects or anything in the house?

22 A. Well, as I walked right before I got to the kitchen
23 door, the stick sitting right there popped up against the
24 couch.

25 Q. Okay.

- 1 A. And that troubled me.
- 2 Q. And you saw the stick?
- 3 A. Yeah, I saw it. It was right there in open.
- 4 Q. Okay. And then what did you do?
- 5 A. I went on into the kitchen and I got a beer.
- 6 Q. Is this the first time that y'all been in the kitchen?
- 7 A. Yes.
- 8 Q. Is that when you talked to Tammy?
- 9 A. Yes, sir.
- 10 Q. Now, did you smoke a joint?
- 11 A. No, I don't smoke marijuana.
- 12 Q. Did you drink beer?
- 13 A. Yeah, I drank beer and some liquor.
- 14 Q. And had you been drinking earlier?
- 15 A. I drank a couple of beers earlier that day.
- 16 Q. Okay. But were people smoking marijuana then?
- 17 A. Yes, sir, they were. There were two of them smoking
- 18 it.
- 19 Q. Okay. After you finished in the kitchen, where did you
- 20 go?
- 21 A. I went back to the living room.
- 22 Q. And what did you do in the living room?
- 23 A. Sit there and tried to find out what was going on.
- 24 There was some arguing going on.
- 25 Q. Then what did you do?

1 A. I went back to the kitchen.

2 Q. And while you were in the kitchen the second time, what
3 did you -- what happened?

4 A. I heard a thump on the floor and I heard something
5 slide across and her scream. I went in there.

6 Q. What were you thinking when you were in the kitchen?

7 A. That something -- that they had done got into a fight.

8 Q. A physical altercation?

9 A. Physical altercation.

10 Q. That's what you believed?

11 A. That's what I thought, yes, sir.

12 Q. And then what did you do?

13 A. I proceeded back into the living room.

14 Q. And?

15 A. I seen him standing there with his back to me and she
16 pulled away from him and she screamed. I saw the stick and
17 I picked the stick up and I popped him in the head with it.
18 He was still standing. He turned around to me and I looked
19 at her and I told her, I said "get out now, because I'm
20 leaving."

21 Q. What did you do?

22 A. She just stood there, so I went out the door. And
23 there was Rick and I told Rick, I said "listen, I'm headed
24 back to Gaffney on foot. When you leave, you can pick me
25 up."

1 Q. Now, what did you do?

2 A. I began walking.

3 Q. Down 29?

4 A. Up -- yeah, down 29 towards Gaffney.

5 Q. Once you left the -- what happened to the stick?

6 A. I just dropped it.

7 Q. There in the living room?

8 A. Yes, sir.

9 Q. And who picked you up?

10 A. Rick and Tammy. I got into the back of the van.

11 Q. Okay. So how many times did you hit him?

12 A. I just hit him one time.

13 Q. And then you dropped the stick?

14 A. And then I dropped the stick.

15 Q. And you left?

16 A. And I left.

17 Q. Did anybody grab you and try to keep you from leaving?

18 A. No, sir.

19 Q. Tammy didn't leave with you?

20 A. No, sir, she just stood there.

21 Q. Thank you.

22 MR. SHEALY: Your Honor, that's all the questions
23 that I have.

24 THE COURT: Yes, ma'am.

25 MS. LESKANIC: If it please the court.

1 CROSS EXAMINATION BY MS. LESKANIC:

2 Q. Where were you working in May of 2006?

3 A. Sanders Brothers.

4 Q. How long had you been there?

5 A. Off and on my whole life.

6 Q. Were you off then or on then?

7 A. I was in between jobs with them. I had been laid off
8 for a couple of weeks, so I went out to another job site,
9 Specialized Riggers, but I was still with Sanders Brothers.

10 Q. You just met Tammy this?

11 A. Ma'am?

12 Q. You met Tammy the day that this happened? That was
13 first time that you met her?

14 A. Yes. Yes, ma'am.

15 Q. How much beer had you had to drink that day?

16 A. Before the incident, probably two, three beers.

17 Q. How much beer did you have at Mr. Emery's house?

18 A. Two more beers and some liquor.

19 Q. Is that your beer or Mr. Emery's beer?

20 A. Mr. Emery's beer at his house.

21 Q. Was that Mr. Emery's liquor or your lecture?

22 A. Mr. Emery's liquor.

23 Q. But you were very concerned about what was going on?

24 A. Yes, ma'am, I was.

25 Q. How long did you stay there?

1 A. It wasn't long at all. Maybe thirty minutes at the
2 most.

3 Q. How much liquor did you drink along with those two
4 beers in that thirty minutes?

5 A. Probably five shots.

6 Q. Five shots of what?

7 A. I think it was Vodka.

8 Q. Five shots of Vodka, two beers, plus the beers that you
9 had before you got there all in thirty minutes?

10 A. Yes, ma'am.

11 Q. And you were concerned about Tammy when you first
12 dropped her off?

13 A. Yes, ma'am, I was.

14 Q. But y'all waited two and a half hours to go back and
15 get her?

16 A. Yes, ma'am.

17 Q. And she never called and said "come back and get me. I
18 need help."

19 A. No, she didn't.

20 Q. So you want this jury to believe that you were
21 defending her?

22 A. Yes, ma'am, I was. I thought I was.

23 Q. You thought you were.

24 And you are not far from the Blacksburg Police
25 Department at his house on [REDACTED], are you?

1 A. No, ma'am, not far at all.

2 Q. Did you go there to tell them that you just hit
3 somebody in the head because you were defending a woman that
4 you just met?

5 A. No, ma'am, I didn't.

6 Q. And did you stop by the Gaffney city police department
7 on your way through Gaffney?

8 A. No, ma'am, I didn't.

9 Q. How about the Cherokee County sheriff's department on
10 the way through Gaffney?

11 A. No, ma'am, I didn't.

12 Q. Phone call to 911?

13 A. No, ma'am, I didn't.

14 Q. And where were you in the van when Officer Phillips
15 made the stop?

16 A. Sitting in the back of the van.

17 Q. And you told Tammy to be quiet, she didn't need to talk
18 to him about anything?

19 A. Yes, ma'am.

20 Q. And you asked Mr. Emery for some money?

21 A. I don't remember doing that at all.

22 Q. You asked him for \$20. You go by the ATM, you can pay
23 him back the next day?

24 A. No, ma'am, I do not remember that at all.

25 Q. Tammy is the one who invited you into the home?

- 1 A. Yes, ma'am.
- 2 Q. So she was at the door in front?
- 3 A. Yes, ma'am.
- 4 Q. She opened the door?
- 5 A. Yes, ma'am.
- 6 Q. So if there was anything really going on, she could
- 7 have just walked out the door, because there is a ride,
- 8 right?
- 9 A. Yes, ma'am.
- 10 Q. Because there wasn't anything going on?
- 11 A. I don't know. I assumed there were.
- 12 Q. You assumed there was?
- 13 A. The way she acted.
- 14 Q. The way she acted?
- 15 A. (Shaking head yes).
- 16 Q. Not making a telephone call to you, not leaving when
- 17 her ride gets there, but staying around drinking, smoking
- 18 pot, drinking liquor, and you thought something was wrong?
- 19 A. Yes, ma'am, I did.
- 20 Q. Isn't it true something was wrong when you asked for
- 21 money and Mr. Emery said "I'm not going to give you any
- 22 more"?
- 23 A. I don't remember asking him for money.
- 24 Q. Do you remember picking up this stick?
- 25 A. Yes, I do.

1 Q. Part of an oak tree?

2 A. Yes, I believe so.

3 Q. And hitting him on the head with it?

4 A. Yes, ma'am, I do.

5 Q. But you only hit him one time?

6 A. Yes, ma'am.

7 Q. Where did you hit him?

8 A. In the head.

9 Q. Two hands on the stick?

10 A. Yes, ma'am.

11 Q. Like a baseball bat?

12 A. Yes, ma'am.

13 Q. Mr. Emery didn't have anything in his hand, did he?

14 A. Not that I recall.

15 Q. In fact, he was sitting on the couch --

16 A. No, ma'am.

17 Q. -- when he was blind-sided?

18 A. No, ma'am, he was not.

19 Q. Where was he?

20 A. He was standing up.

21 Q. Where?

22 A. With his back to me in front of the couch.

23 Q. You heard a thump and heard her scream, is that your
24 testimony?

25 A. Yes, ma'am.

1 Q. And then you came in the living room and what?

2 A. I seen her move away from him, jerk away from him.

3 Q. Uh-huh.

4 A. That's when I hit him.

5 Q. And you were coming out of the kitchen?

6 A. Yes, ma'am.

7 Q. Where did you get the stick?

8 A. It was right on the other side of the door propped up
9 against the couch.

10 Q. What was Mr. Long doing?

11 A. He was out on the front porch smoking a cigarette.

12 Q. So he was not in the room when any of this happened?

13 A. No, ma'am, he was not.

14 MS. LESKANIC: That's all I have, Your Honor.

15 THE COURT: Any redirect limited to what she went
16 into?

17 REDIRECT EXAMINATION BY MR. SHEALY:

18 Q. Who was driving the van?

19 A. Rick Long, sir.

20 Q. Thank you.

21 MR. SHEALY: Thank you. That's all I have, sir.

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

23 Is the defense ready to call their next witness?

24 MR. SHEALY: Your Honor, we would call Ricky Long.

25 You can -- he's in the solicitor's office.

1 THE COURT: Mr. Ricky Long.

2 RICKY LONG, having been first duly sworn,
3 testified as follows:

4 DIRECT EXAMINATION BY MR. SHEALY:

5 Q. Would you tell the judge and the jury your full name,
6 please?

7 A. Ricky Thomas Long.

8 Q. And do you know Scott Jones?

9 A. Yes, I do.

10 Q. Do you know Tammy Byars?

11 A. Yes, I do.

12 MR. SHEALY: And excuse me just for a moment, Your
13 Honor.

14 (Off the record)

15 (Back on the record)

16 BY MR. SHEALY:

17 Q. And do you know Jerry?

18 A. Not -- not particularly, no, sir. I know he was the
19 victim in this case. That's all.

20 Q. Now, what did you do in this particular case?

21 A. I -- I drove Ms. Byars up to Mr. Emery's house to --
22 she wanted to make money to clean his house, or whatever.
23 And then she wanted me to come and pick her back up about
24 ten o'clock. And I was just mostly was the driver on this.
25 I just drove to pick her up and -- to drop her off and pick

1 her up.

2 Q. Okay. And did you go back at ten o'clock and pick her
3 up?

4 A. Yes, I did.

5 Q. And was that -- why did you go back there to pick her
6 up?

7 A. She wanted me to come back and pick her up and take her
8 back to where she -- to Gaffney.

9 Q. She specifically told you ten o'clock?

10 A. Right, yes, sir.

11 Q. All right. Now, when you went back at ten o'clock, did
12 you pick her up?

13 A. Yes, we did.

14 Q. All right. But before you picked her up, what did you
15 do?

16 A. I drove to the house. Mr. Jones got out and went and
17 knocked on the door and I sit in my van until -- for him to
18 go and tell her to come on, we was ready to go. And Mr.
19 Jones went into the house. And while I sit in the van and
20 was waiting on them to come on, about a minute or so, a
21 couple minutes, he told me to come on in the house. Well, I
22 come on in the house and I sit in the front seat of the
23 house. This chair was in the front and the couch was on the
24 back, so you had to look back towards the couch to see, and
25 that's where I sit in the house right there while they was

1 drinking beer and stuff like that.

2 Q. Okay. Did you notice -- what did you do while you were
3 in there?

4 A. I just sit in that chair. When I first got in, I sit
5 down in that chair that's where I stayed the whole time
6 until I left.

7 Q. Were you watching television?

8 A. Yes, me and Mr. Emery was watching TV.

9 Q. What was on?

10 A. The race.

11 Q. And that had your attention?

12 A. Yes, sir, me and him was talking about the race, more
13 or less.

14 Q. Now, did Scott ever leave the room?

15 A. He left and went to the room in the back, which that --
16 you know, I don't know what was -- I know there was a door.
17 I thought the kitchen or something back there. I don't know
18 what, because I never got out of the chair. I never --

19 Q. Well, how many times did he leave the living room?

20 A. I would say maybe once or twice. I know he went and
21 got a beer and came back and then left again and went.

22 Q. Okay. Now, what was the next thing that you saw or
23 heard as you are watching TV?

24 A. Well, when him and Tammy come back in there, Tammy and
25 Mr. Emery, they was arguing a little bit about paying money,

1 or something like that, is all I know.

2 Q. Okay.

3 A. And so I just ignored them, because they was drinking,
4 you know, and I was just watching the race and then I heard
5 a thump. Then I looked back and I seen Mr. Jones holding a
6 stick and Mr. Emery holding his head and asked him why he
7 hit him for. That's when I got up out of that chair and I
8 left that residence.

9 Q. Did you see any other hits?

10 A. That's all I seen is. You know, if it was after, I
11 don't know, because that's -- the first one I got up and
12 left. I said "this is bull crap, I'm leaving."

13 Q. Did Mr. -- on that first hit, did Mr. Emery hit the
14 ground?

15 A. He was sitting on the couch holding his head. You
16 know, I didn't sit there to watch to see if he was bleeding
17 or what. You know, after I seen him what -- seen him hold
18 his head and ask Mr. Jones why he hit him, that's when I got
19 up and left. I didn't --

20 Q. When was the next time that you saw Mr. Jones?

21 A. When I left the residence, I was about halfway in the
22 yard to get in my van. I seen him come out of the house and
23 started walk in the other direction towards 29.

24 Q. And then what did you do?

25 A. Then I proceeded to get in my van and pull out. As I

1 pulled out of the driveway and pulled up, Ms. Byars come
2 around and hopped in the front seat crying and she was
3 hysterical, drinking, drunk, and all that. And I asked her
4 what was going on, you know, "you know that was really
5 wrong."

6 Q. Then what did you do?

7 A. And then I proceeded to come toward -- take a left and
8 come down 29 back toward Gaffney. That's when I seen Mr.
9 Jones walking down 29. That's when I give him a ride back
10 to Gaffney.

11 Q. Okay.

12 MR. SHEALY: Thank you, Your Honor. That's all I
13 have.

14 CROSS EXAMINATION BY MS. LESKANIC:

15 Q. All right. Mr. Long, so when Mr. Emery was struck --

16 Well, let me ask you this. I'll show you State's
17 Exhibit 7. Do you recognize this?

18 A. I -- it was a stick. I really -- because you had to
19 look really back to see where it was standing in the hallway
20 of the door.

21 Q. Okay.

22 A. I seen him holding something. I can't really say that,
23 but I know it was a stick. That could have been.

24 Q. Who was holding this?

25 A. Scott Jones was holding it.

1 Q. Do you see Scott Jones in the courtroom?

2 A. Yes, he's sitting there.

3 Q. Where is there? If you can identify him for the
4 record.

5 A. Mr. Jones sitting right there.

6 Q. What color shirt does he have on?

7 A. That dark shirt, gray shirt, black shirt.

8 Q. Sitting at the defense table?

9 A. Yes, ma'am.

10 Q. Thank you. I'm sorry, we are making a record. I don't
11 need to be silly with it, but --

12 A. Okay.

13 Q. And where was Mr. Emery?

14 A. He was on the couch, about the middle of the couch.

15 Q. Just sitting on the couch?

16 A. Yes, ma'am.

17 Q. And Tammy was sitting there also?

18 A. Yes, ma'am. She was like on the other side.

19 Q. And when the defendant struck him in the head, you said
20 "this is bull, I'm out of here"?

21 A. Right. When I looked back, I seen him holding the
22 stick down and I seen Mr. Emery holding his head and said
23 "why did you hit me?" That's when I got up and left. I
24 didn't want no part of it.

25 Q. So Mr. Jones stayed in there after you left?

1 A. Right, I went out first.

2 Q. Okay.

3 A. It was about halfway down across the yard and he came
4 out and walked the other direction --

5 Q. Okay.

6 A. -- from where I was parked.

7 Q. Do you believe, based on your observations that night,
8 that Ms. Byars was in any danger?

9 A. No. You know, I just -- Mr. Emery and them and Tammy
10 was arguing, just -- you know, how if you drink a little bit
11 and just say -- you know, if he paid her, you know, for
12 cleaning his house, or whatever. She wanted more money, or
13 something, and apparently he done paid her, or something,
14 and it was just get out of my face type deal.

15 Q. But nothing that you felt was in any danger or --

16 A. No, it was no -- no physical, no.

17 Q. Nothing physical?

18 A. No.

19 Q. Okay. Thank you very much.

20 THE COURT: Any redirect into what she went into?

21 MR. SHEALY: Yes, Your Honor. If I can just have
22 a moment?

23 (Off the record)

24 (Back on the record).

25

1 REDIRECT EXAMINATION BY MR. SHEALY:

2 Q. I want to show you State's Exhibit 4. Do you recognize
3 that?

4 A. That looks like Mr. Emery's house.

5 Q. Okay. Is that the door that you left out of?

6 A. The front door. My van with a parked down here.

7 Q. But did you come out that door that's --

8 A. Yes, sir, the front door.

9 Q. So it's a very short space between there and the road?

10 A. Right, the road is right here. You can see the road
11 right there.

12 Q. And you were about where?

13 A. I was right down here near the end of the -- about the
14 end of the --

15 Q. To the right?

16 A. The right. And then I looked back and I seen Mr. Jones
17 come out. He was walking towards 29. You see, 29 is right
18 here.

19 Q. So you are heading over here to the --

20 A. Right, to get in my van. My van was parked pulled in,
21 and I was going to the driver's side to get in to back out
22 and come up. When I come up that road, that's when Ms.
23 Byars come out and got in my van.

