

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Pickens County
Robin B. Stilwell, Circuit Court Judge

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SEP 15 2014

S.C. Supreme Court

KENT R. CLAYTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2014-000179

APPENDIX

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INDEX

INDEX.....	i
TRIAL TRANSCRIPT (dated October 21-23, 2008).....	1
APPLICATION FOR POST-CONVICTION RELIEF.....	419
RETURN	429
POST-CONVICTION RELIEF HEARING TRANSCRIPT (dated August 26, 2013).....	434
ORDER OF DISMISSAL	455
SENTENCE SHEET, INDICTMENT AND ARREST WARRANT	461
OPINION OF THE COURT OF APPEALS	466

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

COUNTY OF PICKENS

STATE OF SOUTH CAROLINA,

PLAINTIFF,

-VS-

KENT CLAYTON,

DEFENDANT.

07-GS-39-499

OCTOBER 21, 22, 23, 2008

TRANSCRIPT OF RECORD

BEFORE:

THE HONORABLE G. EDWARD WELMAKER, JUDGE

APPEARANCES:

PETER THEM, ESQUIRE
ASSISTANT SOLICITOR FOR 10TH JUDICIAL CIRCUIT
ATTORNEY FOR THE STATE

JOHN DEJONG, ESQUIRE
DALLAS BALL, ESQUIRE
ATTORNEYS FOR THE DEFENDANT

DANETTE P. HANKS
CIRCUIT COURT REPORTER

INDEX

WITNESSES	DIRECT	CROSS	REDIRECT	RECROSS
Aleatha Jones				
Them	150		184	
Dejong		164		186
Scott Smith				
Them	193		208	
Dejong		195		
Steve Young				
Them	209		272	
Dejong		256		
Kett Fowler				
Them	278			
Dejong		300		
Keith Cochran				
Ball	334		342	
Them		341		
David Lee Jones				
Them	350			
Dejong		352		

<<-->>

PAGE

Jackson v. Denno hearing	5
Niel v. Biggers hearing	55
VOIR DIRE	96
OPENING STATEMENTS	
Them	143
Dejong	146
CLOSING STATEMENTS	
Dejong	360
Them	378
CHARGE	389
VERDICT AND SENTENCING	408
CERTIFICATE OF REPORTER	418

PLAINTIFF'S/ EXHIBITS

NO	DESCRIPTION	ID	EV
S-1	Rights Advisement and Waiver of Rights	5	291
S-2	Voluntary Statement of defendant	5	291
S-3	Three photographs of victim	5	157
S-4	Four photographs of victim	5	157
S-5	Four photographs of victim	5	157
S-6	CD	203	217

DEFENDANT'S EXHIBITS

	NONE		
COURT'S EXHIBITS			
C-1	Email from John Dejong to Dallas Ball	125	
C-2	Note from juror	274	
C-3	Excerpt from State Exhibit 1	291	
C-4	Note from jury	406	
C-5	Note from Judge to jury	407	
C-6	Note from jury	408	

Voir Dire

Juror #	Name	Race	Sex	<u>Strikes</u>			Accept
				Court	Plaintiff	Def.	
80	Obryant, Daniel H	W	M				x
122	Walsh, Mark D	W	M				x
90	Pittinger, John T	W	M				x
25	Chappell, Ryan E	W	M			x	
55	Jones, Janie M	B	F				x
22	Cassell, Tammy L	W	F			x	
37	Galloway, April L	W	F				x
97	Robinson, Adam S	W	M				x
8	Beckham, Robert J Jr.	W	M				x
76	Mode, Ingrid J	W	F				x
78	Mount, Charles P	W	M			x	
110	Steed, Holly M	W	F			x	
106	Smith, Junius R III	W	M				x
85	Pfeiffer, Mark K	W	M				x
101	Searcy, Ricky K	W	M				x
59	Lesley, Teresa E	W	F			x	
38	Ellison, Mary B	W	F			x	
98	Robinson, Stewart R	W	M				x
58	Landers, Kathy A	W	F				x
44	Gambrell, Pamela Y	W	F			x	
*For the Court column, please indicate who made the motion to strike the juror "for cause" with a "C" for Court, "P"							
Juror	Name	Race	Sex	<u>Strikes</u>			Accept
34	Doll, Stephanie	W	F				x

1 (WHEREUPON, court convened with all parties present and
2 the following proceedings were had.)

3 (WHEREUPON, State Exhibit Numbers 1 and 2 were marked
4 for identification only for Jackson v. Denno hearing.)

5 (WHEREUPON, State Exhibit Numbers 3, 4 and 5 were
6 marked for identification.)

7 MR. THEM: Detective Fowler, would you take the
8 stand, sir?

9 KETT FOWLER,

10 being duly sworn, testified as follows:

11 DIRECT EXAMINATION

12 BY MR. THEM:

13 Q. Where are you employed, Detective Fowler?

14 A. Pickens County Sheriff's Office.

15 Q. And how long have you been employed there?

16 A. Almost eight years.

17 Q. Okay. And what is your rank now or responsibility
18 area?

19 A. Detective investigator.

20 Q. And how long have you been a detective investigator?

21 A. Almost five years.

22 Q. Okay. Let me call your attention to September of last
23 year. Did you have the occasion to get involved in an
24 incident that may have happened down at the fairgrounds?

25 A. I did.

1 Q. Were you assigned the case?

2 A. Not initially. However, as new information came in, it
3 was my responsibility to investigate.

4 Q. At some point in time in your early involvement in the
5 case did you have the occasion to interview one Kent Rhode
6 Clayton?

7 A. I did.

8 Q. And do you see that person in court today?

9 A. I believe that's him at the table.

10 Q. Okay. Let the record reflect that the witness is
11 pointing at the Defendant. Let me show you -- well, let me
12 back up. Where did you interview him?

13 A. At the fairgrounds.

14 Q. Okay. Where at the fairgrounds?

15 A. In my patrol vehicle.

16 Q. And was anybody with you other than you and Mr.
17 Clayton?

18 A. Captain Phil Sargent.

19 Q. Okay. And at the time you interviewed the Defendant
20 was he under arrest?

21 A. He was not.

22 Q. Was he free to leave at any time?

23 A. Yes.

24 Q. Let me show you a copy of the document marked State's
25 Exhibit Number 1 for identification only at this point, and

- 1 ask you if you've ever seen that before, sir?
- 2 A. Yes.
- 3 Q. What is that?
- 4 A. That's a rights -- advisement and waiver of rights.
- 5 Q. Would you tell me how you used that in the interview?
- 6 A. Basically I read the form to Mr. Clayton and asked if
- 7 he understood and asked if he agreed to speak with us.
- 8 Q. Okay. Did you ask him whether or not he understood his
- 9 individual rights or just in, just in one big collective?
- 10 A. Just one collective.
- 11 Q. Okay. And did he initial those rights?
- 12 A. Yes.
- 13 Q. All right. And did he appear to understand what he was
- 14 doing?
- 15 A. Yes.
- 16 Q. Did you observe any indications of reduced mental
- 17 abilities or anything?
- 18 A. I did not.
- 19 Q. Did he appear to be normal to you?
- 20 A. Yes.
- 21 Q. And did he sign it?
- 22 A. He did.
- 23 Q. After he signed that, that he understood that, did he
- 24 waive those rights?
- 25 A. Yes. As a normal procedure I have each person actually

- 1 read aloud -- out loud the waiver.
- 2 Q. Okay.
- 3 A. And then I explain that part and make sure they
- 4 understand and then they sign it.
- 5 Q. You say you have each person read aloud the waiver.
- 6 You talking about the person that's going to sign the
- 7 statement or you read it aloud?
- 8 A. I always have the person that I'm advising of their
- 9 rights read the waiver out loud.
- 10 Q. Okay.
- 11 A. So I can attest that they can read and write.
- 12 Q. Okay. And did he waive his rights?
- 13 A. He did.
- 14 Q. And did he subsequently give you a statement that would
- 15 be represented by State's Exhibit Number 2 for
- 16 identification purposes?
- 17 A. Yes.
- 18 Q. And does that statement also contain a listing of his
- 19 constitutional rights?
- 20 A. It does.
- 21 Q. Did you read that to him?
- 22 A. I did not.
- 23 Q. Did you ask him to read it?
- 24 A. I don't recall doing that.
- 25 Q. And whose handwriting is that statement?