24 Q. And the chair that you were sitting in is in the far
25 side of the room?

1 A. No, when you walked through that door, it was sitting
2 right there in the front.

3 Q. So you were right there at the door when you left?

4 A. Right. Well, in the living room. I was in the living
5 room, not on the porch.

6 Q. No, no, I understand you are not on the porch, but you
7 are --

8 A. Right. As soon as you walk in that door, there was a
9 chair sitting right there.

10 Q. That's where you were?

11 A. Yes, sir.

12 Q. Okay. And so you had only covered a small distance
13 when Scott came out?

14 A. Right. I was about at the end of the house there. And
15 then I looked back and I seen him coming out, and -- you
16 know, about thirty seconds, something like that.

17 MR. SHEALY: Thank you, Your Honor.

18 MS. LESKANIC: No.

19 THE COURT: All right. Thank you, sir. You may
20 step down.

21 THE WITNESS: I'm sorry, Jerry.

22 THE COURT: Is the defense ready to call their
23 next witness?

24 MR. SHEALY: No, the defense rests.

25 THE COURT: All right. State, do you know if you

1 have anything in reply?

2 MS. LESKANIC: No reply, Your Honor.

3 THE COURT: All right. Ladies and gentlemen, we
4 have now concluded the presentation of the evidence in the
5 case. There is a matter or two of law that I need to take
6 up with the lawyers.

7 I'm going to instruct you again on not having any
8 discussions among yourselves about anything involved in this
9 case. I'm going to let you go with the bailiff and we will
10 get you back out just shortly.

11 (The following takes place outside the presence of
12 the jury panel)

13 THE COURT: Any matters of law I need to take up?

14 MR. SHEALY: Your Honor, I would just renew the
15 motion for directed verdict on the same grounds.

16 THE COURT: All right. And I have not -- the
17 testimony I have received since I have ruled on the motion
18 earlier has not changed my opinion, so I do not believe I
19 need to hear from the State. I would deny the motion.

20 All right. Are y'all ready to proceed with
21 closings?

22 MR. SHEALY: Your Honor, I have got a couple of
23 requests for charge. I hope that you have already got these
24 in your repertoire, because -- I found over lunch.

25 THE COURT: Do you have a copy for me?

1 MR. SHEALY: Well, they are from Judge Ervin's
2 book, requests to charge. That's the only request to charge
3 book the Public Defender's office has. I understand Judge
4 Anderson has come out with a much more recent one, but we
5 don't have access to that.

6 So what we would ask that you charge in his book,
7 one is Section 8-5, the defendant's right to judge opponent
8 harshly. And I would hand the book up to you.

9 And the other is coming to the defense of another.
10 I believe here he calls it defense or a friend or relative,
11 Section -- it's 14-10.

12 Your Honor, I could xerox them and hand them to
13 counsel.

14 THE COURT: Let the State take a look at them.

15 MR. SHEALY: Do you have your own charge about
16 coming to the defense of another?

17 THE COURT: Well, since this is the first I have
18 been apprised of it, I haven't looked.

19 MR. SHEALY: Oh, sorry, judge.

20 THE COURT: I have prepared my charges based upon
21 the information that I have received thus far in the case.

22 MS. LESKANIC: I know that you haven't look at
23 this, Your Honor.

24 I would respond first to defendant's right to
25 judge opponent harshly. That discusses a bad blood or ill

1 feelings between the parties where they have possibly had
2 contact with one another in the past. And so then you have
3 a right to, I guess, be on your guard a little bit more.
4 But in this case I think everyone testifies that they didn't
5 know Mr. Emery. There is no ill will between these parties.
6 They didn't even know each other, so I don't think that
7 charge is appropriate at all.

8 Defense of others, I think first there would have
9 to be a right of self-defense, and I don't think Ms. Byars
10 testified to anything that she heeded to be defended from.

11 And, first, she would have to be entitled to
12 self-defense for Mr. Jones to be entitled to defense of
13 others. And her testimony was everything was great. Nobody
14 was arguing. There were no problems at all between the
15 parties, and that's the same thing of Mr. Emery. He said
16 everybody was polite up to the point that this happened. So
17 I don't think he is entitled to that instruction either, and
18 I would object to the court granting either requests.

19 MR. SHEALY: Judge, I'll hand the book up.

20 Your Honor, as to the ill will, the testimony of
21 the defendant was based on what Tammy Byars told him, that
22 he was concerned about his physical safety and her physical
23 safety. The -- and, therefore, while he was sitting there,
24 he had ill will towards, based on what Tammy had told him.

25 The self-defense, the testimony was -- once again,

1 it's a state of mind, but he heard things in the living room
2 that lead him to believe that Tammy was under attack and
3 that he went to her defense. He thought he was rescuing
4 her. And even Mr. Long testified there was an argument
5 there. Now, there is a disagreement of facts as to how
6 violent the argument was.

7 THE COURT: I'm taking a look at the defendant's
8 right to judge opponent harshly and I'm reading from the
9 book that you were kind enough to hand up, Section 8-5.
10 Tell me what you would propose I charge.

11 MR. SHEALY: Your Honor, we would propose that you
12 charge that where the defendant has information that his
13 physical safety is in danger and holds the person that's in
14 danger the ill will, he has the right to view him harshly,
15 to take actions to defend himself.

16 THE COURT: So you are requesting -- I'm sorry.

17 MR. SHEALY: Or others.

18 THE COURT: So you are requesting a charge on the
19 defendant's right to judge opponent harshly based upon not
20 his belief that he was in harm's way, but because of the
21 third -- because of the third person, Ms. Byars, was in
22 harm's way?

23 MR. SHEALY: Well, it was his belief at the time.
24 It became his belief after Ms. Byars talked to him.

25 THE COURT: I understand that. I mean -- and I

1 just want to be sure you are requesting a defendant's right
2 to judge opponent harshly, not based upon his own personal
3 fear or his own personal concerns for his safety, but that
4 of Ms. Byars?

5 MR. SHEALY: A little bit of both, Your Honor.
6 His testimony was he felt uneasy when he got there. He was
7 trying to figure out what was going on. He went into the
8 kitchen. Ms. Byars went in and said something to him, and
9 that he was concerned about both Ms. Byars and his own
10 physical safety, that he believed that he was going to be
11 harmed, that he was in some sort of danger. I don't
12 remember the exact words, but it was along those lines. So
13 he was concerned for both of them, himself and Ms. Byars.

14 THE COURT: Any comment?

15 MS. LESKANIC: I stand by my original position,
16 Your Honor. I think his testimony was that he stayed there
17 for thirty minutes getting drunk. I don't know where now
18 he's going to try to say "well, I was very fearful during
19 that time." There was no past ill will between these two.
20 He never met Mr. Emery. Mr. Emery hadn't said anything to
21 him or done anything to him. That's based on everyone's
22 testimony.

23 THE COURT: All right. And the other charge in
24 the book that you wanted me to take a look at was what?

25 MR. SHEALY: 14-10. That would require some

1 tailoring, but --

2 THE COURT: All right. Does the State wish to be
3 heard?

4 MS. LESKANIC: I haven't had an opportunity to
5 read that one, Your Honor, but if it's defense of others, I
6 would argue, first, that she has to -- that Tammy would have
7 to be entitled to a charge of self-defense. We didn't get
8 much testimony on what the supposed argument was about,
9 other than it was over money.

10 I believe Tammy and Mr. Emery both testified she
11 had already been paid, so she was requesting more money, I
12 would assert she would be at fault in bringing on any
13 difficulty that did occur by demanding more money, and,
14 therefore, would not be entitled to a charge of
15 self-defense; thereby, denying the defendant a right to a
16 charge of defense of others.

17 THE COURT: Anything in reply?

18 MR. SHEALY: Your Honor, I believe that if he
19 reasonably thought that she was under an attack, that a
20 reasonable person in his situation would have thought that,
21 that he would be entitled to come to her rescue.

22 THE COURT: All right.

23 I don't see the applicability of the defense of
24 other's position. Even viewing the evidence in the light,
25 which this court is trying to do in a very strong manner,

1 towards the defense to even try to justify a charge to that,
2 I do not see the applicability of that position, based on
3 the facts that have been presented in this case, not the
4 least of which is that the person who supposedly was being
5 defended absolutely did not present testimony to this court
6 that I can construe to indicate she was in fear of her
7 safety, of her well-being. I do not view her testimony in
8 any way consistent with that position, as well as even if
9 you take her testimony out of it, that at the time that the
10 defendant's admitted use of the weapon to inflict the bodily
11 injury on the victim, that at that moment I don't recall the
12 testimony establishing that the one being defended was, in
13 fact, in fear, regardless of the actual statement, that the
14 record simply seems to be lacking, which is the statement
15 that was made in the kitchen. By the time that the person
16 supposedly being defended went into the other room, there is
17 a disconnect in evidence for that of which a jury could
18 reasonably infer that person being defended was, in fact,
19 still infer in any number of ways to where I believe that
20 the defense of self-defense, that I will not review for
21 purposes of the record, so I'm not going to charge that.

22 I do not believe that the charge on -- that's
23 related to Section 8-5 on defendant's right to judge
24 opponent harshly is applicable either to this case. I would
25 not charge it.

1 I have tried to look at the evidence in making
2 this decision in a light that is definitely consistent with
3 the position that's tried to be put forth by the defendant
4 in this case, which almost does require me to view blindly
5 the testimony that has been presented by the other witnesses
6 in order to even begin to see an appropriate analysis where
7 the defendant's right to judge opponent harshly would apply.
8 But if you just take a look at the most favorable testimony
9 to the defendant, which is that of the defendant, the
10 brevity of the relationship between the victim and the
11 defendant seems to cut against the applicability of this
12 defendant's right to judge opponent harshly, and many other
13 factors, but also the one that I have never heard that the
14 defendant was the one -- I have not heard the evidence that
15 someone could reasonably conclude he was the one put into
16 the position to where he felt he was in fear. I do not
17 believe we have had any indication that there has ever --
18 was ever a weapon, or any object, or any type of item within
19 the possession of the victim, or anywhere near the victim,
20 that would have caused some -- that the victim could have
21 used to attack the defendant.

22 I'm just having -- I'm trying to view this at this
23 stage in the way that I know that I'm required to do so,
24 because I want to give a liberal view towards the request to
25 charge. I'm just not seeing that that request to charge

1 applies to the facts of this case. I'm just not seeing it,
2 so I'm not going to charge that section. All right.

3 MR. SHEALY: Your Honor, because I never
4 understand what I'm supposed to do to preserve that request,
5 could I be protected on the record on that?

6 THE COURT: And I have heard that for purposes of
7 appellate review, I can tell you you are protected on the
8 record and it doesn't matter what my opinions are.

9 MR. SHEALY: Then, Your Honor, with all --

10 THE COURT: You have stated your objection on the
11 record. I am not aware of anything else that you need to
12 do. You have asked me to charge this, so I have denied your
13 request.

14 MR. SHEALY: Thank you.

15 THE COURT: If you feel like there is something
16 else that needs to be done, you need to do, but I'll tell
17 you I have been advised simply because I state that you are
18 protected on the record doesn't mean that you are reflected
19 on the record.

20 MR. SHEALY: Thank you, Your Honor, and you
21 correctly stated that I have objected.

22 Your Honor, at this time may I put on the record
23 my response to the hearsay objections about what my -- we
24 did that at the side bar and I just want to make sure that
25 that's on the record as well.

1 THE COURT: Probably I'll tell you again, Mr.
2 Shealy, probably for purposes of appellate review, they
3 would look disfavorably upon post-presentation of evidence.
4 You are now stating facts.

5 I do not have any problem with you now telling me,
6 because the State was present during the bench conference,
7 you know, but if you want to give it a try to make the
8 record more complete, you are more than happy to do so now.

9 MR. SHEALY: Thank you, Your Honor.

10 Your Honor, I asked on two occasions, I believe it
11 was limited to two occasions, the defendant about what did
12 Tammy Byars tell him. And each time the State objected and
13 each time we had a side bar and each time my response was
14 that I was not offering what Tammy Byars told him for the
15 truth of the matter asserted, but to show his state of mind
16 at the time. And you heard that and your instructions to me
17 was to rephrase the question. That's what I wanted to put
18 on the record.

19 THE COURT: All right. And I believe that I
20 did -- I believe on the record both times when we separated
21 from the side bar I did state my instructions of please
22 rephrase the question.

23 MR. SHEALY: Thank you.

24 THE COURT: Okay.

25 MR. SHEALY: Oh, and one last thing. I would ask

1 for a charge on the lesser included ABHAN.

2 THE COURT: All right, I would grant that request.

3 MS. LESKANIC: I have no objection, Your Honor.

4 The only difference is malice and that's for the jury to
5 accept or reject.

6 THE COURT: All right. May I ask y'all to take a
7 look at the verdict form that I have prepared?

8 MS. LESKANIC: Your Honor, will you be charging
9 voluntary intoxication is no defense?

10 THE COURT: No.

11 MS. LESKANIC: Okay.

12 No objection to the verdict form by the State,
13 Your Honor.

14 MR. SHEALY: Your Honor, I see you anticipated my
15 request for a lesser included in the verdict form. I
16 appreciate that.

17 THE COURT: I prepared was to, in the event you
18 didn't request it. I wasn't going to put words in your
19 mouth.

20 MR. SHEALY: Thank you.

21 THE COURT: All right, let's, I want to go off
22 record for just a moment.

23 (Off the record)

24 (Back on the record)

25 THE COURT: I have reviewed the substantive part

1 of the charge with the lawyers. They have expressed no
2 objection, but after I give the charge to the jury they can
3 renew any objections that they might decide.

4 If the lawyers would want to approach for one
5 minute?

6 (Whereupon, the lawyers approached the bench for
7 an off-the-record discussion)

8 THE COURT: We are ready to proceed then and bring
9 the jury back.

10 (The following takes place in the presence of the
11 jury panel)

12 THE COURT: Mr. Foreman, ladies and gentlemen,
13 thank you very much for your attention so far.

14 We have now reached the stage of the case where
15 you are about to receive what is commonly referred to as the
16 closing arguments from the attorneys.

17 Now, ladies and gentlemen, I need to instruct you
18 and inform you, as it was with the opening statement, the
19 closing arguments are not evidence in the case, but it does
20 give the attorneys the opportunity to argue to you what they
21 believe the evidence established in the case and also what
22 they feel what appropriate inferences can be drawn from the
23 evidence that has been presented to you.

24 In the event that one of the lawyers argues facts
25 that you do not recall having been presented in the case, or

1 you do not agree with the inference from the facts as argued
2 by the lawyers, that is within your prerogative as the jury,
3 but I will let you know that the arguments themselves are
4 not to be considered as evidence in the case by you.

5 But at this time we will receive the closing
6 arguments.

7 MR. SHEALY: If I may, Your Honor?

8 THE COURT: Yes, sir.

9 MR. SHEALY: We have closed the trial part of this
10 case. There is not going to be any more facts presented to
11 you. As soon as we get done arguing, the judge instructs
12 you, then we are done. It's over with. It will be up to
13 y'all. After he instructs you, you will finally be able to
14 go back and talk about all the things that you heard today.
15 This has been a very quick trial, but a whole lot of words
16 have been said and there are still some confusing things
17 that y'all are going to have to resolve.

18 Now, when I'm in the middle of cross-examining
19 people or examining people, sometimes I get things wrong.
20 As the judge has already told you, and I'm sure he will tell
21 you again, it's your recollection of the facts as to what
22 happened, not mine.

23 This is what I heard. Jerry Emery doesn't know
24 who did it. He testified he didn't know who it was, and
25 that's supported by the 911 call. Whenever they called him

1 back and he said that somebody had blind-sided him. He
2 knows he got hit. We know he got hit. There is no question
3 about that. We have got pictures of it. You are going to
4 see that. And that's a horrible, horrible thing that
5 happened to him. It's a horrible, horrible thing that Scott
6 hit him with that stick, Scott Jones, but we have got to go
7 beyond all that. You have got to look at all of the
8 evidence that's been presented here.

9 First off, Tammy Byars.

10 Well, first off, the 911 officer and you have
11 heard the 911 tape, but Tammy Byars came in and testified
12 one way, and then she would be asked a question by the
13 solicitor and she would testify another way. And then the
14 solicitor would ask her two different ways, for her to
15 choose. And there is coin flip as to which way she chose,
16 but then on cross-examination she routinely changed her mind
17 as to what happened. She routinely contradicted herself.
18 She was picked up first when they left. She was picked up
19 second when they left. She -- one of the things she said
20 was that it was not in her character to beat on an
21 ex-boyfriend. Then right after that what did she say? She
22 said "I often do things that might not be in my character,"
23 and that wasn't even in response to a question. She just
24 said it.

25 Tammy Byars that day got money from Jerry. Went

1 down here and got crack cocaine. She didn't want to share.
2 She said she didn't go back to Jerry, even though she knew
3 he was waiting for her, because she knew she had gotten all
4 the money that she was going to get from him. So she snuck
5 off in the woods and smoked the crack cocaine, so she smoked
6 crack cocaine. And then shortly after that what did she do?
7 She calls Jerry for more money. That doesn't make any
8 sense, but that's what she said.

9 She tells Scott and Ricky that she's going to
10 clean his house for money, and that's not true. Even Mr.
11 Emery, Jerry Emery, testified that they had money for sex.
12 Now, sex wasn't the whole thing, but visiting, going back
13 and forth, but, nevertheless, she wasn't there to clean the
14 house. We never did find out if she was ever paid the
15 second time she went to Blacksburg. Sentence after
16 sentence, paragraph after paragraph, one paragraph said she
17 was paid and she was asking for more money. Another -- the
18 next paragraph out of her mouth would be "I wasn't paid, so
19 I couldn't have gotten any more money." So that -- Tammy
20 Byars is hard to understand anything that she had to say.

21 Now, she was the last one there and she says that
22 she saw Scott hit him twice, but yet Jerry Emery says he was
23 hit three or four times. You have got testimony from Mr.
24 Emery, who said he had two separate cuts on the top of -- on
25 his heads, plus he had a broken hand.

1 Tammy Byars, I submit to you, just whatever she
2 had to say is just not believable. And on a couple of times
3 she said stuff backs us up. And, of course, like we would
4 like you to believe that, and the judge will tell you what
5 you can believe, what you choose to believe. You can pick
6 and choose as to what people say. But if it's favorable to
7 my client, of course I want you to believe her. She said
8 that he was the first to leave the house.

9 Now, nobody tried to stop this. Apparently he hit
10 him, dropped the stick and left. And then later he gets
11 picked up as he's walking down Highway 29 and he tells
12 "Tammy, get out."

13 Jerry Emery and Tammy would have you to believe
14 that there was no argument, but there is an argument there.
15 There was an argument. Jerry might not remember it. He got
16 hit over the head, and they had been drinking and smoking
17 dope. Tammy is going to say whatever Tammy is going to say
18 at the time that she said it, which we don't know about
19 that. The -- but those two are the ones saying that there
20 wasn't argument and then they are denying it. Jerry did say
21 "well, she did ask for some more money." Every now and then
22 Tammy would say "well, except I was going to ask him for
23 more money. I wasn't going to argue." But Ricky said
24 "yeah, there was an argument going on." He downplayed it.
25 He wasn't paying any attention to it, because he was

1 watching NASCAR. He was watching the races and he didn't --
2 he wasn't paying any attention anything else that was going
3 on.

4 Now, Scott, he told you that he went into the
5 kitchen. He never went to go into the bathroom. He just
6 went into the kitchen a total of two times. The first time
7 he goes in, he's going in to get a beer, Tammy comes in and
8 tells him something. And as a result of whatever she told
9 him, he became very concerned. He mentioned as soon as he
10 walked in he felt like something was going on, but he didn't
11 know. He couldn't put his finger on it. He was trying to
12 figure out -- a couple of times he said he was trying to
13 figure out what was going on here, but Tammy said something
14 to him and that -- he told you that he was -- he was
15 concerned for his welfare. Not just his, but also Tammy's.
16 And then he goes back into the living room and he's sitting
17 there and he's thinking what is going on. And then he got
18 up to go back into the kitchen and he hears a thump and
19 something came rolling across the floor and he hears Tammy
20 scream. And he told you. What did he do? He went to help
21 her. He thought he was rescuing her.

22 Now, he came in person. As soon as all this was
23 going on, he grabbed the stick, he hit Mr. Emery one time
24 over the head. He didn't make it pretty. He didn't try to
25 dress it up. He told you he hit him over the head. He told

1 you why. He thought he was coming to Tammy's rescue. He
2 immediately pointed to Tammy and told her to get out, and
3 put down the stick and left the house. He thought he was
4 coming to the defense of Tammy, but Tammy didn't back up any
5 of that.

6 Ricky, who could care less how many times who hit
7 who with what, he's the one that has no dog in this fight as
8 to who hit who. What did he say? "I heard a thump." He
9 didn't say he saw Scott hit him. He said "I heard a thump
10 and I looked up and Jerry was still standing." Scott held
11 the stick. And then he left. And there is some question as
12 to who left first. He claims he left first. Scott says
13 that he left first. And Tammy says that Scott left first.
14 Jerry, he doesn't know who left first, because he was hurt.

15 Now, getting back to what Ricky said. Ricky said
16 that he -- that as soon as he got outside the house -- and
17 you will see it on State's Exhibit 4, you will see the
18 house. You will be able to take that back with you. He was
19 halfway coming towards -- halfway across this yard when
20 Ricky -- I mean when Scott came out right behind him and
21 walked in the opposite direction heading for Highway 29. So
22 even if you believe that Ricky left first, Scott was right
23 on his heels. He was -- even by Ricky's testimony and by
24 Scott and Tammy's testimony, he left first. Scott left
25 first. He didn't have time to hit him more than that one

1 time that Scott saw, that I heard. I mean not Scott, that
2 Ricky heard. He didn't see but he heard, so he didn't have
3 time to do any more damage to Jerry.

4 Now, a couple of things for you to do. Remember
5 what I asked you to look for issues of truthfulness and
6 stuff like that? People come to a guy's house, sitting in
7 the living room and everything is going fine. Nothing,
8 nothing untoward happened to anyone. Not an angry word
9 spoken and then all of the sudden somebody is beating
10 somebody with a stick? Something -- something has got to
11 bridge the gap. Something happened. Something happened.
12 Otherwise, it makes absolutely no sense.

13 And Scott tells you he only hit him once and that
14 was to save Tammy and then he left. Tammy tells you that he
15 hit him twice. Well, that doesn't stick with the facts.
16 The only person that was still in there, in that house, not
17 injured was Tammy for any length of time. Scott can't tell
18 you how -- he can account for one hit and he did that. He
19 told you. I wished he had gotten up and tell you he didn't
20 hit him, but he told you he hit him. He told you why he hit
21 him, coming to Tammy's defense. But as soon as he hit him,
22 he dropped the knife -- the stick and he left.

23 Now, this is not assault and battery with intent
24 to kill. There is no intent to kill here. As soon as he --
25 he stopped. He left -- he dropped the stick and he left.

1 Told Tammy to get out, dropped the stick and he left.

2 Now, the judge is going to advise you that assault
3 and battery with intent to kill has a lesser included
4 offense, and he's going to explain to you what a lesser
5 included offense is, and that lesser included offense is
6 assault and battery of a high and aggravated nature.

7 Now, we submit -- we told you why Scott did what
8 he did. The only thing this case has ever been, in our
9 estimation, is the assault and battery of a high and
10 aggravated nature. We still submit that Scott is not guilty
11 of it. We told you about his mindset, but we do want you to
12 consider that whatever you listen -- I mean, whenever y'all
13 go in your deliberation.

14 We are convinced that when you come back, after
15 considering everything that's been said, when you've
16 compared and contrasted all the testimony and all that, we
17 are convinced that at the very least you will come back with
18 assault and battery of a high and aggravated nature, but we
19 also believe that you will come back not guilty. Thank you.

20 THE COURT: Yes, ma'am.

21 MS. LESKANIC: May it please the court.

22 Ladies and gentlemen of the jury, Judge Hayes at
23 the conclusion of my statement is going to instruct you on
24 the law. I know that he's going to tell you about the
25 credibility of witnesses, who you believe. You will have

1 some evidence for you to back with you to the jury room,
2 take a look at the pictures, the weapon that was used, the
3 911 call. If you want to hear those again, they will bring
4 the tape player back for you. If there is any testimony
5 that you want to hear from a witness. If I say something in
6 my closing or Mr. Shealy said something in his closing, you
7 don't quite remember it that way, you ask that that be read
8 back to you. The court reporter has been making a record of
9 everything that goes on, so that's still available to you.
10 You can't have any more live testimony, but that is
11 available.

12 This case comes down to credibility of witnesses
13 and who you do believe. We heard from the defendant, his
14 version of what happened when he was coming to a woman's
15 rescue. I would say chivalry is dead in this case and that
16 is simply not true. None of the facts bear his version of
17 these events.

18 We start, first of all, with the 911 call. We
19 were able to hear who Mr. Emery called. 911 was contacted
20 and then you heard from Mr. Emery. He had to come in here
21 today and do something that's very hard. He told you the
22 truth, that he had somewhat of a relationship with Tammy,
23 but on this day he has already taken from her earlier that
24 morning. He had given her money. She left him to go smoke
25 some crack and never came back. And then he still wants to

1 be with her and agrees to give her some money, more money,
2 if she will come back and spend time with him. And I can
3 tell you after meeting with Mr. Emery, that's a hard thing
4 for him to do, to come in here and tell you that.

5 And he also told you that he is at home with Tammy
6 when they got a knock at the door. And Tammy goes to the
7 door, and the defendant says this, she opens the door and
8 Scott Jones comes in. He doesn't know this guy. He is in
9 there trying to spend time with Tammy and have a nice
10 evening and now two strange men coming into his home. If
11 there was any uneasy feeling in the house, that would be it.
12 Why were these two men in my house now when I'm trying to
13 spend time with Tammy? But he's nice. He offers them a
14 drink. They have a drink. They even smoke some marijuana.
15 And his testimony was, and Tammy's, that at some point Tammy
16 asked for more money. And Mr. Emery says that even Mr.
17 Jones, the defendant, asked for some money, "give me \$20 and
18 I'll pay you back tomorrow. I'll get the money from the
19 ATM." He said "no, I'm not going give you any more money."
20 He's drinking vodka. He's drinking beer. He's been
21 drinking before he got there.

22 I submit he got upset when he was denied that
23 money, he saw the stick. He saw an opportunity and he
24 wasn't going to let Mr. Emery tell him no. He came up to
25 him while he was sitting on the couch and he swung this and

1 hit him in the head. Not one time. At least two times. We
2 have got a laceration on the right side of his head, head
3 split open in the back. A broken arm. He couldn't even
4 give a written statement to the police. And if you will
5 look at State's Exhibit 14, which you will have back there,
6 you can still see the blood on this stick. And that matches
7 with this. Just be careful where you touch this.

8 Mr. Shealy said that there are some confusing
9 things to resolve. There is only one thing to resolve: Did
10 Scott Jones hit Mr. Emery in the head with this weapon on
11 that night? Nothing else matters.

12 When Tammy came in here, and I know she was
13 confusing, but she told you that she is charged with armed
14 robbery in this incident. She's in jail on that right now.
15 And she admitted to you that after Mr. Emery was down and
16 bleeding and hurt, she took his wallet. But she never said
17 that she was in any danger. She never said "he hasn't paid
18 me yet." She said "everything was fine. Everything was
19 quiet. I had already been paid my money. Maybe I asked him
20 for more, maybe I didn't," but nothing along the lines of
21 what the defendant is saying, and that would help her case.
22 She is still charged with armed robbery. It would help her
23 if she said "yeah, he was beating up on me and he hasn't
24 given me my money and this guy came to my rescue and I took
25 the money that I was due." That's not what she said. She

1 came in here and said "he did this. I don't know why, and
2 then I did take his wallet, and I'm facing those charges
3 now."

4 And his version of what he told you would, it
5 actually helped us, that she wasn't in danger that night.
6 Never. She didn't call for the ride. They just showed back
7 up. And when she opened the door, she could have just left.
8 So the defendant, he was very worried, so he was going to
9 sit there and drink Mr. Emery's liquor and drink his beer
10 while he tried to figure out what was going on. It doesn't
11 make sense. Judge the credibility of the witnesses. Who is
12 going to tell you the truth as to what was going on that
13 night and who is not?

14 Now, Ricky Long, who the defense called, said they
15 were talking about money, but there was nothing physical.
16 There was no thump. There was no screaming by Tammy. And
17 Ricky Long wasn't on the porch, like the defendant said. He
18 was sitting in that rocking chair, in recliner, the whole
19 night. Everybody says that.

20 And everybody, including the defendant, says he's
21 the one that hit Mr. Emery with this.

22 And Ricky Long said that he left the house first.
23 As soon as he saw that first swing, he said "this is bull.
24 I'm out of here." And he said about thirty seconds later
25 that's when the defendant came out. That's plenty of time

1 to deliver a couple more blows.

2 I wish I could give you a concrete reason here why
3 he did it. I don't know why people do a lot of things.
4 Maybe being told no about the money. Maybe he and Tammy had
5 some kind of other discussion in the kitchen. I don't know.
6 I didn't charge Mr. Jones with anything to do with the
7 money.

8 What the facts show, and I'm asking you to find
9 him guilty of, is what we are sure he did, and that is an
10 assault and battery with intent to kill.

11 The judge is going to instruct you on the law. I
12 want to talk a little bit about that for you, because it is
13 confusing. Before I do that, let me just -- as I said, Mr.
14 Emery said there was no yelling or arguing. His statement
15 was everybody was nice and polite until that went down.
16 Tammy Byars, no one was angry. Ricky Long, there was
17 nothing physical, there was no screaming.

18 And Al Phillips who testified, that officer, said
19 that when he pulled the van over, that the defendant was in
20 the back of the van trying to hide.

21 MR. SHEALY: Objection, Your Honor. That wasn't
22 his testimony.

23 THE COURT: Ladies and gentlemen, I told you at
24 the beginning it's your prerogative to recall the facts as
25 you recall them and that the arguments presented by counsel

1 would not be necessarily the facts of the case.

2 You may proceed.

3 MS. LESKANIC: Thank you, Your Honor.

4 He appeared to be hiding in the back of the van.

5 And then when Tammy Byars tries to talk to Al Phillips,

6 "don't talk to him. Don't talk to him.

7 "Why not? He's an officer. Tell the officer.

8 "No."

9 It doesn't make sense.

10 They drop her off; wait two and a half hours to
11 come back and get her, although he's very concerned about
12 her entire time; drinks five vodka shots and two beers in
13 thirty minutes. And he is so concerned about Tammy also
14 that after he hits Mr. Emery in the head, beats him in the
15 head, he leaves and leaves Tammy in the house.

16 The facts are they went to pick up Tammy and knew
17 she was going to have some money. She was supposed to get
18 paid and maybe they wanted some of that money too. And they
19 want their hit. Donald Jones was drunk. He was told no,
20 that he wasn't getting any money and wasn't going to take
21 no. And he attacked Mr. Emery when he had his back to him
22 sitting on the couch talking to Tammy, Ricky Long in the
23 chair, and out of nowhere, just like he said on the 911 tape
24 "I was sitting here and I was blind-sided."

25 Assault and battery with intent to kill is defined

1 as an unlawful act of a violent nature to the person of
2 another with malice aforethought. That sounds very
3 complicated. That's why I want to talk to you a little bit
4 about unlawful act of violent nature. Was it an unlawful
5 act? Did he have a right to hit him in the head? No. He
6 did it just because he got mad. And after he did it, he
7 goes walking down the road probably to cool off, how some
8 people do. You get made, you get angry and you do something
9 and you take off out the door and you go waking. And that's
10 what he did. He didn't get back in the van. He goes off
11 then to cool off, because he had just done something really
12 bad.

13 Unlawful act of a violent nature. Certainly
14 violent to hit somebody in the head with this. And I want
15 you to hold it and feel it. Think about Mr. Emery being
16 hit. Mr. Jones said he held it like a baseball bat and
17 being struck in the head with this.

18 Intent to kill? Probably thought he would die.

19 Person of another? It was Mr. Emery.

20 With malice aforethought. Malice is defined
21 different ways. The judge is going to give you a definition
22 of malice. If you intend to do serious bodily injury to
23 another person, you as a jury can infer malice. And I don't
24 know how you would intend to do anything except serious
25 bodily injury when you use a weapon of this type to strike

1 someone in their head. That's serious bodily injury and you
2 can infer malice.

3 You can also infer malice if you find that he had
4 an ill or wicked heart. There was no reason for him to do
5 this. Everybody in that house, except for him, the one who
6 is on trial, said there was nothing physical going on, there
7 was no arguing, and he did it anyway. And that is a wicked,
8 ill, depraved heart. That is malice. That is the heart of
9 malice.

10 You can also infer malice from the use of a deadly
11 weapon. Doesn't have to be a deadly weapon. It can be
12 something nice to display in your home, but when you swing
13 it up against somebody's head, it quickly becomes a deadly
14 weapon. And you can infer malice him using that in that
15 way.

16 It's also defined as a wrongful intent to injure
17 another, or having a reckless disregard for the safety of
18 others.

19 And you, the jury, get to decide whether malice
20 exists in this case. There was no reason for him to do this
21 to Mr. Emery. None. There wasn't any ill words between the
22 two of them. They didn't even know each other. No bad
23 blood. No bad background. He just wanted to do it. It is
24 evil.

25 You do not have to find a specific intent to kill.

1 Although the wording says assault and battery with intent to
2 kill, the judge will instruct you you do not have to find
3 that he wanted to kill him. All you have to find is a
4 general intent to do serious bodily injury. That is what
5 that means under the law. So if you find that he intended
6 to do serious bodily injury, and, again, I can't see how you
7 find it any other way, then that is assault and battery with
8 intent to kill, and that is what I want you to find him
9 guilty of.

10 You will have a choice of assault and battery of a
11 high and aggravated nature. The only difference between
12 those two is the existence of malice.

13 If you find that there was malice, that he used a
14 deadly weapon, he had an evil heart, or that he intended to
15 do serious bodily injury, you may infer malice and find him
16 guilty of assault and battery with intent to kill. That is
17 what he did, that is what he is guilty of, and that is the
18 verdict that I ask you to deliver. Thank you.

19 (Whereupon, at 4:05 p.m., the Court instructed the
20 jury panel)

21 THE COURT: Ladies and gentlemen, this indictment
22 charges the defendant with assault and battery with intent
23 to kill.

24 Now, I'll remind you that the fact that the
25 defendant was arrested, charged and indicted in this case is

1 not evidence in this case and cannot be considered by you as
2 evidence of guilt in this case, nor does it create any
3 presumption or inference of guilt. This document is simply
4 the formal written instrument which contains the charge made
5 against the defendant. It is the formal document by which
6 this case is simply brought to court.

7 Ladies and gentlemen, the defendant has pled not
8 guilty to the charge and that plea of not guilty puts the
9 burden on the State to prove the defendant guilty.

10 A person charged with committing a criminal
11 offense in South Carolina is never required to prove himself
12 innocent. I charge you that it is an important and
13 important rule of law that the defendant in a criminal
14 trial, no matter what the seriousness of the charge may be,
15 will always be presumed innocent of the crime for which the
16 indictment was issued, unless guilt has been established,
17 has been proven by evidence satisfying you of that guilt
18 beyond a reasonable doubt.

19 Now, the presumption of innocence does not end
20 when you begin your deliberation, but it accompanies the
21 defendant throughout the trial, until you reach a verdict of
22 guilt, based on evidence satisfying you of that guilt beyond
23 a reasonable doubt.

24 Now, presumption of innocence is like a robe of
25 righteousness placed about the shoulders of the defendant,

1 which remains with the defendant until it has been stripped
2 from the defendant by evidence satisfying you of the
3 defendant's guilt beyond a reasonable doubt.