1 A. Mr. Clayton's.

2 Q. Okay. And who is it signed by?

3 A. Mr. Clayton.

4 Q. Okay. And who are the witnesses?

5 A. Myself and Captain Sargent.

6 Q. Okay. Thank you very much. No further questions.

7 THE COURT: You may cross examine the witness.

8 MR. DEJONG: Thank you, Your Honor. May it please
9 the court.

10 CROSS EXAMINATION

11 BY MR. DEJONG:

12 Q. Mr. Fowler, you went to the fairgrounds on September
13 the 1st, and you talked to Kent Clayton; right?

14 A. Yes, sir.

15 Q. We're talking about the fairgrounds, that's the Upper
16 South Carolina State Fairgrounds on 123; right?

17 A. That's correct.

18 Q. Now, I understood you to say that Mr. Clayton was not
19 under arrest at this point in time?

20 A. No, sir, he was not.

21 Q. I see. And he was free to leave?

22 A. Yes.

23 Q. I see. And nonetheless, you went ahead and gave him
24 his *Miranda* warnings; right?

25 A. I did.

1 Q. Okay. And then you took the statement; right?

2 A. Correct.

3 Q. Did you ever Mirandize Mr. Clayton again?

4 A. After that date I went back to speak with him again, I
5 simply asked him if he wanted to discuss the situation
6 further and he declined.

7 Q. Okay. Maybe I wasn't clear on my question. I'll try
8 to ask it somewhat different. On September the 1st when he
9 was not under arrest and he was free to leave, you gave him
10 his *Miranda* warnings?

11 A. Yes.

12 Q. And that was the only time you gave him his *Miranda*
13 warnings?

14 A. Yes.

15 Q. Thank you, sir. No further questions.

16 THE COURT: May the witness step down? Any
17 redirect?

18 MR. THEM: I have no redirect.

19 PHIL SARGENT,

20 being duly sworn, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. THEM:

23 Q. Where are you employed, sir, and in what capacity?

24 A. Pickens County Sheriff's Office, and I'm the jail

1 administrator.

2 Q. Okay. What is your rank?

3 A. Captain.

4 Q. Okay. On September the 1st, 2007, what were your
5 responsibilities?

6 A. I was the command officer in charge of the weekend
7 duty.

8 Q. Were you also the jail officer then, just doing
9 additional duties on the weekend?

10 A. Yes. I assist the techs on the weekend.

11 Q. Did you have the occasion to participate with Detective
12 Fowler in the interview of one Kent Rhode Clayton?

13 A. I did.

14 Q. Where did that interview take place?

15 A. Inside his car and out the main gate, I believe it was,
16 at the Upper State Fairgrounds.

17 Q. Okay. Was the Defendant under arrest?

18 A. No, sir.

19 Q. Was he free to leave at any time?

20 A. Yes, sir, he was.

21 Q. Let me show you this form and ask you -- I'm showing
22 you State's Exhibit 1, and I ask you, have you ever seen it
23 before?

24 A. Yes, sir, this is a rights -- statement of Miranda
25 warnings and also waiver of rights.

1 Q. Okay. Were you present when that form was used?

2 A. I was, and I have my signature on the bottom left hand
3 corner.

4 Q. Tell me how that form was used in this particular
5 interview?

6 A. Detective Fowler presented this form to the Defendant
7 and I believe he did read him the rights there and written
8 waiver of rights and he asked him if he was willing to make
9 a statement.

10 Q. Okay. And did he read him each of those rights?

11 A. I believe he did, but I can't say for sure.

12 Q. All right. Initials appear by them. What do those
13 initials represent?

14 A. Those initials represent the Defendant.

15 Q. Okay. And they may represent his initials, but do they
16 mean anything else?

17 A. Yes. It meant that he was read or he did read each of
18 those rights and he agreed that he understood them.

19 Q. And is there a typewritten paragraph on the form below
20 that?

21 A. Yes. It's the waiver of rights.

22 Q. Okay. How was that handled, the actual waiver?

23 A. The -- it's presented to the suspect and at the end of
24 it, you see the Defendant's signature, or initials, I'm
25 sorry.

1 Q. Was it read to him by anyone?

2 A. I do not recall. I know that we went through the
3 process while he was in the car. But I'm not sure that
4 Detective Fowler read -- actually read it.

5 Q. Who else could have read it?

6 A. The Defendant could have.

7 Q. Do you know whether or not he did?

8 A. I do not, no. I do not.

9 Q. And there's a signature under that waiver. Whose
10 signature is that?

11 A. It's the Defendant's.

12 Q. Did you see him sign it?

13 A. He was in the front seat and I was in the back seat.

14 Q. And did you witness it?

15 A. Yes. I was there the entire time.

16 Q. And the person that's -- do you see the person that
17 signed that form in this courtroom?

18 A. Yes, sir. Mr. Clayton is sitting between the two
19 attorneys.

20 Q. Okay. Let the record reflect the witness has
21 identified the Defendant. Let me show you State's Exhibit
22 Number 2 for identification. I ask if you've ever seen
23 that?

24 A. Yes, sir, I have.

25 Q. Where?

1 A. This was a written statement made by the Defendant, Mr.
2 Clayton, and I signed it as a witness at 7:06 p.m. on
3 September the 1st, '07, which is just after the *Miranda*
4 warnings and waiver of rights were given to the Defendant.

5 Q. The body of the statement that's handwritten on top of
6 those five lines, whose handwriting is that?

7 A. The Defendant's.

8 Q. And does the signature appear on there?

9 A. Initials KC at the very end, and also his statement or
10 his handwriting and signature is on the bottom right.

11 Q. Does your name appear in the witness block?

12 A. Yes, sir, as a witness.

13 Q. Did you actually see him sign that?

14 A. I was behind him, but he was there in the front seat,
15 so ...

16 MR. THEM: That's all the questions I have of this
17 witness, Your Honor.

18 THE COURT: You may cross examine.

19 MR. DEJONG: May it please the court. Thank you.

20 **CROSS EXAMINATION**

21 **BY MR. DEJONG:**

22 Q. Captain Sargent, after this meeting that you and Mr.
23 Fowler had with Mr. Clayton on September the 1st at the
24 fairground, did you ever have anymore contact with Mr.
25 Clayton?

1 A. Well, he was booked later in the detention center. And

2 I may have been in the control room.

3 Q. My using the word contact may not have been clear.

4 After you and Mr. Fowler had this conversation in the car at

5 the fairground, did you ever have anymore conversations with

6 Mr. Clayton?

7 A. Not that I recall. I think we were in separate

8 vehicles ---

9 Q. All right, sir.

10 A. -- when we left.

11 Q. So you may have been around him at some point in time,

12 but never had occasion to have any conversations with him

13 after the fairground conversation?

14 A. No, sir, not that I recall.

15 Q. All right, sir. Now, let's go back to September the

16 1st at the fairground. He was free to leave?

17 A. Yes, sir.

18 Q. He was not under arrest?

19 A. No, sir.

20 Q. And his *Miranda* warnings were given to him at that

21 time?

22 A. Yes, sir.

23 Q. Was Mr. Clayton given a copy of that, do you know?

24 A. I do not know.

25 Q. All right, sir.

1 A. Are you speaking of the *Miranda* warnings or a copy of
2 the statement?

3 Q. Both?

4 A. I do not know. I do know, I believe, that that -- the
5 *Miranda* warnings form is a single form. But the statement
6 form is a multiple copy form, and he may have a pink copy of
7 it, what we call the pink copy or his copy of that.

8 Q. So I'm clear on what you're saying, the statement form
9 that you use is kind of what we used to call carbon pack. I
10 don't know what they call them nowadays.

11 A. Yes, sir.

12 Q. But you write on the top page and it goes all the way
13 through; right?

14 A. Yes, sir.

15 Q. Now the waiver of rights form, that is just a single
16 sheet and that is not a carbon pack that I am referring to?

17 A. That's correct. I believe that's a single sheet of
18 paper.

19 Q. All right, sir.

20 MR. DEJONG: May I have one moment, please, Your
21 Honor?

22 THE COURT: Yes, sir.

23 MR. DEJONG: Thank you, Captain Sargent.

24 THE COURT: Any redirect?

25 MR. THEM: None, Your Honor. That's our case for

1 the Jackson v. Denno portion.

2 THE COURT: You may step down, Officer Sargent.

3 Any witnesses you wish to present?

4 MR. DEJONG: I do not, Your Honor.

5 THE COURT: All right. I understand we've got a
6 verdict from the jury on the other case, if we could take it
7 first before we hear any arguments on this.