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

9 Now, the State has the burden of proving the
10 defendant guilty beyond a reasonable doubt. Some of you may
11 have served as jurors in civil cases, where you were told
12 that it is only necessary to prove a fact is more likely
13 true than not true, such as by the greater weight or the
14 preponderance of the evidence. Now, in criminal cases the
15 State's proof must be more powerful than that. It must be
16 beyond a reasonable doubt. Proof beyond a reasonable doubt
17 is proof that leaves you firmly convinced of the defendant's
18 guilt.

19 Now, there are very few things in this world that
20 we know with absolute certainty and in criminal cases the
21 law does not require proof that overcomes every possible
22 doubt.

23 If, based on your consideration of the evidence,
24 you are firmly convinced that the defendant is guilty of the
25 crime charged, you must find the defendant guilty.

1 If, on the other hand, you think there is a real
2 possibility that the defendant is not guilty, you must give
3 the defendant the benefit of the doubt and find him not
4 guilty.

5 Now, I'll remind you that during this trial you
6 and I have had certain duties to perform. As the trial
7 judge it has been my responsibility to preside over the
8 trial of this case.

9 And I also have the duty to rule on the
10 admissibility of evidence offered during this trial.

11 You are to consider only the competent evidence
12 before you. If there was ever any testimony ordered
13 stricken from the record during this trial, you must
14 disregard that testimony. You are to consider only the
15 testimony which has been presented from the witness stand,
16 and any exhibits which have been made part of the record of
17 this trial.

18 Now, I have the additional duty to charge you the
19 law applicable to this case. As the presiding judge, I am
20 the sole judge of the law that you apply in this case, and
21 it is your duty as jurors to accept and apply the law as I
22 now state it to you. If you already have an idea as to what
23 the law is or what the law should be and it disagrees what
24 I'm now telling you law is, you must abandon that idea,
25 because you were sworn to accept and apply the law exactly

1 as I state it to you.

2 In every case in this court a trial before a jury,
3 the jury becomes the sole and exclusive judge of the facts
4 of a case. A trial judge cannot intimate, state, comment
5 on, or make any statement to a trial jury about the facts in
6 a case. Since you, the jury, are the sole judge of the
7 facts in this case, you are not to infer from what I have
8 said during the progress of this trial in ruling on the
9 admissibility of evidence, or otherwise, or anything that I
10 say during the course of this instruction that I have any
11 opinion about the facts in this case. The law does not
12 allow me to have an opinion about the facts in this case.
13 This is a matter solely for you, the jury, to determine. As
14 jurors, it is your duty to determine the effect, value,
15 weight, and truth of the evidence presented during this
16 trial.

17 Now, ladies and gentlemen, there are two types of
18 evidence which are generally presented during a trial:
19 Direct evidence and circumstantial evidence.

20 Now, direct evidence is testimony of a person who
21 claims to have actual knowledge of a fact, such as an
22 eyewitness. Direct evidence is evidence which immediately
23 establishes the fact sought to be proved.

24 Circumstantial evidence is proof of a chain of
25 facts and circumstances indicating the existence of a fact.

1 It is evidence which immediately establishes collateral or
2 other facts from which the main fact may be inferred.

3 Now, circumstantial evidence is based on inference
4 and not on personal knowledge or observation.

5 I want to let you know that the law makes
6 absolutely no distinction between the weight or value to be
7 given to either direct or circumstantial evidence, nor is a
8 greater degree of certainty required of circumstantial
9 evidence than of direct evidence.

10 You should weigh all the evidence in this case.
11 After weighing all the evidence, if you are not convinced of
12 the guilt of the defendant beyond a reasonable doubt, then
13 you must find the defendant not guilty.

14 As I told you at the beginning of the case,
15 necessarily you must determine the credibility or
16 believability of witnesses who have testified in this case.

17 Now, credibility means believability. It becomes
18 your duty as jurors to analyze and to evaluate the evidence
19 and determine which evidence convinces you of its truth.

20 In determining the believability of the witnesses
21 who have testified, you may believe one witness over several
22 witnesses, or several witnesses over one witness.

23 You may believe a part of the testimony of a
24 witness and reject the remaining part of the testimony of
25 that same witness.

1 You may believe the testimony of a witness in its
2 entirety or reject the testimony of a witness in its
3 entirety.

4 You may consider whether any witness has exhibited
5 to you any interest, bias, prejudice, or other motive in
6 this case.

7 You may also consider the appearance and manner of
8 the witness while on the witness stand.

9 Ladies and gentlemen, the defendant has been
10 charged with assault and battery with intent to kill.

11 In order to prove assault and battery with intent
12 to kill, the State must prove beyond a reasonable doubt that
13 the defendant committed an unlawful act of violence of a
14 violent nature to the person of another with malice
15 aforethought.

16 An assault. An assault occurs when a person
17 unlawfully attempts or offers to commit a violent injury
18 upon another person and had the present ability to commit
19 the attempted injury. An assault is the intentional
20 creation of a reasonable fear of immediate bodily harm.

21 Now, it is not necessary that the attempted injury
22 or harm actually have taken place. For example, if I walk
23 up to you and when you are within an arm's reach of me I
24 draw back to hit you, that is an assault.

25 A battery is the unlawful touching of another

1 person by a person who committed the assault. An unlawful
2 touching can be caused by a part of the accused body, or by
3 any object the accused puts in motion. A battery is the
4 completion of the assault by using or applying force to
5 another person, however slight, in a rude, angry, or
6 resentful manner, without legal justification for doing so.

7 Let's use my example earlier. If I carry through
8 the assault by hitting you, then that is a battery.

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

14 Malice aforethought does not require that malice
15 exists for any particular time before the act is committed,
16 but malice must exist in the mind of the defendant just
17 before and at the time of the act is committed. Therefore,
18 there must be a combination of the previous evil intent and
19 the act.

20 Malice aforethought may be express or inferred.

21 Now, these terms, express or inferred, do not mean
22 different kinds of malice, but merely the manner in which
23 malice may be shown to exist; that is, either by direct
24 evidence or by inference from the facts and the
25 circumstances which are proved.

1 Express malice is shown when a person speaks words
2 which express hatred or ill will for another or when the
3 person prepared beforehand to do the act which was later
4 accomplished. For example, lying in wait for a person or
5 any other acts in preparation going to show that the deed
6 was within the defendant's mind would be expressed malice.

7 Malice may be inferred, however, from conduct
8 showing a total disregard for human life.

9 Inferred malice may also arise when the deed is
10 done with a deadly weapon.

11 A deadly weapon is an article, instrument, or
12 substance which is likely to cause death or great bodily
13 harm.

14 Whether an instrument has been used as a deadly
15 weapon depends on the facts and circumstances of each
16 particular case.

17 Ordinary objects may become deadly weapons when
18 the facts show that they have been used to inflict serious
19 bodily harm or death.

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

1 A specific intent to kill is not an element of
2 assault and battery with intent to kill, but there must be a
3 general intent to commit serious bodily injury.

4 Intent means intending the result which actually
5 occurred, not accidentally or involuntary. Intent may be
6 shown by acts and conduct of the defendant and other
7 circumstances from which you may naturally and reasonably
8 infer intent.

9 Evidence of the character of the assault, the
10 character of the instrument used, the manner in which it was
11 used, the purpose to be accomplished, and the resulting
12 wounds or injuries may be considered in determining the
13 intent with which the assault was committed.

14 Intent may be inferred when it is demonstrated
15 that the defendant voluntarily and willfully commits an act,
16 the natural tendency of which is to destroy another's life.

17 Ladies and gentlemen, if you find that the State
18 has not proven the defendant is guilty of assault and
19 battery with intent to kill, you must then determine whether
20 the State has proved that the defendant is guilty of assault
21 and battery of a high and aggravated nature.

22 Now, assault and battery of a high and aggravated
23 nature includes all the elements that I have just reviewed
24 with you of assault and battery with intent to kill, except
25 malice aforethought. Assault and battery of a high and

1 aggravated nature does not include that element of malice
2 forethought, but assault and battery of a high and
3 aggravated nature does require the State to prove beyond a
4 reasonable doubt an aggravating circumstance.

5 Circumstances of aggravation include the use of a
6 deadly weapon; the intent to commit a felony; the infliction
7 of serious bodily injury; a great disparity between the ages
8 or physical condition of the parties; a difference in the
9 gender of the parties; the taking of indecent liberties or
10 familiarities with a female through the use of force; the
11 purposeful infliction of shame and disgrace; and the
12 resistance of lawful authority. These are only examples of
13 circumstances of aggravation, of which the State must prove
14 beyond a reasonable doubt for there to be a finding of guilt
15 of assault and battery of a high and aggravated nature.

16 Now, ladies and gentlemen, Mr. Foreman, there
17 are -- if I can find it, I have prepared a verdict form for
18 your use back in the jury room. I have on the verdict form
19 prepared first a review of the assault and battery with
20 intent to kill charge.

21 And then if, and only if, you find that the State
22 has not met its burden of proof beyond a reasonable doubt as
23 to the charge of assault and battery with intent to kill,
24 only at that point would you proceed with considering
25 whether the State has met its burden of proof beyond a

1 reasonable doubt of the offense of assault and battery of a
2 high and aggravated nature.

3 Now, Mr. Foreman, ladies and gentlemen, there has
4 to be a finding of either guilt of one charge and not guilty
5 of one charge, but -- there has to be on finding of guilt or
6 not guilty on at least one of the charges.

7 Your decision in the jury room must be unanimous.
8 It cannot be based upon conjecture. It cannot be based upon
9 speculation. It cannot be based on surmise on your part.
10 It must be based upon the deliberations that all twelve of
11 you, and the decision must be unanimous.

12 Mr. Foreman, in the event that during your
13 deliberations one member of the jury has to leave the room
14 for any particular reason - to use the restroom, make a
15 telephone call, or whatever reason - your deliberations have
16 to cease. Your deliberations cannot start back until all
17 twelve members return.

18 Again, I want to make myself clear. On the
19 verdict form, there is -- first, you must deal with the
20 charge of assault and battery with intent to kill.

21 You will only address the charge of assault and
22 battery of a high and aggravated nature if you find the
23 State has not met its burden of proof as to the first
24 charge.

25 And on either charge you may find that the State

1 has not met its burden of proof as to both of the charges.

2 Mr. Foreman, ladies and gentlemen, I want to thank
3 you for your time during this trial. The bailiffs are now
4 going to take you back to the jury deliberation room, but do
5 not begin your deliberations until the bailiff has brought
6 you the evidence that has been presented in this case and
7 instructs you to begin your deliberation.

8 Once you have concluded your deliberation, Mr.
9 Foreman, please execute the form, sign your name and knock
10 on the door and let the bailiff know when you are at the
11 conclusion. I thought -- I have to remind you of that
12 because once I forgot to tell the bailiff to do that and
13 they waited several hours before they actually knocked on
14 the door and said we have finished. So don't forget to let
15 us know when you are finished. If you will return back with
16 the bailiff, we will let you start with your deliberations
17 shortly.

18 (Whereupon, at 4:25 p.m., the jury panel went to
19 the jury room, awaiting instructions to begin deliberations)

20 THE COURT: Any objections to the charge?

21 MS. LESKANIC: Not by the State, Your Honor.

22 MR. SHEALY: Not by the defense, Your Honor.

23 THE COURT: All right. Will you all check to be
24 sure we have all the exhibits and then we will let the
25 bailiff go back and tell them to begin.

1 (Off the record)

2 (Back on the record)

3 MR. SHEALY: Judge, just one question about the
4 911 tape. Do you want the tapes to physically go back there
5 without the tape recorder, or do you want them to just -- if
6 they want to hear it --

7 THE COURT: If they want to hear it, I want them
8 to come back out and hear it.

9 MR. SHEALY: So do you want the tapes to go back
10 there?

11 THE COURT: The tapes can go back. So way they
12 will have it in their hands.

13 (Whereupon, at 4:27 p.m., the jury panel was
14 instructed to begin deliberations)

15 THE COURT: Bring the alternate out.

16 (Whereupon, the alternate was brought into the
17 courtroom)

18 THE COURT: Mr. Alternate, I regret to inform you
19 that your services on this jury have concluded. I do want
20 to thank you, though, for your service. Fortunately, we did
21 not have anyone to become ill or have to be replaced, so at
22 this point I can't allow you back in the jury deliberation
23 room.

24 Now, you are more than welcome to stay with us, if
25 you would like, if you want to wait around. I don't know

1 how long they will be. You know, you are more than happy to
2 stay with us, or you are free to go.

3 I can't tell you right now that you don't have to
4 come back, although the best I can tell you is to call back
5 to that telephone number after six o'clock night and you
6 will receive further instructions.

7 I do want to thank you for your service. I also
8 want to let you know that you now are free to talk with as
9 little or as much to anyone about this case. But if anybody
10 does approach you or talk to you and you feel like you are
11 being harassed by anyone associated with this case or
12 involvement with this case, please contact the clerk's
13 office or the sheriff's department and I will see to it that
14 that type of contact with you ceases immediately.

15 ALTERNATE JUROR: All right.

16 THE COURT: Thank you very much.

17 ALTERNATE JUROR: Thank you, sir.

18 THE COURT: Yes, sir.

19 You may see the clerk and she will tell you what
20 to do.

21 (Whereupon, the alternate juror was discharged
22 from service)

23 (Whereupon, at 4:30 p.m., proceedings were
24 recessed, pending the verdict of the jury panel)

25 (Whereupon, at 4:40 p.m., proceedings were

1 reconvened)

2 THE COURT: Bring the foreperson in, please.

3 (Whereupon, the Foreperson of the Jury entered the
4 courtroom)

5 THE COURT: Mr. Foreman, I received your note.
6 What I can do, if you feel this will meet the jury's wishes,
7 is just bring them back out here. I will then recharge the
8 law, but just on the malice part.

9 JURY FOREMAN: Okay.

10 THE COURT: But I cannot send this back. I have
11 to do it out here.

12 JURY FOREMAN: Okay.

13 THE COURT: See if they want to come back out here
14 and have me recharge.

15 JURY FOREMAN: Okay.

16 (Jury Note marked as Court's Exhibit No. 1 for
17 identification)

18 (Whereupon, the Jury Foreperson returned to the
19 jury room)

20 (Off the record)

21 (Back on the record)

22 (Whereupon, at 4:45 p.m., the jury panel returned
23 to the courtroom)

24 THE COURT: Mr. Foreman, ladies and gentlemen, I
25 am now going to recharge you just on the law that related to

1 the definition of malice.

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

7 Malice aforethought does not require that malice
8 exists for any particular time before the act is committed,
9 but malice must exist in the mind of the defendant just
10 before and at the time of the act is committed. Therefore,
11 there must be a combination of the previous evil intent and
12 the act.

13 Malice aforethought may be expressed or inferred.
14 These terms expressed and inferred do not mean different
15 kinds of malice, but merely the manner in which malice may
16 be shown to exist; that is, either by direct evidence or by
17 inference from the facts and circumstances which are proved.

18 Expressed malice is shown where a person speaks
19 words which express hatred or ill will for another, or when
20 the person prepared beforehand to do the act which was later
21 accomplished. For example, lying in wait for a person or
22 any other acts of preparation going to show that the deed
23 was within the defendant's mind would be expressed malice.

24 Malice may be inferred from conduct showing a
25 total disregard for human life.

1 Inferred malice may also arise when the deed is
2 done with a deadly weapon.

3 A deadly weapon is any article, instrument, or
4 substance which is likely to cause death or great bodily
5 harm. Whether an instrument has been used as a deadly
6 weapon depends on the facts and circumstances of each case.

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

13 And then also ordinary objects may become deadly
14 weapons when the facts show that they had been used to
15 inflict serious bodily harm or death.

16 All right, ladies and gentlemen, you may return to
17 back to your jury deliberation room and continue with your
18 deliberations.

19 (Whereupon, at 4:48 p.m., the jury panel returned
20 to the jury room to continue deliberations)

21 THE COURT: All right, off the record.

22 (Whereupon, at 4:49 p.m., proceedings were
23 recessed, pending the verdict of the jury panel)

24 (Whereupon, at 4:54 p.m., proceedings were
25 reconvened)

1 THE COURT: I'm informed that we have a verdict.
2 Bring the jury in, please.

3 (Whereupon, at 4:55 p.m., the jury panel returned
4 to open court to report its verdict)

5 THE COURT: Mr. Foreman, I'm informed that the
6 jury has reached a verdict, is that correct?

7 JURY FOREMAN: Yes, sir.

8 THE COURT: If you would, please give the verdict
9 form to the bailiff.

10 Madam clerk, please publish the verdict.

11 THE CLERK: 2009-GS-11-924, the State versus
12 Donald Scott Jones, we, the jury, unanimously find the
13 defendant Donald Scott Jones guilty of assault and battery
14 with intent to kill.

15 Signed by the foreperson Christopher Rollins.

16 Ladies and gentlemen of the jury, if this is the
17 verdict of you all, please indicate by raising your right
18 hand.

19 (Whereupon, all the jurors raised their right
20 hand)

21 THE CLERK: Thank you.

22 THE COURT: Anything from the State or the defense
23 before I dismiss the jury?

24 MS. LESKANIC: Not for the State, Your Honor.
25 Thank you.

1 MR. SHEALY: Not by the defense, Your Honor.

2 THE COURT: Thank you.

3 Mr. Foreman, ladies and gentlemen, I want to thank
4 you for your work and your service during this case. I know
5 that the inconvenience that jury service causes to your
6 personal lives, so we do -- I want you to take our gratitude
7 with you.