8 MR. DEJONG: That's fine, Your Honor.

9 (WHEREUPON, the court stood at recess for a short
10 break.)

11 THE COURT: All right. Is there any -- be glad to
12 hear from you on any issues on this.

13 MR. THEM: Yes, sir. We would like to do a Niel
14 v. Biggers hearing.

15 THE COURT: Is there any -- I'd like to -- is this
16 -- is there an issue about the statement in this case? I'd
17 like to sort of do them one at a time if I could. Is there
18 an argument about the statement in this particular case?

19 MR. DEJONG: With regard to this statement, the
20 one that the State has introduced for purposes of
21 identification, which I believe is State's Exhibit Number 2,
22 taken at approximately six fifty-eight p.m. on September the
23 1st of 2007, Your Honor, I have no argument.

24 THE COURT: All right. Did you talk to him about
25 that before you presented him this? Did you talk to him

1 about that before we had the hearing?

2 MR. THEM: I got the impression this morning that
3 he was desirous of a *Niel v. Biggers*.

4 THE COURT: Well, that's what we're about to do.
5 I'm talking about what we just did. Does that set the stage
6 for the *Niel Biggers*? Am I missing something?

7 MR. THEM: No, sir. I think we need a ruling. I
8 understand what you said. We need a ruling on the
9 voluntariness in the *Jackson v. Denno*.

10 THE COURT: He has no objection to that, so ...

11 MR. DEJONG: Your Honor, I want the record to be
12 clear because that is not the only statement that was taken
13 from my client.

14 THE COURT: Yeah. We're piecemealing this for the
15 benefit of the Judge to not give him too much at one time.

16 MR. DEJONG: Yes, sir.

17 THE COURT: So as far as this issue right now, no
18 objection to these statements?

19 MR. DEJONG: That's why I limited it to that
20 statement, Your Honor.

21 THE COURT: I understand that. All right. Now,
22 ...

23 MR. THEM: If you want to stay in this general
24 area before we get to the line-up, I can move to the next
25 statement, Your Honor.

1 THE COURT: Whichever way you want to present
2 it.

3 MR. THEM: Mr. Young.

4 STEVE YOUNG,
5 being duly sworn, testified as follows:

6 DIRECT EXAMINATION

7 BY MR. THEM:

8 Q. Slide that chair closer a little bit so you're closer
9 to the mike. Your full name?

10 A. Steven, Steven Randall Young.

11 Q. Okay. And where do you work, sir?

12 A. I work for Amusements of America. It's a carnival.

13 Q. Okay. And where do you live?

14 A. I live -- basically I travel with the show. My home is
15 in Princeton, Florida.

16 Q. Okay. And were you working the Upstate Fair last year
17 around September the 1st?

18 A. Yes, sir.

19 Q. Okay. And what were your duties there?

20 A. At the time I had just been hired on at Lebanon,
21 Tennessee. And I was hired on as first man on a ride called
22 the Rock 'n Roll.

23 Q. Okay. Do you know the Defendant, Kent Clayton?

24 A. Yes, sir, I do.

25 Q. Did you know him prior to that day?

1 A. Yes, sir, I did.

2 Q. Did you know him prior to going to work for the
3 amusement company?

4 A. Yes, sir, I did.

5 Q. When did you first meet him?

6 A. In Evansville, Indiana under the Ohio -- or under the
7 bridge between Evansville and Henderson, Kentucky. It's
8 right on the Ohio River.

9 Q. Okay. Where was he living then?

10 A. At the time he was living out of his van with his two
11 dogs.

12 MR. DEJONG: I don't mean to interrupt, Your
13 Honor, but could we approach?

14 THE COURT: Yes, sir.

15 (WHEREUPON, Mr. Them and Mr. Dejong approached the
16 bar.)

17 Q. You say you met him when?

18 A. It was around June, about a month before me and my
19 fiancé split up.

20 Q. In what year?

21 A. 2007.

22 Q. Did the two of you become friends?

23 A. Yes, sir, we did.

24 Q. Did y'all become co-workers?

25 A. I had some contracts I was doing in construction, and

1 yes, I took him on to help me finish the contracts.

2 Q. Did the two of you travel away from that area that you
3 just talked about to another state to do work?

4 A. Yes, sir, we did.

5 Q. Okay. Where did y'all go?

6 A. First we went to Kentucky and tore down -- I tore down
7 what's called Pharaoh's Fury. It's a boat ride. And then
8 we went back to Evansville and did some more work. And then
9 we went to a town called Lebanon, Tennessee after that.

10 Q. When you say you tore down, you mean you dismantled a
11 fair ride?

12 A. Yes, sir.

13 Q. Okay. And what did you do in Lebanon, Tennessee?

14 A. Well, we started out just tearing down a ride cause we
15 was making extra money. We was heading to New Orleans to go
16 down and work down there. Because I'm a heavy equipment
17 operator.

18 Q. And where did y'all go when y'all left Lebanon?

19 A. Well, I got hired on full time and we decided to go
20 ahead and travel south with the fair and make money on the
21 way down to where we would have more money when we got to
22 New Orleans.

23 Q. And where did y'all travel to from Lebanon?

24 A. I'm not sure, but I think it was either Lawrenceville
25 or Greenville was the next stop.

1 Q. Okay. And did Mr. Clayton come with you?

2 A. Yes, sir, he did.

3 Q. And did he go to work for the fair too?

4 A. Yes, sir, he did.

5 Q. Did the two of you maintain your friendship at that
6 point in time?

7 A. Yes, sir, we did.

8 Q. All right. Let me call your attention to early in the
9 morning of approximately September the 1st. Did you have
10 the occasion to have a conversation with the Defendant at
11 the fairgrounds?

12 A. September the 1st, was that on a Thursday or a Friday?

13 Q. I said on or about. Either one of those two days?

14 A. Okay.

15 Q. Did you have an early morning conversation with him?

16 A. Yes, sir, I did.

17 Q. Where did it take place?

18 A. It took place back in the living quarters. We was -- I
19 was sleeping in a car and he was sleeping in a van. I was
20 sitting on the car at the time talking to a friend, well a
21 co-worker, and he come up on his bicycle.

22 Q. Okay. And what, if anything, did he say?

23 A. Well, he said he needed to talk to me. And I basically
24 told Danny to go ahead to his house and I'd come over and
25 we'd finish drinking beer together. And then Mr. Clayton

- 1 told me that he needed me to tell anybody that come up
2 asking, whether it be policeman or anybody, that he was with
3 me all night drinking.
- 4 Q. Okay. Had he been with you all night drinking?
- 5 A. No, sir, he hadn't.
- 6 Q. Did he tell you why he needed someone to say that?
- 7 A. Yes, sir. His exact, his exact words was, I asked him
8 why, and he said, I half-heartedly tried to rape somebody.
- 9 Q. Okay. And did you agree to do that?
- 10 A. At the time I didn't give him an answer because I
11 wouldn't give somebody an alibi for anything such as that.
- 12 Q. All right. Did you subsequently that morning have a
13 conversation with representatives from the Pickens County
14 Sheriff's Department?
- 15 A. Yes, sir, I did.
- 16 Q. Did you pass that information on to them?
- 17 A. Yes, sir, I did.
- 18 Q. All right. And at some later point in time, either
19 that day or the day immediately following, did the police,
20 Sheriff's Office, come out to the fairgrounds with a woman
21 and walk around?
- 22 A. Well, I don't know if they come out with a woman, sir,
23 but I do know that they come out and talked to me.
- 24 Q. Okay. And what did they talk to you about?
- 25 A. The statement I made to the deputy regarding -- which I

1 didn't tell the deputy any names or anything because I
2 didn't want to get anybody in any trouble that didn't
3 deserve it. But I told him basically what I told the
4 detective. And then I told him that I knew the man that --
5 and I gave him -- told him where he was working at and gave
6 a description of what he looked like.

7 Q. And what description did you give him?

8 A. I told him that he was wearing a show shirt. He was
9 working at ---

10 Q. A show shirt? What's a show shirt?

11 A. It's got a -- like an A that trails off into another A.
12 Basically, it's Amusements of America, and we have red --
13 blue and yellow shirts.

14 Q. Are these like uniforms?

15 A. Yes, sir, they are.

16 Q. Okay. All right.

17 A. V-neck shifts with collars.

18 Q. At some later point in time did you learn that he was
19 arrested shortly thereafter?

20 A. Yes, sir, I did.

21 Q. After he -- well, do you know whether or not he made
22 bond when he was arrested?

23 A. No, he did not, sir.

24 Q. Okay. At any point in time after that did you have the
25 occasion to visit him at the law enforcement center?

- 1 A. Yes, sir, I did.
- 2 Q. What brought about that visit?
- 3 A. I'd called the detective that was in charge of the
- 4 case, Detective Fowler, and asked to basically go and talk
- 5 to him and be wired to where -- get more information on the
- 6 case.
- 7 Q. Who asked you to do that?
- 8 A. I asked them to be wired.
- 9 Q. Whose idea was it for you to go to the jail?
- 10 A. It was mine.
- 11 Q. Okay. Were you contacted by the Defendant before you
- 12 had that idea?
- 13 A. Yes, I was.
- 14 Q. Tell me about that contact with the Defendant?
- 15 A. Right after he was arrested, he told me what he was
- 16 arrested for, which he called me on my cell phone, I guess
- 17 from the county jail. I don't know if he had his cell phone
- 18 or whatever he called from. But he called me and he told me
- 19 he got arrested and that he needed me to be his alibi and
- 20 reinforced that he wanted me to help him out.
- 21 Q. All right.
- 22 A. And I told him I'd try to get up to see him before I
- 23 left -- before we left.
- 24 Q. Okay. Now, did you eventually go to see him?
- 25 A. Yes, sir, I did.

- 1 Q. And were you wearing a wire?
- 2 A. Yes, sir, I was.
- 3 Q. Was that wire provided to you by the Pickens County
- 4 Sheriff's Department officers?
- 5 A. Yes, sir, it was.
- 6 Q. And where did you talk to Mr. Clayton?
- 7 A. It was in the visiting room.
- 8 Q. Okay. Can you describe the place it was that you were
- 9 talking to him?
- 10 A. Yeah. It's just like the little cubicles got half
- 11 walls coming out, about two foot high, glass with a phone on
- 12 the left-hand side, I believe, and it had regular glass with
- 13 wire through -- I think it had wire through. It's safety
- 14 glass type, you know.
- 15 Q. Could you contact each other? Were you able to touch
- 16 each other?
- 17 A. No, sir, we was not.
- 18 Q. Was all the visiting done over the telephone?
- 19 A. Yes, it was.
- 20 Q. And did the subject of the alibi come up in that
- 21 conversation?
- 22 A. Yes, sir, it did.
- 23 Q. And was that conversation recorded, to the best of your
- 24 knowledge?
- 25 A. Yes, sir, it was.

1 Q. Okay. I have nothing further of this witness, Your
2 Honor.

3 THE COURT: You may cross examine, Mr. Dejong.

4 MR. DEJONG: Thank you, Your Honor. May it please
5 the court.

6 CROSS EXAMINATION

7 BY MR. DEJONG:

8 Q. Mr. Young, you said you and Mr. Clayton left Lebanon
9 and went to, you think, Greenville; right?

10 A. Lawrenceville or Greenville, sir. I wasn't sure on the
11 next stop.

12 Q. Would that Greenville have been South Carolina or North
13 Carolina?

14 A. South Carolina, sir.

15 Q. All right. Now, let's back up. You say at some point
16 in time Mr. Clayton came to you, without rehashing the whole
17 thing, you went to his house. He didn't have a house; did
18 he?

19 A. Went to his house. Where is this at, sir?

20 Q. I'm on the fairground?

21 A. On the fairgrounds in Greenville, okay.

22 Q. Early morning hours?

23 A. Yes, sir.

24 Q. Okay. What time?

25 A. It was, oh, around five o'clock, I guess. I'm not sure

1 exactly.

2 Q. Could have been five thirty?

3 A. Could have been.

4 Q. Six?

5 A. It wasn't that late.

6 Q. So that's when he first came to you; right?

7 A. Yes, sir.

8 Q. Now, I want to be clear on something here. You
9 contacted law enforcement on -- when? On the 31st or the
10 1st or do you know?

11 A. It was exactly -- well, not exactly. Approximately
12 three and a half, four hours after I talked to Mr. Clayton.
13 It was the same day he gave me -- told me what he told me.

14 Q. Now, you say that you contacted law enforcement and you
15 asked to be wired; right?

16 A. Yes. This was after Mr. Clayton got arrested.

17 Q. All that happen the same day?

18 A. No, sir.

19 Q. Okay. You contacted law enforcement one time; didn't
20 you?

21 A. Yes, sir.

22 Q. And they contacted you the next time?

23 A. Yes, sir.

24 Q. So it wasn't that you contacted them and asked to put a
25 wire on. You contacted them and they called you back a

1 couple of days later; didn't they?

2 A. No, sir, that's not right.

3 Q. All right, sir. Very good. Nonetheless, you were
4 wired; correct?

5 A. Yes, sir.

6 Q. The Sheriff's county -- Pickens County Sheriff's Office
7 wired you?

8 A. Yes, sir.

9 Q. Right? They told you to go talk to Kent Clayton?

10 A. They didn't tell me to go talk to Mr. Clayton, sir.

11 Q. Well, that was certainly the purpose of you being
12 there; wasn't it?

13 A. No. The purpose was -- they didn't ask me to be wired.
14 I asked to be wired.

15 Q. I see. Okay. Well, certainly after you were wired you
16 went and talked to Mr. Clayton at their request?

17 A. No, it was at my request.

18 Q. All right, sir. Okay. And then you talked to him;
19 right?

20 A. Yes, sir.

21 Q. Then you went back downstairs and they took the wire
22 off of you; right?

23 A. There was no downstairs. It was the same floor.

24 Q. Same floor. Then you went and searched Mr. Clayton's
25 van; didn't you?

1 A. He asked me to go find his license and take care of it
2 and take care of his dogs. It's on the tape.

3 Q. So Mr. Clayton asked you to go search his van to look
4 for a telephone battery and his driver's license?

5 A. I didn't ---

6 Q. Right?

7 A. I didn't say nothing about a telephone battery, sir, I
8 just said license.

9 Q. Yes, sir. And you didn't give them to Mr. Clayton; did
10 you?

11 A. No, sir, I did not.

12 Q. The driver's license?

13 A. I wasn't able to.

14 Q. You gave them to the cops; didn't you?

15 A. I had to, sir, because I was leaving town.

16 Q. Did law enforcement ask you to go search his van?

17 A. No, they did not, sir.

18 Q. Why did you then go search his van?

19 A. Well, I had property in it and we was talking in the
20 visiting room, he told me where his license was, to find it
21 for him, and he also told me not to give it to the police.

22 Q. I see. Now he told you not to give it to the police.
23 But you did that anyway?

24 A. Yes, sir, I did.

25 Q. Okay. Did he tell you where any other property was in

1 the van?

2 A. Yes, sir, he did.

3 Q. Did he tell you there was four hundred dollars in the
4 van?

5 A. Yes, sir, he did.

6 Q. Did you take that to the cops?

7 A. No, I did not.

8 Q. What did you do with that?

9 A. I put it towards taking care of his dogs the rest of
10 the year.

11 MR. THEM: Objection, Your Honor. I question the
12 relevancy of this whole line of questioning.

13 MR. DEJONG: I'm done with it, Your Honor.

14 MR. THEM: Thank you.

15 THE COURT: Any redirect?

16 **REDIRECT EXAMINATION**

17 **BY MR. THEM:**

18 Q. Was there any other subject matter brought up during
19 the conversation with Mr. Clayton as to any possible
20 evidence being in that van?

21 A. Yes, sir, there was.

22 Q. Tell us about that?

23 A. We was talking about anything -- I asked him if there
24 was anything that he wanted me to get to get rid of for him
25 so the police couldn't find it if they did search the van.

1 And he told me that there was a cell phone battery that he
2 took from her. And I asked him about if any weapons were
3 involved or anything, if they was in the van, and he said,
4 no, he had taken care of that too.

5 Q. Thank you very much. I have no further questions.

6 MR. DEJONG: Nothing on recross, Your Honor.

7 MR. THEM: You can step down, sir.

8 THE COURT: You may step down.

9 Officer Fowler, let me remind you, you're still under
10 oath.

11 OFFICER FOWLER: Yes, sir.

12 **REPLY DIRECT EXAMINATION**

13 **BY MR. THEM:**

14 Q. According to State's Exhibit Number 1 and Number 2, you
15 advised the Defendant of his rights on September the 1st,
16 2007; is that correct?