8 I believe I might have mentioned during the
9 opening part of this case where I told you that frequently
10 our justice system is considered the greatest justice system
11 ever created, and that is true. Another phrase that
12 frequently we hear in the court system is that outside of
13 military service for one's country, service on a jury is
14 probably the most difficult task a citizen does to defend
15 the democracy that we live in. Today you have done what
16 citizens are doing all across our country and we have become
17 the envy -- at least our justice system has become the envy
18 of the free world. I had the privilege of serving on a
19 Supreme Court as an Associate Justice a couple years back
20 and we had visiting judges from Eastern European countries
21 that were studying us in South Carolina how good the system
22 worked and they were amazed that citizens like you make the
23 decisions that are made in a court of law. So I tell you
24 that to try to make you use some focus in you have done
25 today in serving your country so that you know the gratitude

1 that I and all the other court members and staff people, and
2 we are sincerely in extending that gratitude. Thank you.

3 I wish I could tell you you don't have to come
4 back, but I can't. I'm going to have to tell you please
5 call back at that telephone number after six o'clock tonight
6 and you will receive further instructions. But in the event
7 that you do not come back, thank you very much, and
8 hopefully you found this experience as enjoyable as
9 possible, but you may go with the bailiff.

10 (Whereupon, at 4:58 p.m., the jury panel was
11 discharged)

12 THE COURT: Anything from either the State or the
13 defense before we proceed with sentencing?

14 MS. LESKANIC: Nothing from the State, Your Honor.

15 MR. SHEALY: Nothing from the defense.

16 I'll get him to sign this.

17 THE COURT: I have been given the sentencing sheet
18 for Donald Scott Jones.

19 Mr. Jones, I'm going to remind you that you remain
20 under oath. I just want to get some basic information first
21 and then I'll hear from the solicitor and then I'll allow
22 your lawyer to speak and also hear from you.

23 How old are you?

24 THE DEFENDANT: 41, sir.

25 THE COURT: How far did you go in school?

1 THE DEFENDANT: 11th grade.

2 THE COURT: Did you ever get your GED?

3 THE DEFENDANT: No, sir.

4 THE COURT: Presently are you married, single,
5 divorced, widowed?

6 THE DEFENDANT: Separated.

7 THE COURT: Do you have children?

8 THE DEFENDANT: No, sir.

9 THE COURT: Prior to being arrested, did you have
10 a job outside the home?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: What kind of work were you doing?

13 THE DEFENDANT: Metal fabrication.

14 THE COURT: Ever serve in the military?

15 THE DEFENDANT: No, sir.

16 THE COURT: And how long have you been in jail on
17 this charge? Do you remember the date that you went in?

18 THE DEFENDANT: On this charge, it was around
19 thirty days.

20 THE COURT: You are not in jail now?

21 THE DEFENDANT: Yes, sir, on two other charges.

22 THE COURT: Was your bond ever revoked on this
23 charge?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Okay. How much credit is he entitled

1 to?

2 MR. SHEALY: Your Honor, I don't have the bond
3 revocation order. I can't tell you what date it was --

4 THE COURT: All right.

5 MR. SHEALY: -- revoked on.

6 THE COURT: We will need to find that out, because
7 I'm supposed to write that on this sheet.

8 All right. I'm going to ask the State if they
9 would give me the prior record.

10 MS. LESKANIC: 1986, violation of open container.

11 2003, criminal domestic violence, first offense.

12 And as the defendant stated, he is currently in
13 jail on charges of criminal sexual conduct, first degree,
14 and assault and battery with intent to kill.

15 I'm not sure if that bond was revoked or not. If
16 it was, I may not have handled that, so -- but I know he's
17 in jail on those charges as well.

18 THE COURT: Do you remember when your bond got
19 revoked?

20 THE DEFENDANT: About two months ago, sir.

21 THE COURT: All right. I know the victim is
22 present and I have heard his testimony. Does the victim
23 wish to address the court in any other way?

24 MS. LESKANIC: He, he does not, Your Honor. He
25 just asked that I speak on his behalf. I have met Mr. Emery

1 several times. This incident has affected him greatly, the
2 injuries that he sustained and also just his ability to
3 trust people. He already kept a very close circle of
4 friends and that has tightened even more after this
5 incident. It's just made him very fearful to trust
6 individuals and do anything, except work and stay at home.

7 THE COURT: Restitution?

8 MS. LESKANIC: No restitution, Your Honor.
9 Everything has been taken care of.

10 THE COURT: Anything else from the State on Mr.
11 Jones?

12 MS. LESKANIC: That's all, Your Honor.

13 THE COURT: Yes, sir, Mr. Shealy.

14 MR. SHEALY: Thank you, Your Honor.

15 Your Honor, as Scott told you, he is 41 years old.
16 He's told you where he works. He lives with his mother,
17 Nancy Jones, and provides quite a bit of care for her and
18 he's deeply concerned about her well-being and the future.

19 Your Honor, his family is here with him today.
20 They have been supporting him throughout the trial. They
21 were here even all day yesterday. They weren't here at the
22 time that we did the pretrial motions, but they had waited
23 until they felt that -- well, they waited a very, very long
24 time before they left. They love Scott very much and they
25 ask you to be as lenient with him as you possibly can.

1 Your Honor, in working with Scott, he's been
2 consistent with his story with me ever since we first met.
3 I believe we met in 2008. He gave me his story then.

4 Since then on various different occasions, and as
5 we have already pointed out, he was originally charged with
6 assault and battery of a high and aggravated nature. The --
7 as we -- time went on and I re-interviewed Scott at least
8 two more times, if not three more times, meaning making him
9 go from a very start to the end, without me suggesting what
10 he had already said, or anything like that. He's always
11 been consistent in all three of those times that I know of
12 that we went over them. And then his testimony today was
13 consistent.

14 I would like to point out that in his testimony,
15 he testified even when it hurt him. He told -- we submit
16 that he told the truth, that -- you saw his demeanor on the
17 stand and heard his testimony and it was straightforward.

18 Your Honor, we would ask that you be as lenient as
19 you possibly can. I was surprised to hear that there was
20 not any restitution. I don't know if the State took up the
21 medical bills, or what, but it sounds to me like there
22 should be something simply because of the -- well, the
23 pictures, the injuries that were shown to the jury.

24 At any rate, Your Honor, we would ask that you be
25 as lenient as you possibly can. Thank you.

1 THE COURT: Mr. Jones, were you able to hear what
2 your lawyer just said to me?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: Do you agree with the things that he
5 stated to me?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Mr. Jones, is there anything that you
8 would like to say or would like for me to know or consider?

9 THE DEFENDANT: I just want Mr. Emery to know that
10 I'm sorry and ask his forgiveness if I was wrong in
11 defending that woman.

12 MR. SHEALY: Your Honor, if I may just add to
13 that. There is a note that he wrote to me before we even
14 got started Monday asking me if he could go over and talk to
15 Mr. Emery and apologize to him for all this coming about. I
16 told him, of course, not, that he could not, but,
17 nevertheless, I just wanted you to know he's not saying that
18 now after -- he was also feeling that way before the
19 conviction.

20 THE COURT: Thank you, sir.

21 THE DEFENDANT: Thank you.

22 THE COURT: I'll find that there is a substantial
23 factual basis for the plea.

24 I find that the defendant's decision to enter the
25 plea has been made freely, voluntarily, knowingly and

1 intellectually by --

2 I'm sorry, I would find that this is not necessary
3 because this has been a trial that has taken place.

4 I will enter a sentencing on 2009-GS-11-0924 of a
5 sentence of twenty years at the Department of Corrections.
6 I will suspend that to the service of twelve years and the
7 service of five years probation.

8 He gets credit by the calculations this Clerk of
9 Court has given me of 136 days.

10 Once he is released, even though testimony was in
11 conflict, I have ordered substance abuse counseling. You
12 need to comply with any type of treatment that they order.
13 You will need to stay clean of any illegal substances,
14 because they will be drug testing on you.

15 I have indicated on the sentencing sheet that you
16 cannot have any contact with this victim. That is direct or
17 indirect contact: Write, call, go around his job, his home,
18 in no form or fashion.

19 After the active twelve year sentence on it and
20 you are placed in five years of supervision, you will enter
21 the Department of Corrections again to finish the twenty
22 years, if you in any way have any contact with this victim.
23 Do you understand that?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: There are other terms and conditions

1 that will be placed on you that will send you back into the
2 Department Corrections, if you violate that.

3 Good luck to you, sir.

4 THE DEFENDANT: Thank you, sir.

5 MR. SHEALY: Thank you.

6 MS. LESKANIC: Thank you, Your Honor.

7 (State's Exhibit No. 6 was not admitted into
8 evidence and was withdrawn by the State)

9 (END OF REQUESTED TRANSCRIPT OF RECORD)

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CERTIFICATE

I, the undersigned, Michael R. Watts, Official Court Reporter for the Sixteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for CHEROKEE County, South Carolina, on the 14th and 15th days of September, 2009.

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

DECEMBER 2, 2009



Michael R. Watts
Circuit Court Reporter

FORM 5

012CP-110111

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA)

County of Cherokee)Donald Scott Jones 336980)

Full name and prison number (if any) of Applicant)

v.)

State of South Carolina)

APPLICATION FOR

POST-CONVICTION RELIEF

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 FEB 13 AM 11 10
BRANDY M. BEE

INSTRUCTIONS - READ CAREFULLY

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

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

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

1. Place of detention Lieber Corr. Inst.
2. Name and location of Court which imposed sentence Cherokee County General Sessions
3. Name(s) of co-defendant(s) (if any) _____
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 09-GS-11-0924 Assault and Battery with Intent to Kill
 - (b) _____

ATTORNEY GENERAL'S OFFICE

RECEIVED FEB 15 2012

ADMINISTRATIVE INSTRUCTIONS

FILE _____ OPEN _____ END _____
HAVE _____ COPIES MADE _____
ROUTE TO _____
ORDER: _____ TRANSCRIPT _____
PEN RECORDS _____ CLERK RECORDS _____
OTHER: _____

- (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
- (a) September 15 2009 20yrs suspended 12yrs 5yrs probation
- (b) _____
- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty trial by jury
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
- _____
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. S.C. Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Denied
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. JUNE 13, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) N/A
- (b) _____

- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:
- (a) Ineffective Assistance of Counsel
- (b) _____
- (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
- (a) Failure to investigate
- (b) Applicant herein reserves the right to Amend at later date
- (c) _____
12. Prior to this application have you filed with respect to this conviction:
- (a) any petition in a State Court under South Carolina Law? _____
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
- (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
- (a) the specific nature thereof:
- i. N/A
- ii. _____
- iii. _____
- iv. _____
- (b) the name and location of the Court in which each was filed:
- i. N/A
- ii. _____
- iii. _____
- iv. N/A

(c) the disposition thereof:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. N/A
- ii. _____
- iii. _____
- iv. _____

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

- i. _____
- ii. _____
- iii. _____
- iv. _____

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

first filing of PCR

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

(a) which grounds have been presented:

- i. N/A
- ii. _____
- iii. _____

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

- i. N/A
- ii. _____
- iii. _____

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

(a) First filing of PCR
 (b) _____
 (c) _____

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

(a) your arraignment and plea? _____
 (b) your trial, if any? yes
 (c) your sentencing? yes
 (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
 (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed?

NO

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

i. Thomas shealy Cherokee County Ass. P.D. Attorney
Thomas shealy "
 ii. Robert M. Pachak S.C. Comm. on Ind. Defense

iii. _____

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

i. Trial
 ii. Sentencing
 iii. Appeal

19. State clearly the relief you seek in filing this application:

VACATE sentence AND conviction

20. Are you now under sentence from any other court that you have not challenged?

NO

STATE OF SOUTH CAROLINA)

County of Cherokee)

VERIFICATION

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

D. Scott Jones

SWORN to and subscribed before me this 10th day of February, 2012.

Sylvia Jones (L.S.)
Notary Public

My Commission Expires: 1/24/2018

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 FEB 13 AM 11 10
BRANDY W. MCBEE

012CP-110111

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

I, Donald Scott Jones, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Donald Scott Jones
Applicant

SWORN or affirmed to and subscribed before me this

10th day of February, 2012.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2018

FILED IN OFFICE OF
CLERK OF COURT
CHEROKEE COUNTY, S.C.
2012 FEB 13 AM 11 10
BRANDY W. MOBEE

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
	)	
Donald Scott Jones, #336980,	)	2012-CP-11-0111
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

The Respondent, making its Return to the application for post-conviction relief (PCR) filed February 13, 2012, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted by the Cherokee County Grand Jury in August 2009 for assault and battery with intent to kill (09-GS-11-0924). He was represented by Thomas E. Shealy, Esquire. On September 15, 2009, the Applicant was convicted of the charge by a jury. Applicant was sentenced by The Honorable J. Mark Hayes II to a sentence of twenty years, provided upon the service of twelve years, the balance would be suspended to five years of probation.

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Jones, Op. No. 2011-UP-287 (filed June 13, 2011). The Remittitur was returned on June 29, 2011.

Attached herewith and incorporated herein are the records of the Cherokee County Clerk of Court regarding the subject conviction(s), the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the Applicant's appellate records. The

Respondent reserves the right to amend this Return upon receipt of any relevant materials or submit an amended Return to reflect any amended allegations.

II.

In his application, the Applicant alleges that he is being held in custody unlawfully based upon the following:

- I. Ineffective assistance of counsel, in that;
 - a. Counsel failed to investigate.

III.

In a post-conviction relief proceeding, the Applicant bears the burden of proving the allegations in their application. Id. Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 80 L.Ed.2d 674. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Each and every allegation contained within the application not herein before either expressly admitted, qualified or explained is hereby denied.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held.

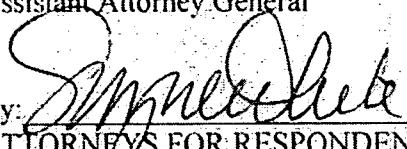
Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

SUZANNE H. WHITE
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT
Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

November 30, 2012

STATE OF SOUTH CAROLINA
COUNTY OF CHEROKEE

)
)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Donald Scott Jones,

)

2012-CP-11-0111

Applicant,

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v.

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State of South Carolina,

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Respondent.

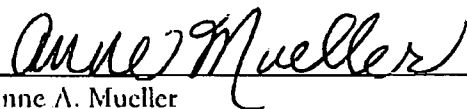
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CERTIFICATE OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Respondent's Return in the above-captioned matter on the following person(s) by depositing same in the United States mail, postage prepaid:

Alexander Hray, Jr., Esquire
389 E. Henry Street, Suite 107
Spartanburg, South Carolina 29302



Anne A. Mueller
Legal Assistant for the Respondent

DATED this 30th day of November, 2012.

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF CHEROKEE) IN THE COMMON PLEAS COURT
3
4 Donald scott Jones,)
5 Applicant,) TRANSCRIPT OF RECORD
6 -VS-) 2012-CP-11-111
7 The State.) October 4, 2013
8 Spartanburg, South Carolina
9

10
11 B E F O R E:

12 HONORABLE J. DERHAM COLE, JUDGE
13

14
15 A P P E A R A N C E S:

16 ALEXANDER HRAY, JR., ESQUIRE
17 Attorney for the Applicant

18 SUZANNE H. WHITE, ESQUIRE
19 Attorney for the State
20

21
22 Linda D. Moffitt
23 Circuit Court Reporter
24
25

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19	No exhibits entered into evidence.	
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1 MS. WHITE: Thank you, Your Honor. This is the case
2 of Donald Scott Jones vs. the State. It's case
3 No. 2012-CP-11-0111. He's represented today by Mr. Lex
4 Hray.

5 Mr. Jones was indicted August of '09 on an assault and
6 battery with intent to kill charge. He proceeded to trial
7 represented by Tommy Shealy and was convicted.

8 He received a sentence of 20 years suspended to 12
9 years and five years probation.

10 He has filed this application alleging ineffective
11 assistance of counsel in that counsel failed to
12 investigate.

13 And at this point I'll turn it over to Mr. Hray.

14 MR. HRAY: May it please the Court, Your Honor.

15 If I could make a brief opening statement to kind of
16 clarify the issues for the Court and make things move a
17 little more smoothly I think today --

18 THE COURT: Okay.

19 MR. HRAY: -- I've been appointed in this case, and I
20 have met with my client two times face to face, one time
21 several months ago down at Ridgeville where he's
22 incarcerated. I met with him at length yesterday again in
23 addition to having various correspondence back and forth
24 about the case for him to clarify for me what the issues
25 are and for me to help him cipher which issues might be of

1 benefit to him today in this P.C.R.

2 what this case is about if I could just give you a
3 little background as far as the trial case, had to do with
4 an initial charge against him of assault and battery of a
5 high and aggravated nature, as well as a burglary charge
6 against him.

7 MS. WHITE: Armed robbery.

8 MR. HRAY: Armed robbery, excuse me. Those were the
9 two initial charges.

10 This is an event that occurred in May of 2006. The
11 event occurred in Blacksburg, South Carolina, at a private
12 residence. There were four parties at that residence
13 including my client.

14 And after that the case sat for three years. There
15 was not a trial. No hearing occurred on the case.

16 After that 3-year period there was an allegation of
17 other charges against my client on a different matter
18 altogether that intervened before his trial.

19 After that event occurred and came up for trial and
20 was scheduled for trial in August of 2009, at that point
21 the solicitor had him reindicted on a different charge of
22 assault and battery with intent to kill. And the trial
23 occurred a couple of weeks after that grand jury indictment
24 was issued.

25 So in this case what our position is, there are a

Thomas E. Shealy
Direct examination by Mr. Hray

1 couple of things as far as ineffective assistance of
2 counsel.

3 Our first position I'm going to argue today or have in
4 this case is that the trial counsel did not make a motion
5 to quash that indictment as ineffective assistance of
6 counsel, and certainly going along with that is
7 that counsel -- you know, the trial attorney failed to
8 properly investigate by interviewing key witnesses in the
9 case prior to going to trial.

10 And also there was a trial publicity for the other
11 case that occurred that same year, May of 2009. And there
12 was no motion to change the venue of that trial to a
13 different jurisdiction after all that trial publicity on
14 the other case, which my client was in the paper and in the
15 news and that kind of thing.