17 A. That's correct, at six fourteen p.m.

18 Q. Were you involved in the situation when Mr. Young went
19 into ---

20 A. I was.

21 Q. -- the jail to talk to the Defendant?

22 A. I was.

23 Q. Had the case formally been assigned to you by that
24 time?

25 A. At that point, yes.

1 Q. And to your knowledge had Mr. Clayton requested
2 appointed counsel prior to the day you went -- excuse me --
3 that Mr. Young went in there wearing that wire?

4 A. To my knowledge, no.

5 Q. Did you have any information that he had in anyway
6 invoked his Fifth and Sixth Amendment rights after you
7 advised him of his rights on September the 1st, 2007, which
8 he waived, prior to allowing Mr. Young to go into the jail?

9 A. What's the question again, please? Had he did what
10 now?

11 Q. Do you know if at any point in time he had ever invoked
12 his Fifth Amendment rights to a lawyer, counsel, all that
13 sort of stuff?

14 A. No. No, sir.

15 Q. Sixth Amendment rights prior to Mr. Young going in the
16 jail?

17 A. Not to my knowledge, no.

18 Q. And did you help outfit Mr. Young with that equipment?

19 A. I did.

20 Q. And was that equipment, I say tape recorder, put on one
21 of those disc things?

22 A. Yes.

23 Q. Okay. Now after that visit by Mr. Young, did you have
24 another visit with Mr. Clayton?

25 A. Yes.

- 1 Q. When did that take place?
- 2 A. It was after the visit, I believe it was a day or two,
3 roughly, later, I went back to Mr. Clayton to see if he
4 would discuss the case further with me. At that point ---
- 5 Q. Did you readvise him of his rights at that point?
- 6 A. At that point I did not.
- 7 Q. Why not?
- 8 A. I simply asked him if he wanted to talk with me
9 further. He declined.
- 10 Q. Okay.
- 11 A. I left.
- 12 Q. And when he declined, did he invoke his constitutional
13 rights or any -- in anyway?
- 14 A. On the 10th I met and explained that I wanted to speak
15 with him further. He stated he did not want to speak with
16 me further without speaking with his attorney.
- 17 Q. Okay.
- 18 A. And that was it.
- 19 Q. Is that the -- had you ever had any indication from him
20 that he wanted to talk to a lawyer before that day?
- 21 A. I had not.
- 22 Q. Okay. The area where the visitation takes place
23 between inmates at the law enforcement center and people
24 from the street, can you describe that area to us?
- 25 A. It's an open area kind of like the design of pay

1 phones, several pay phones. There are borders on the sides,
2 but for the most part it's open and free of conversation and
3 whatnot, with the glass or plexiglass divider that allows
4 for visible contact but you talk through the phones.

5 Q. Okay. Are the back of the booths where the free world
6 people would sit open?

7 A. Yes, sir.

8 Q. What do they open onto?

9 A. Well, it's -- there's enough room behind where a person
10 would sit that you stand up and walk out, kind of a hallway.

11 Q. It's a hallway?

12 A. More or less.

13 Q. Is it a hallway that leads to the stairs and the doors,
14 et cetera?

15 A. Yes.

16 Q. Okay. Was Mr. Young -- listen to this carefully. Was
17 Mr. Young employed by you?

18 A. No, sir.

19 Q. The Sheriff's Department?

20 A. No, sir.

21 Q. Was he paid anything for going in and talking to Mr.
22 Clayton?

23 A. No, sir.

24 Q. Whose idea was it for Mr. Young to go in and see Mr.
25 Clayton?

1 A. He contacted me and stated that Mr. Clayton had called
2 him and asked him if he would come visit or could come
3 visit.

4 Q. Okay.

5 A. Because of that he offered to come visit and he offered
6 to be recorded.

7 Q. Thank you, sir. No further questions.

8 THE COURT: Mr. Dejong.

9 **REPLY CROSS EXAMINATION**

10 **BY MR. DEJONG:**

11 Q. So, Mr. Fowler, you say that Mr. Young contacted you
12 and said that Clayton had called him wanting him to visit?

13 A. Yes.

14 Q. Okay. Now, did you file -- let me ask you this. As a
15 result of that conversation was he wired?

16 A. Not necessarily. Mr. Young was wired because he
17 offered to, and came to the Sheriff's office and agreed to
18 be wired to go visit with Mr. Clayton.

19 Q. Did you file a report in this case?

20 A. Which ...

21 Q. Did you file a report in this case?

22 A. I did.

23 Q. More than one?

24 A. Yes.

25 Q. Several sheets; right?

- 1 A. I did a supplemental report, yes.
- 2 Q. Well, let me show you this one. Look up at the top and
- 3 see who generated that report? Is that your report?
- 4 A. It appears to be, yes.
- 5 Q. All right, sir. Go down and look at the date that says
- 6 September 5 of '07?
- 7 A. Yes.
- 8 MR. THEM: If you could identify which page you're
- 9 on.
- 10 MR. DEJONG: I don't know.
- 11 OFFICER FOWLER: Page three.
- 12 MR. DEJONG: Page three.
- 13 MR. THEM: Thank you.
- 14 Q. In your report you state that Mr. Young contacted you
- 15 on September the 5th of '07; is that not correct?
- 16 A. That's correct.
- 17 Q. And in that statement you state that you asked him if
- 18 he was called again by Mr. Clayton to contact you; right?
- 19 A. Yes.
- 20 Q. Now, let's drop down to the next entry on there which
- 21 is September the 7th; is that correct?
- 22 A. That's correct.
- 23 Q. And does that not say that he had not contacted you and
- 24 you contacted him?
- 25 A. That's correct.

1 Q. All right. Now, looking further down there does it not
2 say he agreed to wear a wire? Is that not what your report
3 says?

4 A. I arranged for him to visit.

5 Q. I'm sorry.

6 A. As he agreed to do. Yes.

7 Q. Pardon me?

8 A. Yes. As he agreed to do. Yes.

9 Q. You put in your report, he agreed to wear a wire;
10 right?

11 A. Yes.

12 Q. That doesn't say, that doesn't say he volunteered; does
13 it?

14 A. He volunteered on the 5th.

15 Q. Pardon me?

16 A. He volunteered on the 5th. He contacted me and offered
17 the information that he had been contacted and agreed that
18 he would meet with him and offered to wear a wire.

19 Q. That's not in your report?

20 A. Well, sir, I simply did not have time to deal with it
21 at that particular time, obviously. I had other things
22 going on.

23 Q. I see. Now, you wired him?

24 A. Agent Campbell wired him. I monitored.

25 Q. Okay.

- 1 A. I was there.
- 2 Q. Pickens County Sheriff's Office wired him?
- 3 A. Yes.
- 4 Q. No two ways about that?
- 5 A. No, sir.
- 6 Q. And then you asked him, whatever, to go talk to Kent
- 7 Clayton?
- 8 A. I arranged for them to visit.
- 9 Q. Yes, sir. You arranged it?
- 10 A. Yes.
- 11 Q. So I am clear, you are a detective for Pickens County
- 12 Sheriff's Office?
- 13 A. That's correct.
- 14 Q. All right, sir. Now, let's back up here a minute.
- 15 What time -- well, strike that. You said when you gave Mr.
- 16 Clayton -- wrong again. You said that when you took the
- 17 statement on September the 1st at roughly six fifty-eight
- 18 p.m., if memory serves me correctly, he was not in custody,
- 19 he was free to go; correct?
- 20 A. Correct.
- 21 Q. On both? Right?
- 22 A. On the 1st.
- 23 Q. Yes, sir.
- 24 A. Yes.
- 25 Q. At six fifty-eight p.m. He was not under arrest?

- 1 A. No, sir.
- 2 Q. You never told him he was under arrest?
- 3 A. No, sir.
- 4 Q. And the point of that is, you never Mirandize him
- 5 again; did you?
- 6 A. No, sir, I did not.
- 7 Q. All right, sir. So once he was arrested he was never
- 8 Mirandize?
- 9 A. I never spoke with him again.
- 10 Q. You spoke with him on the 10th; didn't you?
- 11 A. On the 10th, at which time he -- I asked if he wanted
- 12 to speak with me and he declined.
- 13 Q. To your knowledge did Mr. Clayton ever know that Mr.
- 14 Young was wearing a Pickens County Sheriff's Office wire?
- 15 A. To my knowledge I don't think he would know.
- 16 Q. Right. And the whole point of that is, you didn't want
- 17 him to know; did you?
- 18 A. You know I didn't.
- 19 Q. Of course not, because you were trying to get
- 20 information out of Mr. Clayton; right?
- 21 A. I was -- merely agreed to let Mr. Young be wired, as he
- 22 offered to do, whether it contained anything for me ---
- 23 Q. Detective Fowler, you're a detective with Pickens
- 24 County Sheriff's Office; right?
- 25 A. Yes, sir.

- 1 Q. Five years; right?
- 2 A. Yes, sir.
- 3 Q. You're not going to wire somebody just because they're
- 4 going to go have a visit with somebody; are you?
- 5 A. No, sir.
- 6 Q. You're looking for information?
- 7 A. Yes, sir.
- 8 Q. Right. And that's what you were doing in this case;
- 9 you were looking for information?
- 10 A. Yes, sir.
- 11 Q. You wanted a confession; right?
- 12 A. I -- well, if there was to be such, yes.
- 13 Q. Yes, sir. And that was the purpose of wiring him;
- 14 wasn't it?
- 15 A. That was my purpose.
- 16 Q. That was your purpose?
- 17 A. Yes, sir.
- 18 Q. Thank you, sir. No further questions.
- 19 MR. THEM: No questions of this witness, Your
- 20 Honor.
- 21 THE COURT: Thank you, Mr. Fowler.
- 22 MR. THEM: That's our testimony on using the audio
- 23 tape of the visit with the -- Mr. Young and the Defendant,
- 24 Your Honor, as well as his verbal testimony about what took
- 25 place with that.

1 THE COURT: Any other from the Defense on this
2 issue?

3 MR. DEJONG: There's not, Your Honor.

4 THE COURT: Be glad -- do y'all want to argue
5 about this now or do you want to wait till after the *Biggers*
6 hearing and argue both?

7 MR. THEM: Can we go ahead and just do them one at
8 a time and finish them up?

9 THE COURT: That'll be fine.

10 MR. THEM: Your Honor, I've given counsel, as well
11 as the Court, a copy of the Supreme -- of *Illinois versus*
12 *Perkins*, a United States Supreme Court case at 110 Supreme
13 Court 2394. *Perkins* stands for the proposition in
14 interpreting *Miranda*, that *Miranda* existed to ensure
15 voluntariness of the Defendant in giving a statement and it
16 was concerned with the coercive atmosphere of statements
17 being taken in jails and police stations while people were
18 in custody, by uniformed officers, and the overbearance of
19 someone's will through this real or imagined coercion as
20 perceived by the Defendant. In this particular case, the
21 Defendant initiated the contact with someone that he thought
22 was his friend. He just didn't understand that friendship
23 had its limits about what people would do and would not do.
24 So he initiated this contact purely voluntarily. He
25 initiated this contact so that he could get his supposed

1 friend to come up to the jail so they could work out a good
2 alibi for where the Defendant was on these charges.

3 This case stands for the proposition that what they did
4 is perfectly okay. There's also a State Supreme Court case,
5 I don't have the cite available to me because it's swallowed
6 up by Perkins, about a riot at a prison downstate where they
7 called in WIS and as a condition to releasing hostages, they
8 wanted the news media to come in, so the news media came in
9 and interviewed them and as part of the interview they
10 confessed to a bunch of crimes and they were later
11 prosecuted for those crimes, and those tapes were used
12 against them as statements against interests. The whole
13 issue is voluntariness, Your Honor.

14 Miranda is a prophylactic rule designed to ensure that
15 that is accomplished and to create a bright line sort of
16 situation for law enforcement officers to follow. But it's
17 not the only way. If there is no coercion of any sort --
18 and there was not in this case on that particular issue.
19 The contact was initiated by the Defendant and the fruits of
20 that should be admissible. Thank you.

21 THE COURT: Mr. Dejong, be glad to hear from you.

22 MR. DEJONG: Thank you, Your Honor, may it please
23 the court. I think there are two issues here that the court
24 needs to resolve. I will address the Miranda issue first.
25 I don't believe, Your Honor, in this case -- well, the case

1 that Mr. Them has handed up, I agree that that deals with
2 the issue of voluntariness. But Your Honor, I think what is
3 important in this case in *Miranda* is, that here's a man who
4 is maybe a suspect, he is not under arrest, he is not in
5 custody, he is free to leave, and they Mirandize him. Why
6 Mirandize him? There was no need to Mirandize the man at
7 that point in time. That's purely a non-*Miranda* setting.
8 What do they do? They go arrest him and they never
9 Mirandize him again. That's where *Miranda* comes into play,
10 after arrest. He was never Mirandize.

11 Why would the man need a lawyer if he was free to
12 leave, he wasn't under arrest, there was a non-custodial
13 interrogation. Why would he need a lawyer, even though they
14 Mirandize him. He didn't need one. Didn't even think about
15 he needed a right to have one. Once he's arrested they are
16 silent. There is nothing. They serve an arrest warrant on
17 him. There is never another glimmer of *Miranda*.

18 Now, bringing *Miranda* into the scope of this jail
19 statement, it is not exactly analogous, Your Honor, but in
20 2004, the United States Supreme Court decided the case of
21 *Missouri versus Seibert*, S-e-i-b-e-r-t, 542 U.S. 600. As I
22 indicated, it is a 2004 case. I didn't mark on one of my
23 copies. If the court can give me a moment, I'll hand it up.
24 *Missouri versus Seibert*, Your Honor, is basically a
25 longstanding question that the United States Supreme Court

1 had to answer, and that is, ask first and Mirandize later.
2 And what they are saying, as I understand that ruling, is
3 the police officers were actually interrogating suspects or
4 defendants, getting answers from them, then Mirandizing and
5 in essence saying, okay, now you've made a statement, you
6 might as well go ahead and give a statement, don't invoke
7 your rights or anything else. That's certainly not
8 verbatim, but that's kind of what the opinion is all about.
9 Now, the Supreme Court in that case said that basically
10 emasculates *Miranda*. Well, I think in this case, *Miranda*
11 was also emasculated. They Mirandize him when he doesn't
12 need to be Mirandize. There was no need to Mirandize him.
13 Once he's arrested, that's when he should have been notified
14 he had a right to invoke the Fifth Amendment, that he had a
15 right to counsel, that he could have stopped answering at
16 any time.

17 Now, clearly in this case he was not. There's no
18 testimony from either of the officers that took the witness
19 stand and testified that he was ever Mirandize again. In
20 this case I'm not sure that is really the issue, Your Honor.

21 The issue in this case, and certainly that is --
22 factually it's for you to deal with. But on September --
23 excuse me. Yeah, September the 1st -- 5th, I'm sorry, Young
24 contacts law enforcement, as I understand Detective Fowler's
25 testimony, Young never made him call him back, Detective

1 Fowler called Young back on September the 7th, two days
2 later, because he had had no further contact with Young. I
3 submit to Your Honor that it was at Pickens County Sheriff's
4 Office they requested that this man come -- that Mr. Young
5 come in. They requested that he wear a wire. He agreed to
6 wear a wire, as I recall Detective Fowler's report when we
7 were talking about that. And then they sent him up. And I
8 think the last statement Detective Fowler made is the
9 important one on this, what was Pickens County Sheriff's
10 Office looking for? They were looking for a confession.

11 Now, let's assume for the moment that he had been
12 Mirandize. How in the world would this man know when
13 Pickens County Sheriff's Office very surreptitiously wires
14 him with a wire and sends him up there, how in the world
15 does he know he has a right to invoke counsel. He has none.
16 And that emasculates Miranda in and of itself. If you don't
17 know that you have a right to invoke counsel, why in the
18 world would you invoke counsel. Now, when they went back to
19 him, I believe this came out in the testimony through
20 Detective Fowler, on September the 10th when they went back
21 and talked to him, they said, we want to talk to you. He
22 said, no, I want a lawyer.

23 Well, we don't know what would have happened if the
24 cops would have gone to him on September the 7th rather than
25 surreptitiously wiring this person and trying to get a

1 confession out of him, if they had gone would he have said,
2 I want a lawyer. So I think, Your Honor, there again is a
3 *Miranda* issue.

4 I think, Your Honor, there is also a Sixth Amendment
5 issue here on right to counsel. They are not exactly the
6 same, but I think they are closely intertwined. There is a
7 case, not a fairly recent case, but a 1980 case which is
8 also the United States Supreme Court, *United States versus*
9 *Henry*, 447 U.S. 264, as indicated that is a 1980 case. In
10 *Henry*, the Court is looking at the issue of statements taken
11 by -- more or less, this case, as I understand it, dealt
12 more with jailhouse snitches. But certainly in this
13 instance we had a snitch, he just didn't happen to be in
14 jail. There the court affirmed, I believe this came out of
15 the Fourth Circuit, there the Court affirmed in saying that
16 the statement given by the Defendant in that case to a
17 snitch where they actually -- law enforcement had just asked
18 this guy to be on the lookout and pay attention to
19 conversations, et cetera, that I believe they said that
20 should have been and was suppressed, Your Honor.