16 So those are basically the three items that we're
17 going to present to the Court today.

18 THE COURT: Okay.

19 MR. HRAY: And for our first witness we would call
20 Thomas Shealy.

21 THOMAS E. SHEALY, having been
22 first duly sworn, testified as follows:

23 DIRECT EXAMINATION BY MR. HRAY

24 MR. HRAY: Your Honor, with your permission, and
25 counsel -- stay -- I have a copy of the transcript and a

Thomas E. Shealy
Direct examination by Mr. Hray

1 notebook that might come in handy for the witness. May I
2 give to the witness, please?

3 THE COURT: You may.

4 Q Mr. Shealy, you are no longer the public defender in
5 Cherokee County, is that correct?

6 A That is correct.

7 Q And you work out of Columbia for --

8 A The Children's Law Center.

9 Q But you've testified in other hearings today and
10 established you are -- you were a public defender for many
11 years and had a lot of experience in criminal cases, is
12 that correct?

13 A Yes.

14 Q And did you come to represent the defendant, Donald
15 Scott Jones, in a particular matter?

16 A I did.

17 Q And what was that matter about?

18 A Well, there were a couple of matters.

19 Q Well, this matter. To clarify, this is the assault
20 and battery at the residence in Blacksburg that I've been
21 appointed on.

22 A Okay. That I believe a Jerry Wayne Emory was the
23 alleged victim -- well, was the victim.

24 Q Okay.

25 A That I was appointed to represent him on that case.

Thomas E. Shealy
Direct examination by Mr. Hray

1 Q That's correct. And do you know when your appointment
2 occurred, when you got involved in the case?

3 THE WITNESS: May I consult with my file, please, Your
4 Honor?

5 (Pause.)

6 A All right. My appointment order appears to be
7 undated. I do see that I -- that a motion of discovery
8 that was dated May 31st of 2006 -- so I was -- that would
9 have been within the same week of being appointed I'm sure.
10 So I would say some point prior to May 31st of 2006.

11 Q Is that fairly early on in the case when it first got
12 started?

13 A That's when I got appointed.

14 Q Okay. And the charges that were filed -- and did it
15 go to the grand jury for the indictment?

16 A Yeah. The -- I believe that was all discussed at the
17 first session. I believe he was originally indicted for
18 assault and battery of a high and aggravated nature.

19 Q Okay. And there's another charge too that I mentioned
20 earlier.

21 A Armed robbery. But I had that -- I had managed to get
22 that dismissed.

23 Q Okay. So the only charge that was left was the
24 assault and battery of a high and aggravated nature, is
25 that right?

Thomas E. Shealy
Direct examination by Mr. Hray

1 A Well, at the time of trial the -- the armed robbery
2 and the assault and battery of a high and aggravated nature
3 I think coexisted at the same time all the way up until we
4 were ready to go to trial. And the armed robbery was not
5 prosecuted.

6 Q Okay. In that 3-year span between the time of the
7 initial charge until the actual trial of the case did you
8 interview witnesses involved in the case?

9 A The -- well, I talked to my client. The -- and I
10 have -- you know, this is a long time ago. I have notes.
11 It appears that I talked to a Ricky Long in Blacksburg, and
12 of course my client. And I had the discovery that was
13 given to me by the -- by the prosecution. I -- I have
14 notes on Tammy Byers, but I believe that was from the
15 actual trial. And I don't recall finding her to interview
16 her.

17 Q Okay. Now, in this case your client explained to you
18 that, in fact, he did strike the victim, Mr. Emory, in the
19 head, is that correct?

20 A That's correct.

21 Q And that was with some sort of a big stick?

22 A Correct.

23 Q Okay. Like a baseball bat?

24 A I -- I want to say that I heard it described as --
25 usually it was a stick like a walkingstick. It may have

Thomas E. Shealy
Direct examination by Mr. Hray

1 been described as a -- as a ball bat. I'm pretty sure it
2 was there at trial at the time. It was -- it was -- it was
3 a weapon.

4 Q All right. So you were aware of that from talking to
5 your client that, in fact, he said that he had done that.

6 A Right.

7 Q That was not an issue in the case.

8 A Right.

9 Q And the victim of course -- well, not of course. But
10 the victim knew it was going to be a trial, and it was a
11 trial, is that correct -- Mr. Emory?

12 A The victim was at trial and there was a trial. Yes,
13 there was a trial and he was there.

14 Q And he was there.

15 A He was there.

16 Q And according to the investigation what happened at
17 trial, there also were two other witnesses besides the
18 victim and the -- and my client that was --

19 A I believe that --

20 Q -- Ricky Long and Tammy Byers.

21 A Right.

22 Q You say your notes reflect you talked to Ricky Long.

23 A It appears I talked to him on May 27th of 2006.

24 Q All right. And you did not talk to Tammy Byers as far
25 as your notes reflect.

Thomas E. Shealy
Direct examination by Mr. Hray

1 A I do not see where I interviewed Tammy Byers.

2 Q Okay. And in the case what was the theory of your
3 defense since your client had admitted that he had, in
4 fact, struck the -- the victim and there were other
5 witnesses there to the event? What was the theory of the
6 case for your defense?

7 A Well, that -- that's the problem. There really was no
8 theory of defense.

9 The client, my client, refused to plead guilty to what
10 he did. And he told me that he believed that he was coming
11 to the defense of Tammy Byers, that -- that she had told
12 him that this Emory fellow had raped her and that when they
13 were at the house he heard a scream and that he thought
14 that she was being beaten and that he -- he had noticed a
15 stick earlier, and he grabbed the stick and hit the fellow.
16 I believe he said he only hit him once and -- and left
17 the -- left the residence.

18 Q Well, didn't you attempt to argue at the trial that
19 his defense was a defense of others?

20 A That's -- that's what we -- I wanted it to be, yes.
21 The -- the problem is that the Tammy Byers and the other
22 fellow, Mr. Long --

23 Q That's correct -- Long.

24 A -- that they did not back us up.

25 Q Okay. So that the person --

Thomas E. Shealy
Direct examination by Mr. Hray

1 A If I recall correctly, they didn't back us up.

2 Q The person that -- that -- that Scott was trying to
3 defend was Ms. Byers.

4 A Correct.

5 Q And so it was evident that he struck the victim. That
6 was going to be established, because we had the victim and
7 two other independent witnesses who observed at least one
8 strike.

9 A Right.

10 Q So the only defense you would have would be either
11 self-defense or defense of others.

12 A That's correct.

13 Q Okay. And the information you got from Scott was that
14 he was not being attacked in any way at the time, is that
15 correct?

16 A The inference they have for Scott?

17 Q That Scott was not being attacked by Mr. Emory, the
18 victim.

19 A No, no, that he believed that Tammy was under attack.

20 Q Okay. So in order to establish a defense her
21 testimony is going to be key to establishing that defense
22 of defense of others.

23 A Well, at least Mr. Jones -- at least I think I needed
24 one out of those other people in my opinion. I needed one
25 out of the other people to back Scott up.

Thomas E. Shealy
Direct examination by Mr. Hray

1 I believe Tammy Byers stole the victim's wallet and I
2 believe that the -- that was the armed robbery. The -- and
3 I honestly believe that she had a motive to lie. The --
4 but had she testified the way Scott told me that the facts
5 were, then I believe we would have had a very good defense.

6 Q But if you had known in advance that she was not going
7 to back you up and testify the way you hoped she would
8 would you have handled the case any differently?

9 A I -- I knew what she was going to testify to --

10 Q Okay.

11 A -- because the prosecutor and I were in contact with
12 each other.

13 Q But you had not talked with Tammy Byers herself.

14 A No -- yeah. I did not speak to her directly. I just
15 knew the -- what the -- the -- she was going to say, not
16 through -- through discussing the case with the prosecutor.

17 Q Okay. So but they told you that she's not going to
18 back up -- back up Ricky's story -- Scott's story, is that
19 correct?

20 A No. She told me -- they told me what she was going to
21 say.

22 Q Okay.

23 A But that I believe it was -- and, you know, this is
24 all very hazy.

25 The -- if I recall correctly they were out -- I want

Thomas E. Shealy
Direct examination by Mr. Hray

1 to say that they were partying. She -- she wanted to go to
2 this fellow's house that she had cleaned -- cleaned the
3 house up and that he -- he owed her money.

4 The -- the -- they went there and she -- she told
5 Scott earlier that she was scared of this guy because he'd
6 raped her before.

7 They're sitting in the house, and Scott tells me -- I
8 think he gets up to go to the kitchen. I don't know if the
9 bathroom is on the way through the kitchen or what. But he
10 sees the stick, doesn't know anything about that. That's
11 when he first saw the stick.

12 And he hears a scream from -- from Tammy and
13 immediately believes that this fellow is beating on her.
14 And he grabs the stick and he goes and hits the guy and, as
15 I said, walks out.

16 Q But if during this 3-year period of time -- if you had
17 talked to that particular witness and found out that that
18 scream didn't happen, the fear was not there, those things
19 were not present, would you have been giving advice with
20 regards of what he needed to do as far as a plea in this
21 case?

22 A The -- if I knew -- if I could have talked to Tammy
23 Byers, if I knew where she was and I could talk to her --
24 this isn't an excuse. This is just a fact. We don't have
25 an investigator in Cherokee County, so we're talking about

Thomas E. Shealy
Direct examination by Mr. Hray

1 me. If I had gone and talked to her on Monday, 15 minutes
2 after I asked her questions her story would have changed.

3 Now, if you look at the transcript you'll see her
4 story changes throughout her testimony. Tammy Byers --
5 nothing that she said you could rely on as staying
6 constant.

7 The -- I believe that I was better served by going on
8 the worst possible case scenario, which was discussing the
9 facts with the solicitor as to what she was going to say.

10 Q Did you have the opportunity to settle the case? Were
11 an offers made to you by the solicitor?

12 A That's a -- that's very good question, because what I
13 remember and what my file reflects are two different
14 things.

15 My -- I believed that I was offered several -- both
16 sets of charges for a certain -- certain charges were going
17 to be dismissed and -- and that there was a time component.
18 I thought the time component was 20 years.

19 The -- in reviewing my files I received a -- an offer
20 which did not have a time component, and it didn't involve
21 dismissing certain charges and pleading to -- to other
22 charges. The -- but the -- according to my file that's the
23 only offer that I received.

24 Q But if you had known that Ms. Byers was going to
25 testify the way she testified in court -- you knew that was

Thomas E. Shealy
Direct examination by Mr. Hray

1 going to happen in court -- would you have been more
2 diligent to pursue, to obtain, a plea and be more -- more
3 active and -- and really to push your client to take a plea
4 in the case?

5 A well, the -- first off let me say this. Okay. At no
6 time did -- did I ever feel that Scott lied to me. Every
7 time -- everything that he told me I personally -- I tried
8 not to make this judgment, but I personally believed was
9 true.

10 Nevertheless, I pushed very, very hard to -- to
11 obtain -- to get him to plead because the -- what the -- I
12 believed the state was -- was going to do is what they
13 ultimately did, was they got him to a -- a conviction on
14 him on a -- I believe it's a most serious, or I think it
15 was a most serious charge. And then they were going to try
16 him again on the next charge and then go for life without
17 the possibility of parole.

18 And -- and so I believed that I could settle the case
19 for 20 years. And I really pushed Scott very hard on that.
20 And his response was always -- it never changed -- was I
21 can't do 20 years.

22 Q Okay. In a case where you have a defense, the defense
23 of others, the person you're defending, if that person's
24 not afraid of the person supposedly attacking them or was
25 not being attacked by that person and they're going to say

Thomas E. Shealy
Direct examination by Mr. Hray

1 that, is that not -- even regardless of what Scott said
2 that -- that dissipates that entire defense, does it not?

3 A Correct.

4 Q Okay. That's what happened in this case.

5 A Right. And -- and Scott knew that. And we had
6 discussed it.

7 Q If she testified the way she testified. You weren't
8 sure how she was going to testify, is that correct?

9 A Right. And I -- I told him that based on my
10 conversations with the solicitor this is what the solicitor
11 is indicating she's going to say.

12 Q When did you first meet and talk to Scott after the
13 charges in 2006?

14 A Well, he came into my office on February 25th of 2008.

15 Q Okay. And the trial was in September of 2009. And on
16 that meeting, that first meeting, did he tell you the
17 entire -- his entire version of the events of what
18 happened?

19 A Right.

20 Q And I think you've told me before that he had been
21 consistent throughout what he's told you as far as the
22 events of that evening.

23 A Right.

24 Q After he told you his version did you make attempt to
25 perhaps get Tammy Byers or Ricky Long to sign an affidavit

Thomas E. Shealy
Direct examination by Mr. Hray

1 that conformed with his version of the story to tie down
2 their testimony?

3 A No.

4 Q You did not do that.

5 Okay. Now, let's go back for a second to the
6 indictment itself. There was an indictment made for assault
7 and battery of a high and aggravated nature initially.

8 A Yes.

9 Q And that changed in the end of August of 2009 to with
10 intent to kill, is that correct?

11 A Right. They -- I want to say that we were set to go
12 to trial on the ABHAN and it was delayed so that the
13 solicitor could get a direct indictment on the ABWIK as
14 opposed to the ABHAN.

15 Q Okay. And who was the -- the solicitor in the trial
16 of the case?

17 A Kim Leskanic.

18 Q Okay. And there was a -- mentioned there was another
19 case that cropped up in the interim, is that correct?

20 A Yes.

21 Q And that was an occurrence that happened in May of
22 2009?

23 A I don't have that file. Well, I have it back there,
24 but I'll defer to your -- your date.

25 Q Okay. And -- and you also represented Scott in that

Thomas E. Shealy
Direct examination by Mr. Hray

1 case also, is that correct?

2 A Yes.

3 Q And the same prosecutor in that case also, is that
4 correct?

5 A Correct.

6 Q And so if I'm correct, it was in May sometime of 2009.
7 That incident occurred and charges were brought in that
8 case. What were the charges in that case?

9 A Criminal sexual conduct. I want to say there was --
10 there was a total of two or three. I think assault and
11 battery with intent to kill. And I can't remember what the
12 third charge was if there was a third charge.

13 Q All right. Was there any indication from the
14 solicitor's office they were going to raise his charges to
15 intent to kill prior to that event in May of 2003, that
16 other charge?

17 A I want to say no. I want to say the surprise was we
18 were going to go to trial on ABHAN and that's -- and then
19 that directly indicted. But as to exactly when I was told
20 that was going to happen, I don't recall. But I want to
21 say it's closer to when it actually happened than, you
22 know, waiting a year or two before it happened.

23 Q And by -- by changing the charge from a high and
24 aggravated nature to intent to kill, what implications did
25 they have for your client?

Thomas E. Shealy
Direct examination by Mr. Hray

1 A It -- it changed the -- the status of the crime to I
2 believe it's most serious.

3 Q And what's significant about that?

4 A Well, you get two convictions, two independent
5 convictions, of most serious that -- of a second
6 conviction, the sentence is life without the possibility of
7 parole.

8 Q So he had a pending charge that come up in May of that
9 year of the trial that was also going to be a serious
10 charge, is that right?

11 A Right.

12 Q During the -- prior to the trial commencing did you
13 and the solicitor meet with Judge Hayes and discuss the --
14 the charges?

15 A Well, I'm sure we did.

16 Q Okay. And the increase of the charges?

17 A Right. And, well, I'm sure we discussed it in -- in
18 chambers, but we also discussed it on the record.

19 Q Okay. If you would, take that transcript of that
20 notebook and turn to page 33.

21 A I'm there.

22 Q Okay. At the bottom of page there's a discussion
23 about those changes.

24 And your response is, "One thing, Your Honor." If I'm
25 reading along -- you tell me if I'm reading it correctly.

Thomas E. Shealy
Direct examination by Mr. Hray

1 "And this is so I can explain for the record why I've not
2 brought a motion for prosecutorial misconduct." And you
3 explain your reasoning there.

4 A Correct.

5 Q Okay. So you never made a motion to quash the
6 indictment.

7 A I did not.

8 Q Did you ever question the -- the motives of -- of the
9 prosecution for changing the indictment or raising the
10 indictment to the intent to kill?

11 A Well, the -- I had intended to -- to bring out at
12 trial the -- the -- the change. And Ms. Leskanic made a
13 motion. Well, I don't know if it was a motion or not, but
14 to stop that. And we had -- we had more discussion about
15 that.

16 Q Right.

17 A But as to the -- the issue of prosecutorial
18 misconduct, I discussed that with my boss, that the
19 elements were there. And I was satisfied that that --
20 that -- well, I was satisfied that there was no
21 prosecutorial misconduct. The -- however, if I'm wrong, I
22 believe that that's a very serious mistake.

23 Q Would it be a reason not to raise the issue? Why not
24 raise that issue if you had an opportunity?

25 A Because I think -- I think -- well, and maybe I'm

Thomas E. Shealy
Direct examination by Mr. Hray

1 wrong. But if I don't believe a motion exists, if I don't
2 believe that there's a possibility of -- of it being there,
3 then I have a duty to the Court not -- duty to the Court
4 not to raise it.

5 In this case I -- I saw other -- by what my boss'
6 opinion on it and I -- I just didn't believe that -- that
7 there was any argument that I could make that it was
8 because all of the elements were present.

9 He had not been -- the jury had not been impaneled.
10 The -- the day we're having this discussion Ms. Leskanic
11 wanted to stop the case and directly indict him right then.
12 Based on what I knew about the law she could do it.

13 Q But would that not be a possible -- at least a
14 possible argument that that's a vindictive charge since he
15 had been charged for three years? Nothing's happened.
16 Nothing been changed. And the facts of the case had not
17 changed one iota as far as what occurred.

18 A Right. And I made -- I made the -- that those words
19 are mine. The -- but, no, I did not make the motion.

20 Q And you might have been overruled, but you could have
21 made the motion and preserved that for appeal if you were
22 overruled, is that correct?

23 A I -- I don't -- I know of nothing that keeps me
24 from -- from making the motion other than what I've already
25 stated.