21 Now, in that case -- when you start printing cases out
22 on a printer page numbers get very, very difficult. And I
23 don't even see a page number on this one. Begging the
24 Court's pardon. It'll be on the sixth sheet, just by
25 counting, Your Honor. They talk there about a knowing and

1 voluntary waiver of the Sixth Amendment rights. It said in
2 that case, Henry, who was the Defendant, was unaware that
3 Nichols, that was the snitch, was a government agent,
4 expressly commissioned to secure evidence.

5 And in this case, Your Honor, I don't think there's any
6 questions whether Young volunteered to do it, whether they
7 asked him to do it, they wired him and by their own
8 testimony they were seeking a confession or certainly other
9 evidence to incriminate the Defendant. They say also that
10 Henry's incarceration at the time was relevant. They tie
11 in, in that case back in 1980, the prophylactic requirements
12 of *Miranda versus Arizona*.

13 Again, I think there they are talking about a knowing
14 and intelligent waiver. And when Mr. Them handed up the
15 Illinois case, he talks about, I believe, voluntariness. I
16 don't see how in the world anybody could say it is a
17 voluntary statement or it is not a coerced statement if you
18 don't know who you're talking about.

19 Again, there would be no reason -- rhyme or reason to
20 invoke any right to counsel. Now, if we're talking about a
21 Sixth Amendment issue, that is your right to counsel, Your
22 Honor, when does the right to counsel come into being? I
23 did some research on that and that is basically a foggy
24 issue, even with the United States Supreme Court. I would
25 hand up to the Court a 1972 case, *Kirby, K-i-r-b-y, versus*

1 Illinois, at 406 U.S. 482.

2 As indicated, Your Honor, that is a 1972 case. In that
3 case the Supreme Court talks about the attachment of the
4 right of counsel. I think the pertinent part in there, and
5 hopefully I highlighted it, I don't know if I did. Actually
6 I think on -- again, I apologize for page numbers, Your
7 Honor, but maybe the easy way, one ... Mr. Chief Justice
8 Burger on -- well, I counted and then I didn't tell Your
9 Honor how many pages. I believe on the seventh page, I
10 think maybe there's a concurring opinion written by Mr.
11 Chief Justice Burger which pretty much sums up the opinion
12 of the majority in that case. He says, I agree that the
13 right to counsel attaches as soon as criminal charges are
14 formally made against the accused and he becomes the subject
15 of a, quote, criminal prosecution, end quote, therefore I
16 join in the plurality opinion and in the judgment of this
17 Court.

18 So now, in right to counsel, Your Honor, I submit two
19 things. I submit he was not Mirandized after he was
20 arrested. He would have no knowledge or understanding of
21 his right to invoke his right to counsel. Whether he had
22 right to counsel or not or whether he invoked that right, I
23 would submit he had a right to counsel. And in view of the
24 fact that they did not Mirandize him over -- after his
25 arrest he had no knowledge of that.

1 So I submit, Your Honor, that based on either *Miranda*
2 or a Sixth Amendment right to counsel, the fact that Pickens
3 County was looking for a confession by their own -- the fact
4 that whether he was paid or not is not an issue, Your Honor.
5 I've got case law here, can't put my eye on it right now,
6 but in one of the case, and it may be *Henry*, I'm not sure,
7 but one of the cases they had the same argument and the
8 United States Supreme Court said, whether he's paid or not,
9 that's not relevant. What is relevant, that he was working
10 for law enforcement, and I don't think there was any
11 question about it in this case.

12 Looking at all that, Your Honor, the totality of
13 circumstances, I submit that either through *Miranda* or the
14 Sixth Amendment or both, and specifically the failure to
15 Mirandize, that this statement that was made by Mr. Clayton
16 to this wired jailhouse snitch should be suppressed.

17 THE COURT: Let me ask you this, Mr. Dejong.

18 MR. DEJONG: Yes, Your Honor.

19 THE COURT: If there hadn't been a *Miranda* warning
20 on the first incident, would that change the facts at all in
21 your opinion?

22 MR. DEJONG: No, sir.

23 THE COURT: If there had never been a *Miranda*
24 warning?

25 MR. DEJONG: No, sir.

1 THE COURT: So you're not saying that the State by
2 giving a warning when you say they didn't need to basically,
3 that that created a fatal flaw in their investigation?

4 MR. DEJONG: I think the fatal flaw was, Your
5 Honor, they didn't Mirandize him after he was arrested.

6 THE COURT: So it's your position that every
7 person who is arrested in Pickens County or anywhere in
8 South Carolina or America for that matter, needs to be
9 Mirandize simultaneously or soon after the arrest, even if
10 there's not going to be any interrogation?

11 MR. DEJONG: No, sir, I'm not saying that. If
12 there's no interrogation, if no statement is ever given, we
13 wouldn't even be having this argument. But in this case,
14 there was a statement given, and my client was not Mirandize
15 after he was arrested.

16 THE COURT: Was that not the same situation in
17 *Perkins*?

18 MR. DEJONG: I don't think it is the same
19 situation in *Perkins*, Your Honor. I was just handed that
20 case, so I've been trying to half listen and half read at
21 the same time. Well, and what I have read of *Perkins*, I
22 don't think -- the Supreme Court talked in *Perkins* a little
23 bit, I think that's a U.S. Supreme Court case, it is, they
24 talked a little bit about *Miranda*, but there they talk about
25 voluntariness of a statement, not in terms of having a

1 knowledge of knowing or waiving your right to counsel or
2 anything else. And again, I think what's important on that
3 is that when law enforcement went back to him three days
4 after this particular statement was taken on the wire,
5 Clayton said, no, I'm not talking to you, I want a lawyer.

6 THE COURT: So if a person is arrested and in a
7 cell and writes a letter back home to Mama with
8 incriminating information and then Mama brings that to the
9 law enforcement people and he's never been Mirandize, does
10 that create a flaw?

11 MR. DEJONG: No, sir, there is no flaw there
12 because there was no law enforcement agency involved with
13 the obtaining of that material. And that's my argument on
14 this case.

15 THE COURT: So in my scenario, if Mother then
16 says, it's not quite incriminating, but I think he needs to
17 go to jail and I'm going to write him back and then let him
18 write me back and see if he'll -- and I'll bring that stuff
19 to you. Is that the same case as this?

20 MR. DEJONG: I don't think it is, Your Honor.

21 THE COURT: What's the distinction between that
22 scenario and what we have here?

23 MR. DEJONG: Law Enforcement didn't write the
24 letters for her. They didn't give her the postage stamp.
25 They didn't give her the paper. They didn't give her the

1 pen. They didn't give her the envelope. They did none of
2 this. In this case, law enforcement wired the guy. That
3 was their doing. And I don't want ---

4 THE COURT: If he had brought his own pocket
5 recorder and had a conversation and then went to the
6 Sheriff's Department afterwards and said, look what I've
7 got, everything is fine and dandy then?

8 MR. DEJONG: I think you're in a whole different
9 ball game, Your Honor. Indeed, if the sign down at the jail
10 is right, and the visitation is on the outside, not on the
11 inside, I don't think there are any signs on the inside of
12 the visitation cell that says these calls are subject to
13 monitoring. Whether the prisoners are aware of that or not,
14 I don't know. They didn't do that. They took active
15 participation in this case to get the statement. They were
16 interrogating. They knew exactly what they were doing.

17 THE COURT: All right, Mr. Them. Be glad to hear
18 from you.

19 MR. THEM: Your Honor, it seems as though my
20 distinguished friend is mixing up interrogation and
21 listening to the maddening noise. This is not something
22 that law enforcement initiated. They didn't go out and talk
23 this fellow into calling his friend. They had nothing to do
24 with it. He made a bad mistake. He thought a friend would
25 cover this pretty serious criminal activity. It backfired

1 on him. The man that he went looking for, absolute
2 voluntariness tells him what he wants done, tells him to
3 come up with this phony alibi. There is no *Miranda* issue as
4 to voluntariness because there is no law enforcement
5 involvement other than loaning this piece of equipment to
6 somebody and outfitting them with it. They didn't send him
7 in there with a laundry list of questions. They said, go in
8 and talk to him and see what he's got to say, or basically
9 that's what we're to surmise at this point. They did not
10 initiate anything. They reacted to a bad decision on his
11 part.