Thomas E. Shealy
Direct examination by Mr. Hray

1 Q Okay. Now, this other -- this case, this criminal
2 sexual conduct that occurred in May -- if that's the right
3 month -- of 2009, it was the same year, is that correct?

4 A I -- I'm sorry. I didn't -- that case wasn't on the
5 docket, and I didn't go back and review my notes on it.

6 Q Okay. That's fine.

7 A But I want to say -- I want to say it was in 2008, but
8 I don't know that.

9 Q Well, you -- you --

10 A I will whenever that P.C.R. rolls around.

11 Q Okay. You -- you did live in Gaffney at that time,
12 did you not?

13 A I did.

14 Q Okay. Do you recall the publicity that was
15 surrounding that particular case, the first one?

16 A I -- I do not. I wasn't taking the Gaffney Ledger at
17 the time, and I didn't listen to weac WAGI. So those are
18 our two primary sources of information.

19 Spartanburg tends to leave Gaffney out -- out of --
20 although, it might have been on the Spartanburg news, the
21 television news, but I don't recall what the --

22 Q Okay. You're not saying there wasn't a lot of
23 publicity. You just don't remember one way or another?

24 A Well, I think -- I think it was the -- the publicity
25 that -- that this sort of case would -- would -- would

Thomas E. Shealy
Direct examination by Mr. Hray

1 garner. The -- I don't think they realized about the two
2 cases, the prior charges, which would have included --
3 caused more publicity. I think I would have been aware of
4 that. But I'm sorry. I just -- I don't know what
5 publicity was generated.

6 Q well, if there had been a lot of publicity during the
7 few months before this trial involving the same defendant
8 on a different charge do you think it would have been
9 appropriate to make a motion to change the venue to a
10 different locale?

11 A The reason I'm pausing is I can -- this is -- this is
12 down along those same lines of making the motion that
13 you're talking about. And I don't remember what my
14 research showed. I remember looking into that motion.

15 Q I'm sorry? On this case?

16 A As far as -- not on this case.

17 Q Okay.

18 A I say on the followup case but not -- not this one.
19 At no time -- I'm glad you cleared that up. At no time did
20 I think of filing a motion to -- for a different, new venue
21 for this -- this case.

22 Q Okay.

23 MR. HRAY: Can I have one moment, Your Honor?

24 (Pause.)

25 MR. HRAY: That's all I have, Your Honor, of this

Thomas E. Shealy
Cross-examination by Ms. White

1 witness.

2 CROSS-EXAMINATION

3 BY MS. WHITE

4 Q Mr. Shealy, as we were talking about the other charges
5 that initially started with ABHAN and now were directly
6 indicted as ABWIK, you said you thought all the elements
7 were there.

8 A Right.

9 Q Can you explain that a little bit?

10 A This seems absurd. Okay. But the ABHAN and the ABWIK
11 are very, very close charges.

12 ABHAN is common law, was a common law, charge back
13 then.

14 And ABWIK, theoretically at least, contained an
15 element of malice aforethought where you intended to kill
16 the guy but you -- you didn't.

17 And, whereas, assault and battery of a high and
18 aggravated nature means that you -- you intended to hurt
19 the guy really bad.

20 And the case law if I recall correctly, there's
21 almost -- if there is any difference between the two
22 actual -- the elements of the two actual charges, it wasn't
23 very much.

24 It was up to the jury. It's almost as if the jury in
25 my opinion decided on culpability and a less -- if there --

Thomas E. Shealy
Cross-examination by Ms. White

1 if a client is charged with ABWIK and you have them charged
2 with a lesser included of ABHAN it -- it's -- the jury
3 really is looking at culpability, or at least in my opinion
4 is looking at culpability, of -- it's almost like you have
5 to nullify the jury for the ABWIK to get the ABHAN.

6 Q And in this case, in fact, you got the -- the jury
7 instruction obviously for the ABWIK, but also the judge
8 charged the lesser offense of ABHAN.

9 A Yes, sir.

10 Q And so the -- the jury had that option --

11 A They did.

12 Q -- to find him guilty only of ABHAN.

13 A That's correct.

14 Q And I don't know if you recall the jury deliberations
15 or how long they took. Probably not but --

16 A I -- I -- I don't recall.

17 Q But if the transcript indicates that they started at
18 approximately 4:27, came out with a recharge for the
19 malice, and then had a verdict then about 4:55, essentially
20 30 minutes, would that -- would you agree that maybe that
21 happened?

22 A Reluctantly, yes. I -- it's rare that one of my
23 juries are that quick.

24 Q And, in fact, in this case no one actually other than
25 the defendant supported his own story that Ms. Byers had

Thomas E. Shealy
Cross-examination by Ms. White

1 screamed and he thought he was having to -- to defend her
2 from Mr. Emory.

3 A That's correct.

4 Q In fact, not only did she not say she screamed, the
5 victim didn't say it, and then his other witness, Mr. Long,
6 said he might have heard them talking about money but
7 didn't hear any screams.

8 A Correct.

9 Q No physical altercation.

10 A Right.

11 Q The victim didn't have a weapon.

12 A No. Well, the victim wasn't -- according to him
13 wasn't expecting it.

14 Q And was there some difference obviously from the
15 defendant's version and other testimony as to whether or
16 not he hit him while he was standing up in front of
17 Ms. Byers or crouching down or kind of kneeling on the
18 ground?

19 A I'd have to go back and look and see what was
20 testified to.

21 Q Okay. Wasn't it true that maybe Ms. Byers testified
22 that he had actually been -- they had been sitting on a
23 couch and he was putting something under the couch when he
24 was hit, whereas the defendant said he was standing up in
25 front of Ms. Byers when he saw her jump back and scream?

Thomas E. Shealy
Cross-examination by Ms. White

1 A Okay. I -- I have to apologize. Volume II of this
2 transcript I didn't have, so I couldn't go over it.

3 Q That's true.

4 A That's been a long time. But there was -- I'll be
5 honest with you. I -- I remember Ms. Byers testifying to a
6 number of things that were contradictory to each other.
7 And so as to what she testified to, I believe it, because I
8 think she testified to just about everything.

9 Q Okay. There was also some testimony or concern about
10 the amount of alcohol that the defendant had been drinking
11 in the time before the assault.

12 A Right.

13 Q And some discussion even about marijuana use.

14 A Yes.

15 Q Okay. Did your client call 9-1-1 after the incident?
16 Do you recall?

17 A He -- he -- no. He -- he let outta the house not
18 running but walking very fast.

19 Q In regards to preparing a defense against a charge of
20 ABWIK, was that helpful or harmful to your case?

21 A Well, yeah, that's -- it's harmful.

22 Q Okay. And in regards to the witnesses, you said that
23 you did talk to Ricky Long and you had discovery.

24 Do you recall, had both the witnesses -- had they made
25 statements and did the victim make a statement to the

Thomas E. Shealy
Redirect examination by Mr. Hray

1 police, do you recall?

2 A I'm pretty sure they all made statements.

3 Q So you were -- you had that information --

4 A Right.

5 Q -- in preparing your trial.

6 A Right. I also had a letter that Tammy had written in
7 which she -- she talks about the facts of the case. And I
8 don't remember who she wrote it to, but the solicitor
9 provided that in the discovery.

10 Q Okay. And you had a chance to discuss all of this and
11 the risks that the applicant faced if he proceeded to
12 trial.

13 A Yes.

14 Q On either ABHAN or ABWIK.

15 A Yes.

16 Q Okay. Thank you.

17 MS. WHITE: That's all I have at this time, Your
18 Honor.

19 THE COURT: Anything further?

20 MR. HRAY: Yes, Your Honor, if I could have just a
21 moment.

22 (Pause.)

23 REDIRECT EXAMINATION

24 BY MR. HRAY

25 Q Mr. Shealy, would you please in that transcript turn

Thomas E. Shealy
Redirect examination by Mr. Hray

1 to page 72? Now, you testified a moment ago that you had
2 written statements from the solicitor's office from the
3 witnesses, is that correct?

4 A I believe I did.

5 Q Okay. Could you please read for us on page 72,
6 lines -- line three through line 14?

7 A "In this particular case it is a little bit stranger
8 because usually when we have a case we have a written
9 statement, all the witnesses' written statements, or the
10 victim. Someone has written down what has happened, and
11 they do -- do that to refresh -- refresh their memory later
12 down the road. But that also gives us an idea as to what
13 that witness or victim is going to say. If there's a
14 confession, we have the confession. Here we don't have a
15 confession. We have -- we have always denied this. Here
16 we don't have a written statement of the witness. And
17 oddly we don't have a written statement for the victim --
18 from the witnesses." I'm sorry.

19 Q Okay. So reading that is it your recollection now
20 that there were no written statements from anybody?

21 A Excuse me. Let me look at my --

22 (Pause.)

23 A What I have is the police report the -- as to actual
24 written statements signed by the witnesses and over the
25 victim, I do not have that. I have descriptions of -- of

Thomas E. Shealy
Redirect examination by Mr. Hray

1 conversations and what -- incident reports.

2 The -- I do however have a letter dated June 20th of
3 2006 that's in writing, but it's a letter to -- to Jerry,
4 which I believe is the victim, from Tammy. That's what
5 I've got.

6 Q Okay. And just to verify, you had the transcript a
7 moment ago on page 72. Would you turn to page 71? Just
8 verify that what you read is what you had said in court.
9 That was your -- that was your statement.

10 A Well, I'm sure it is. It's in the transcript. I
11 certainly am not challenging the transcript.

12 Q I understand that but --

13 A The transcript says that Mr. Shealy, "Thank you, Your
14 Honor." And then it goes in -- and, well, lays down what I
15 said as I was talking to -- I believe this is addressing
16 the jury.

17 Q That's right. But -- but it continues on from that
18 point down through what you just read earlier.

19 A Right.

20 Q Okay. I just wanted to make sure I was clear.

21 Did -- did your client ever tell you a plea that he
22 would plead to on the charges? Did he give you a number of
23 years that he would be willing to plead to?

24 A I don't recall that. If he did, I would have taken it
25 to Ms. Leskanic, and I don't know. I don't -- I don't know

Thomas E. Shealy
Redirect examination by Mr. Hray

1 if I did or not. I don't see in -- in going through my
2 file. I don't see where I have. She may be able to help
3 you with that.

4 Q Okay. Just one last thing. Give me a second.

5 (Pause.)

6 Q If you can, turn to page 97 in the transcript.

7 A Yes, sir.

8 Q And you had testified earlier that you did have a
9 conversation with Mr. Ricky Long, is that correct, at some
10 point prior to trial?

11 A Right.

12 Q If you go to line 15, could you read line 15 for us?
13 That's -- that's a statement you made to the Court.

14 A Right. "And, yes, Your Honor. It's a -- I don't know
15 anything about Ricky Long. I have been out to his house
16 and I've tried to find him. I can't find him. The -- I
17 know that the sheriff's office has looked diligently for
18 him because I was over there yesterday. And Friday I even
19 had another talk with one of the deputies. So I know they
20 tried to find him."

21 Q I'm sorry. That's far enough.

22 Are you sure you had a conversation with Mr. Long prior
23 to trial?

24 A Yes, I had a conversation. Well, I mean as I
25 originally testified, I have notes here that are dated

Kimberly Lewis Leskanic
Direct examination by Mr. Hray

1 5/27/2006 of B'burg, which means Blacksburg. And that's
2 a -- a -- my notes from talking to him. And that's back in
3 2006.

4 I haven't read this, the transcript, but I think
5 I'm -- I think what we're talking about is where is
6 Mr. Long at that particular time of the trial.

7 Q Okay.

8 A Not -- not back in 2006.

9 MR. HRAY: That's all I have, Your Honor, of this
10 witness.

11 MS. WHITE: The state has nothing further, Your Honor.

12 THE COURT: You may step down.

13 We'll take ten minutes before we go further.

14 (Whereupon, a recess was taken.)

15 THE COURT: All right. Next witness.

16 MR. HRAY: Yes, Your Honor. I call Kim Leskanic.

17 KIMBERLY LEWIS LESKANIC,
18 having been first duly sworn, testified as follows:

19 DIRECT EXAMINATION BY MR. HRAY

20 Q You're Kim Leskanic, is that correct?

21 A Yes, sir.

22 Q And where are you employed?

23 A I'm employed in the Cherokee County Solicitor's
24 office.

25 Q And were you the solicitor that was assigned to this

Kimberly Lewis Leskanic
Direct examination by Mr. Hray

1 case that we're discussing today against Mr. Jones?

2 A Yes, sir.

3 Q And the case arose out of an incident in 2006, is that
4 correct?

5 A That is correct.

6 Q Were you the initial prosecutor assigned to the case?

7 A No, sir. It was initially Abel Gray.

8 Q Okay. Is Mr. Gray still with the solicitor's office?

9 A He is. He moved to our Spartanburg office, and I'd
10 went to Cherokee County office in October of 2006.

11 Q Okay. And had Mr. Gray obtained an indictment in the
12 case?

13 A He did. He obtained two indictments, one for assault
14 and battery of a high and aggravated nature and one for
15 armed robbery.

16 Q Okay. And the case sat on the docket for quite some
17 time, is that correct?

18 A I don't know if it was actually on the docket, but it
19 was -- it was in our office, yes, sir.

20 Q It was in your office. Okay. And the incident
21 occurred in May of 2006.

22 A That's correct.

23 Q And the trial was in September of 2009.

24 A That is correct.

25 Q More than three years later.

Kimberly Lewis Leskanic
Direct examination by Mr. Hray

1 A Yes, sir. September 14th and September 15th of 2009.

2 Q Okay. And you were also involved in another case
3 involving the same defendant, is that correct?

4 A That's correct.

5 Q And that was the incident that occurred in May of
6 2009, is that correct?

7 A That may be. I did not bring that file or review that
8 file.

9 Q Was it fairly close to the trial date in this case?

10 A It's very possible. If you have that date, I'm not
11 going to argue with you.

12 Q Okay. And the -- the victim in that case was a
13 Ms. Kay Spencer, is that correct?

14 A That's correct.

15 Q And did you know Ms. Kay Spencer prior to that
16 particular incident?

17 A No, sir.

18 Q Were you the only -- were you the solicitor that was
19 assigned to that case initially throughout?

20 A Yes, sir.

21 Q As the case developed did you become friends with
22 Ms. Spencer?

23 MS. WHITE: Your Honor, I object on the relevance
24 grounds.

25 THE COURT: Well, I don't know where he's going, so I

Kimberly Lewis Leskanic
Direct examination by Mr. Hray

1 don't know if it's relevant or not.

2 Is it?

3 MR. HRAY: I hope so, Your Honor.

4 THE COURT: Okay. Are you a friend of Ms. Spencer?

5 THE WITNESS: I know Ms. Spencer. I don't go to lunch
6 with her. I've never been to her home. She hasn't been to
7 my home.

8 She was a victim of a rape, and the defendant stabbed
9 her in the chest where he was charged with assault and
10 battery with intent to kill.

11 So did I form a prosecutor-victim relationship, did I
12 care about her? Absolutely as part of my job. But I did
13 not know her before this. But these were very delicate and
14 difficult circumstances for her to deal with. So I spent
15 as much time with her as she needed.

16 Q Did you spend a lot of time with her before this --
17 this case came to trial?

18 A Before the --

19 Q The one we're here for today.

20 A No, sir. I don't -- I don't believe so.

21 Q Okay.

22 A Spent much more time with her getting ready for her
23 trial.

24 Q Now, this case was initially to be tried in the end of
25 August of 2009.

Kimberly Lewis Leskanic
Direct examination by Mr. Hray

1 A I believe it was August the 10th, may have been. And
2 I say that because I have a subpoena in my file that says
3 the date and time would be August 10th of 2009.

4 Q Okay. Was the case postponed for some reason?

5 A It was -- it was postponed, yes, sir.

6 Q And what was the reason for it being postponed?

7 A As I met with the witnesses -- the defendant was
8 originally charged, as we said, with assault and battery of
9 a high and aggravated nature and armed robbery.

10 Upon meeting with witnesses it became my belief that
11 he was, in fact, not involved with the robbery, which would
12 have been a most serious offense. I did not feel that it
13 would be appropriate for me to pursue an unfounded charge
14 against him if I didn't feel confident in that charge.

15 But without the armed robbery -- him just picking up a
16 stick or ax handle or whatever it was and hitting the
17 victim in the head requiring sutures seemed to be very
18 malicious and would meet the elements of assault and
19 battery with intent to kill, having that malice element.
20 So I did not elect to pursue the armed robbery but did
21 elect to directly indict for assault and battery with
22 intent to kill because I felt those were the appropriate
23 charges and that was my job as the prosecutor.

24 Q That wasn't Mr. Gray's opinion apparently, but he had
25 had the initial indictment in 2006.

Kimberly Lewis Leskanic
Direct examination by Mr. Hray

1 A I -- I don't think he had met with any of the
2 witnesses, and I didn't discuss the case with him. He came
3 to the Spartanburg office. And when I began to get the
4 case ready for trial I met with witnesses. And that's when
5 I determined that the armed robbery would be an
6 inappropriate charge to pursue against Mr. Jones but that
7 the ABWIK would be the most appropriate charge.

8 Q But there are there no different facts of the case
9 that Mr. Gray would have seen as opposed to what you would
10 have seen, nothing else happened except for the new charges
11 against Mr. Jones, is that correct?

12 A No, sir, that's not correct.

13 what happened is we spoke to the witnesses. There
14 were no witness statements in the police file, so Mr. Gray
15 was going strictly off of the incident report.

16 Q Uh-huh.

17 A But before I go to trial -- I met with the witnesses.
18 It's my understanding Ms. Byers is the one that took the
19 wallet from the victim, and therefore it would not have
20 been proper for me to pursue an armed robbery charge
21 against Mr. Jones.

22 Q Okay. But you don't know whether Mr. Gray called
23 witnesses or not, do you?

24 A There were no notes in the file. I mean, he didn't
25 take any notes with him if he had spoken with someone. I

Donald Scott Jones
Direct examination by Mr. Hray

1 can say in other files of his there were notes left in the
2 file.

3 Q Okay.

4 MR. HRAY: That's all I have, Your Honor.

5 MS. WHITE: Your Honor, the state has no questions.

6 THE COURT: You may step down.

7 MR. HRAY: Call Mr. Jones, Your Honor.

8 DONALD SCOTT JONES, having
9 been first duly sworn, testified as follows:

10 DIRECT EXAMINATION BY MR. HRAY

11 Q You are Donald Scott Jones, is that correct?

12 A Yes, sir, I am.

13 Q And you're the applicant on this particular P.C.R.
14 application.

15 A Yes, sir.

16 Q In this case if you had known the -- how witnesses
17 were going to testify at trial in advance would you have
18 wanted to plead in the case?

19 A If I knew I was going to spend the rest of my life in
20 prison, yes, I would have pled.

21 Q Well, my question is if you'd known they were going to
22 testify the way they did.

23 A Well, I would have stuck up for the truth, sir.

24 Q Okay. And whether the truth or not, with your version
25 of the truth, if you knew the witnesses were going to say

Donald Scott Jones
Direct examination by Mr. Hray

1 that there was no provocation for you to do what you did
2 would you have wanted to plea in the case?

3 A I would have pled because I -- I believe that the
4 truth would have come out.

5 Q Okay. You've heard what we've introduced to the Court
6 today as far as this evidence for your relief on your
7 application for P.C.R., is that correct?

8 A Yes, sir.

9 Q Were there any other areas that you'd like to address
10 with the Court that you think are proper for relief under
11 your P.C.R. application?

12 A Yes, sir. There's just one matter if I could.

13 Q Okay.

14 THE COURT: Is it something that's been alleged in
15 your petition?

16 THE WITNESS: No, sir.

17 THE COURT: Well, then it can't be -- the application
18 has not been amended, has it?

19 MR. HRAY: No, Your Honor.

20 THE COURT: You have got to pursue whatever is in the
21 application.

22 MR. HRAY: I understand.

23 A Yes, sir. It's a -- a failure to investigate. I
24 think you established that.

25 THE COURT: Failure to investigate?

Donald Scott Jones
Direct examination by Mr. Hray

1 THE WITNESS: Yes, sir.

2 THE COURT: Okay.

3 Q All right.

4 A In my investigation I found out that the prosecutor,
5 Kim Leskanic, was going to directly indict me with ABWIK.
6 So I wanted an investigation done on that indictment. And
7 the investigation did not go through with my attorney, and
8 it didn't go through with the P.C.R. attorney as well.

9 So I did my own investigation with the help of my
10 brother and my sister on the outside. And this is what I
11 came up with.

12 I requested a grand jury calender from Rosalyn
13 Frierson. She's the director of the court administration.

14 "The information pertaining to your case," she said,
15 "may be obtained by contacting the county clerk of court
16 where your case was heard. They would have information
17 concerning dockets, orders, motions, grand jury schedules
18 and true bills filed in your case."

19 Rosalyn Frierson sent me -- Frierson sent me a general
20 sessions schedule for the entire month of August of 2009.
21 The week of my indictment did not show any general sessions
22 or common pleas in Cherokee County at that time. However,
23 it does show Judge Mark Hayes in Spartanburg earlier that
24 same week but not on August 27th, '09. On Cherokee County
25 public index it shows general sessions file 08-27 --

Donald Scott Jones
Direct examination by Mr. Hray

1 2009 -- by Judge Mark Hayes.

2 THE COURT: Excuse me. Is this an allegation that's
3 been made in the other cases?

4 MS. WHITE: No, Your Honor. It sounds like he's
5 trying to allege lack of subject matter jurisdiction.

6 THE COURT: You can't just -- I understand.

7 You can't just tell me about any investigation you
8 conducted. It has to be relating to some allegation of
9 ineffective assistance that you've alleged in your
10 application. So what does it relate to?

11 THE WITNESS: Failure to investigate the validity --

12 THE COURT: Failure to investigate what?

13 THE WITNESS: The validity of the indictment, sir.

14 THE COURT: And that's in your application?

15 THE WITNESS: Should be, yes, sir.

16 THE COURT: Not what it should be. Is it?

17 MR. HRAY: Well, Your Honor, I think what he's trying
18 to -- Your Honor, if I could help, I think what he's trying
19 to say is that failure to investigate if there was actually
20 a grand jury that was convened on the day the indictment
21 was issued -- I think's what he's trying to say.

22 THE COURT: Well, that might be what he's trying to
23 say. But what I'm trying to determine is what's in the
24 application. I don't see that in this application.

25 If there's something wrong with the indictment -- is

Donald Scott Jones
Cross-examination by Ms. White

1 that alleged in the indictment -- I mean, excuse me -- the
2 application?

3 MR. HRAY: No, Your Honor.

4 THE COURT: All right. Then it's not proper. It's
5 not properly before the Court.

6 All right. Do you have any other allegations that are
7 alleged in your application?

8 THE WITNESS: No, sir, I do not.

9 THE COURT: Okay.

10 MR. HRAY: I have nothing further, Your Honor.

11 Q Answer any questions Ms. White might have for you.

12 CROSS-EXAMINATION

13 BY MS. WHITE

14 Q I just want to clarify.

15 You said you would not have pled guilty to these
16 charges. So the only thing that would have changed the
17 outcome is if you think the charge was ultimately dismissed.

18 A What I'm trying to say is I was -- was hoping that the
19 truth would prevail.

20 Q And you don't -- you don't think that did at the
21 trial.

22 A No, ma'am.

23 Q Okay. But you did testify at the trial.

24 A Yes, ma'am.

25 Q And you told your story to the jury.

1 A Yes, ma'am.

2 Q Okay.

3 MS. WHITE: Your Honor, that's all I have.

4 THE COURT: Anything else?

5 MR. HRAY: Nothing further, Your Honor.

6 THE COURT: You may step down.

7 Any other witnesses on behalf of the applicant?

8 MR. HRAY: No, Your Honor.

9 THE COURT: The state?

10 MS. WHITE: No, Your Honor.

11 THE COURT: All right. I'll review the record in the
12 case and issue an order.

13 END OF REQUESTED TRANSCRIPT OF RECORD

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CERTIFICATE

I, the undersigned Linda D. Moffitt, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of all the proceedings had and evidence introduced in the trial of the captioned cause, relative to appeal, in the Common Pleas Court for Cherokee County, South Carolina, on the 4th day of October 2013.

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

May 15, 2014

A handwritten signature in cursive script, appearing to read "Linda D. Moffitt", written over a horizontal line.

Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF CHEROKEE	)	
Donald Scott Jones, #336980,	)	2012-CP-11-0111
	)	
Applicant,	)	
	)	
v.	)	ORDER OF DISMISSAL
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed February 13, 2012. The Respondent made its Return on or about November 30, 2012. An evidentiary hearing into the matter was convened on October 4, 2013, at the Spartanburg County Courthouse. The Applicant was present at the hearing and was represented by Alexander Hray, Jr., Esquire. Suzanne H. White, Esquire, of the South Carolina Attorney General's Office, represented the Respondent.

At the hearing, the Applicant testified on his own behalf. Thomas E. Shealy, Esquire, and Kim Leskanic, Esquire, also testified. This Court also had before it a copy of the records of the Cherokee County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the Return, Applicant's appellate records and the trial transcript.

PROCEDURAL HISTORY

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Cherokee County Clerk of Court. The Applicant was indicted by the Cherokee County Grand Jury in August 2009 for assault and battery with intent

to kill ("ABWIK") (09-GS-11-0924). He was represented by Thomas E. Shealy, Esquire. On September 15, 2009, the Applicant was convicted of the charge by a jury. Applicant was sentenced by the Honorable J. Mark Hayes II to a sentence of twenty years, provided upon the service of twelve years, the balance would be suspended to five years of probation.

A timely Notice of Appeal was filed and an appeal was perfected. The South Carolina Court of Appeals affirmed the conviction and sentence. State v. Jones, Op. No. 2011-UP-287 (filed June 13, 2011). The Remittitur was returned on June 29, 2011.

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel, in that;
 - a. Counsel failed to investigate.

At the hearing, Applicant indicated that he would also proceed on allegations that Counsel failed to make a motion to quash the indictment because the Applicant was originally indicted for assault and battery of a high and aggravated nature ("ABHAN"), but three years later Applicant was indicted for ABWIK, Counsel failed to interview key witnesses prior to trial, and Counsel failed to make a motion for a change of venue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony and arguments presented at the PCR hearing. This Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. This Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80 (2003).

Ineffective Assistance of Counsel

The Applicant alleges he received ineffective assistance of counsel. In a PCR action, "[t]he burden of proof is on the applicant to prove his allegations by a preponderance of the evidence." Frasier v. State, 351 S.C. 385, 389, 570 S.E.2d 172, 174 (2002) (citing Rule 71.1(e), SCRCP). Where ineffective assistance of counsel is alleged as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 692 (1984); Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Butler, Id. The Applicant must overcome this presumption to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

First, the Applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 385 S.E.2d at 625, *citing* Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of trial." Johnson v. State, 325 S.C. 182, 186, 480 S.E.2d 733, 735 (1997) (citing Strickland).

Applicant testified that he believed Counsel failed to properly investigate the case.

Applicant testified that he also wanted Counsel to investigate the change in the indictment. Applicant attempted to testify about allegations that the grand jury had not been properly convened, but the State objected because the allegation was not properly before the Court. This Court sustained the State's objection and ruled that the Applicant could not pursue that claim. Applicant testified that he told his story at trial and hoped the truth would prevail. However, Applicant did admit that his testimony included facts about the large amount of alcohol consumed by Applicant that day and the fact that the victim never had a weapon. Applicant also testified that he would not have ever pled guilty, but would have stood up for the truth.

Counsel testified he represented the Applicant on this charge while working at the Cherokee County Public Defender's office, but now works at the USC Children's Law Center. Counsel testified that he was unsure of the date he was appointed to represent the Applicant, but he filed a Motion for Discovery on May 31, 2006, so it was sometime prior to that date. Counsel testified that originally the Applicant was indicted for ABHAN and armed robbery, but prior to the trial three years after the original indictment, the State indicted Applicant for ABWIK and dismissed the armed robbery charge. Counsel testified that the State had offered a plea of twenty years for both charges, but Applicant always indicated to Counsel that Applicant would not accept twenty years. Counsel testified that he did push the Applicant to plea because Counsel was concerned about the risks of proceeding to trial, in particular in light of the fact that ABWIK was a most serious charge. Counsel testified that he was also representing Applicant on charges of criminal sexual conduct – 1st degree and another ABWIK charge related to a separate incident. Counsel testified that he did not make a motion to quash the indictment for ABWIK because Counsel believed the elements of the charge were present and that there was no prosecutorial misconduct involved in the new indictment.

Counsel testified that his case notes indicate that he spoke with the Applicant and witness Ricky Long, but does not recall that he found witness Tammy Byers to interview. However, Counsel testified that he letters from Byers discussing the facts and had discussed her planned testimony with the Assistant Solicitor. There was no question about the fact that the Applicant hit the victim with a large stick, but the issue was if it was done in defense of Ms. Byers. Counsel testified that because the theory of the defense was that Applicant hit the victim in defense of another, at least one of the two witnesses needed to back up the Applicant's story at trial. However, Counsel testified that neither witness, Mr. Long or Ms. Byers, provided testimony at trial to support Applicant's defense. In fact, Counsel testified that Ms. Byers' story changed numerous times and he felt you could not rely on anything she said. Counsel testified that he discussed Ms. Byers' possible testimony with the Applicant and the risks of proceeding to trial.

Counsel testified that he was not aware of any publicity surrounding this case because he did not take the local paper in Gaffney. However, Counsel testified that at no time did he consider making a motion for change of venue or see the necessity of a motion. Counsel testified that he requested and the jury was charged with both ABWIK and ABHAN, but came back with a verdict of guilty of ABWIK in thirty minutes.

Kim Leskanic, Esquire, testified that she was the Assistant Solicitor who prosecuted the Applicant on these and the later charges. Leskanic testified that in 2006, Assistant Solicitor Abel Gray handled the case, but once she moved to Cherokee in October 2006, the case became hers. Gray received an indictment for charges of ABHAN and armed robbery against Applicant in 2006 based upon the incident reports. There were no notes in the case file indicating that Gray had the opportunity to speak with any witnesses or the victim. However, Leskanic testified that

as she prepared the case for trial and met with witnesses, she determined that Applicant was not involved in the armed robbery, but did believe the case warranted an ABWIK indictment. Leskanic testified that she believed that was the appropriate charge.

This Court finds the testimony of Counsel to be more credible than the testimony of the Applicant. The Applicant's allegation that Counsel did not conduct an adequate pre-trial investigation is without merit. Following testimony and review of the transcript, it is clear that Counsel had reviewed the facts and evidence, as well as the options that Applicant faced. The "brevity of time spent in consultation, without more, does not establish that counsel was ineffective." Easter v. Estelle, 609 F.2d 756, 759 (5th Cir. 1980). To establish counsel was inadequately prepared, an Applicant must present evidence of what counsel could have discovered or what other defenses could have been pursued had counsel been more fully prepared. Jackson v. State, 329 S.C. 345, 495 S.E.2d 768 (1998); Skeen v. State, 325 S.C. 210, 481 S.E.2d 129 (1997) (applicant not entitled to relief where no evidence presented at PCR hearing to show how additional preparation would have had any possible effect on the result at trial). The Applicant failed to point to any specific matters Counsel failed to discover, or any defenses that could have been pursued had Counsel been more fully prepared. Furthermore, the Applicant failed to show any prejudice that may have resulted from Counsel's alleged inadequate preparation. Accordingly, this allegation is dismissed.

This Court also finds that the Applicant failed to meet his burden of proof as to the claim that Counsel failed to interview key witnesses prior to trial. As the testimony indicates, Counsel acknowledged that he did not interview Ms. Byers prior to trial, but because of review of the incident reports, letters, and conversations with the Assistant Solicitor, he felt prepared for her possible testimony. "[A] defendant has a 'burden of supplying sufficiently precise information,'

of the evidence that would have been obtained had his counsel undertaken the desired investigation, and of showing 'whether such information . . . would have produced a different result.'" United States v. Rodriguez, 53 F.3d 1439, 1449 (7th Cir. 1995). The Applicant did not proffer any questions counsel allegedly failed to ask and did not present any testimony showing the witness' answers at trial would have been different. Accordingly, the Applicant has not shown that a different approach to cross-examination would have been beneficial to the defense. Therefore, this claim is denied and dismissed.

Regarding Applicant's allegation that Counsel failed to move to quash the indictment, this Court finds that this allegation lacks merit. This Court reviewed the indictment and found no deficiency that would have provided a basis for any objection. Further, this Court finds both Counsel and Ms. Leskanic's testimony to be credible. This Court finds that the crime did contain the elements of ABWIK and the jury was presented with both ABWIK and ABHAN as possible verdicts. Therefore, this Court finds that the Applicant has failed to meet his burden of proof as to this claim.

This Court also finds that the Applicant failed meet his burden of proof regarding Counsel's failure to make a motion for change of venue. The Applicant offered no evidence or testimony to demonstrate that the pretrial publicity was such that Counsel should have made a motion for change of venue or that the motion would have been granted had it been made. Therefore, this claim is denied and dismissed.

Summary

This Court finds in regards to the allegation of ineffective assistance of counsel, the Applicant's testimony is not credible. This Court further finds Counsel adequately conferred with the Applicant, conducted a proper investigation, was thoroughly competent in his

representation, and that Counsel's conduct does not fall below the objective standard of reasonableness.

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that Counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that Counsel committed either errors or omissions in his representation of the Applicant.

This Court also finds the Applicant has failed to prove the second prong of Strickland – that he was prejudiced by Counsel's performance. This Court concludes the Applicant has not met his burden of proving Counsel failed to render reasonably effective assistance. See Frasier supra. Therefore, this allegation is denied.

CONCLUSION

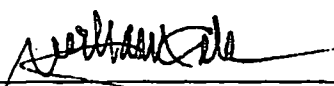
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post conviction relief must be denied and dismissed with prejudice.

This Court cautions Applicant that he must file and serve a notice of appeal within thirty (30) days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of PCR. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, PCR counsel must serve and file a Notice of Appeal on the Applicant's behalf. Your attention is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED:

1. That the Application for Post-Conviction Relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 20 day of February, 2014.



J. Derham Cole
Presiding Judge

BRANDY W. NOBEE

2014 FEB 24 PM 8:50

CLERK OF COURT
JUDICIAL BRANCH
CHAMBERLAIN COUNTY, MO

WITNESSES

Blacksburg Police Dept.

Sandy Thomas

ARREST WARRANT NUMBER

Direct Indictment

ACTION OF GRAND JURY

TRUE BILL

Adell Mickle
Foreperson of Grand Jury

Date: 8-27-09

VERDICT

Guilty

[Signature]
Representative of Petit Jury

Date: 9-15-09

DOC 09-GS-11-0024

The State of South Carolina

County of Cherokee

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

AUG 27 2009

TERM

THE STATE
vs.

Donald Scott Jones

Indictment for

ASSAULT AND BATTERY
WITH INTENT TO KILL

SC Code: 16-3-620
CDR Code: 014
Class FEL-C

STATE OF SOUTH CAROLINA)
COUNTY OF CHEROKEE)

INDICTMENT

At a Court of General Sessions, convened on AUG 27 2009, the
Grand Jurors of Cherokee County present upon their oath:

ASSAULT AND BATTERY WITH INTENT TO KILL

That Donald Scott Jones, did in Cherokee County on or about May 27, 2006,
commit an unlawful act of a violent nature to the person of another with malice
aforethought, either express or implied, by striking Jerry Wayne Emery, all in violation of
§16-03-620, *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976, as amended).

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


ASSISTANT SOLICITOR