12 Now, on the question of counsel, somehow he had an
13 epiphany of Biblical proportions that when he was
14 interviewed the second time he wanted a lawyer then. He
15 knew he had a right to a lawyer then. Mr. Dejong makes it
16 sound like this fellow just landed on another planet or
17 something. He had already been advised of his rights. He
18 knew he had a right to a lawyer. And it was not law
19 enforcement talking to him. I don't believe that the
20 Constitution requires that law enforcement run around like
21 this when they have somebody who wants to brag about and
22 conspire with others to cover up their criminal activity. I
23 think law enforcement has got the right to listen. I don't
24 know, and certainly we're not addressing in this argument
25 today, whether or not they had the right to incite that

1 conduct on his part. They didn't in this case. He did it
2 himself. He is hoisted on his own petard, as we say, Your
3 Honor.

4 THE COURT: All right. How many witnesses do you
5 have in the other matter?

6 MR. THEM: Just a second, Your Honor, I've got to
7 shift gears. I believe just one or two, Your Honor.

8 THE COURT: Let's take a short break before we
9 start on that. We'll take about a ten minute break.

10 (WHEREUPON, the court stood at recess for a short
11 break.)

12 THE COURT: Mr. Them.

13 MR. THEM: Actually that's all we have left on
14 that particular issue, Your Honor.

15 THE COURT: Be glad to hear from you on that. I
16 want to read these cases before I rule on what we just
17 heard. You ready to go on to the *Biggers* issue?

18 MR. THEM: I think I've probably beat that horse
19 to death arguing it, Your Honor.

20 THE COURT: Do you have another matter that we
21 need to ---

22 MR. THEM: Oh, yeah, yeah, I'm sorry. I thought
23 you wanted more on ---

24 THE COURT: No, sir. What I said was before I
25 rule on that I want to review these cases. We'll move on to

1 the next motion.

2 ALEATHA JONES,

3 being duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. DEJONG:

6 Q. Would you state your name, please, ma'am?

7 A. Aleatha Jones.

8 Q. Okay. Can you slide forward a little bit? Pull the
9 chair.

10 A. I'm good.

11 Q. Ms. Jones, let me take you back to early September
12 2007. Did you have the occasion to be at the Upstate Fair?

13 A. Yes.

14 Q. And while you were there, were you assaulted?

15 A. Yes.

16 Q. All right. What I'd like for you to do is tell me when
17 was the first time you actually saw the man that assaulted
18 ---

19 MR. DEJONG: Your Honor, I'm going to object to
20 that. I know we're in a pretrial hearing, but he's leading
21 and he's testifying. He can ask if she ever identified who
22 she claims to be the assailant. We're not here talking
23 about whether she was assaulted or not. We're here to talk
24 about identification.

25 THE COURT: All right. Just rephrase your

- 1 question, if you would, Mr. Them. Try not to lead her.
- 2 Q. Were you assaulted?
- 3 A. Yes, sir.
- 4 Q. What was the sex of the person that assaulted you?
- 5 A. Male.
- 6 Q. Okay. When did you first see that person?
- 7 A. At the front gate.
- 8 Q. Okay. On the night you were assaulted?
- 9 A. Yes, sir.
- 10 Q. All right. At what time?
- 11 A. At closing, around twelve.
- 12 Q. What time?
- 13 A. I guess around eleven or twelve, I'm not sure. At
- 14 closing.
- 15 Q. And how long -- I'm sorry. I didn't mean to cut you
- 16 ---
- 17 A. At closing.
- 18 Q. Okay. And how long were you -- how long was he in your
- 19 sight at the main gate?
- 20 A. For, I don't know, ten, fifteen minutes or so.
- 21 Q. Did y'all have any interaction there?
- 22 A. (Negative nod.)
- 23 Q. Okay. And what happened after that? Did you leave?
- 24 A. I was leaving.
- 25 Q. Okay. Where were you going?

- 1 A. Home.
- 2 Q. Did anyone accompany you?
- 3 A. Yes. He said, I'll walk you to the gate. And he was
4 standing there talking to somebody else at the front gate.
- 5 Q. This person that you're talking about now, was this the
6 person you were talking to at the gate?
- 7 A. Yes.
- 8 Q. Okay. How far did you get from the gate before you
9 realized there was a problem?
- 10 A. Not far at all.
- 11 Q. Could you talk to me in terms of feet, yards, point ---
- 12 A. Few feet.
- 13 Q. -- at something? Huh?
- 14 A. A few feet.
- 15 Q. Okay. And what was the first indication you had there
16 was a problem?
- 17 A. He had a knife.
- 18 Q. Okay. What, if anything, did he do or say to you
19 involving that knife?
- 20 A. I seen the knife and I just said, what are you doing --
21 I said, what is that? I looked again, and it was a knife.
22 I said, what are you going to do? He said, I'm going to
23 rape you. The next thing I know I was on the ground.
- 24 Q. You've got to talk slower now, and I know you want to
25 move. All right. Go ahead. Talk slow.

1 A. He said -- stuck the knife to my neck and said -- threw
2 me on the ground and said, I'm going to rape you.

3 Q. Okay. What was the position of your body when he stuck
4 the knife to your throat and said, I'm going to rape you?

5 A. I was laying on my back on the ground and the knife was
6 right at my neck.

7 Q. How did you get on the ground?

8 A. He threw me down.

9 Q. Okay. And where was his body at that point in time?

10 A. Over mine, straddling me, I guess, sort of like on top
11 of me, I guess.

12 Q. Was there anything covering his face?

13 A. No.

14 Q. Okay. How close was your face to his face?

15 A. Pretty close.

16 Q. Huh?

17 A. Pretty close.

18 Q. All right. This court reporter can't pick that up.

19 Talk to me in terms of ---

20 A. He was close. He was laying on top of me, so he was
21 close.

22 Q. Okay. All right. And what happened after he said
23 that? What were you doing is, I guess, maybe a better
24 question. What were you doing when he was talking like
25 this?

1 A. I was screaming trying to get away from him, fighting
2 trying to get away from him. Then he covered my -- his hand
3 went over my mouth so I couldn't scream.

4 Q. Were you ever able to get away from him?

5 A. Yeah. I fought and got away. He moved, because I was
6 kicking, and he moved the knife and I moved and got away and
7 started running again and he grabbed me again.

8 Q. How far were you able to run?

9 A. Not far.

10 Q. Okay. What happened when he caught you the second
11 time?

12 A. He threw me back down the second time.

13 Q. Excuse me?

14 A. He threw me back down the second time.

15 Q. Okay. And what was -- he threw you back down on the
16 ground?

17 A. Yes, sir.

18 Q. What did he do when he threw you on the ground the
19 second time?

20 A. Put a knife back next to my neck.

21 Q. Okay. And what, if anything, did he do or say?

22 A. He said, I was going to rape you, he said, but I'm
23 going to let you go. And he took my phone where I couldn't
24 call for help. Because I was screaming and fighting him.

25 Q. Okay. How close were you to his face at that point in

- 1 time?
- 2 A. About the same as the first time.
- 3 Q. All right. Are you married?
- 4 A. Yes, sir.
- 5 Q. How tall is your husband?
- 6 A. He's like five -- six, one.
- 7 Q. Okay. And how much does he weigh?
- 8 A. About two, two forty.
- 9 Q. Okay. The person that assaulted you, how tall were
- 10 they?
- 11 A. He was probably just a little bit taller than my
- 12 husband.
- 13 Q. Okay. And how much do you think he weighed?
- 14 A. Probably two, two -- two something.
- 15 Q. Okay. Can you approximate the age of that person?
- 16 A. I would say late forties, early fifties.
- 17 Q. Was that person Caucasian, African American, Indian,
- 18 what?
- 19 A. American.
- 20 Q. American. Okay. Trouble is all those people are
- 21 Americans. Was he Caucasian, was he white, black ---
- 22 A. White.
- 23 Q. Okay. Did he have on any clothing that was unusual
- 24 that you remember?
- 25 A. He had on a fair uniform, shirt.

1 Q. All right. After you got away from him the second
2 time, what did you do?

3 A. I ran.

4 Q. Okay. Were you able to get home?

5 A. Yes.

6 Q. Did you report this to the police at that time?

7 A. No, sir.

8 Q. Why not?

9 A. I was scared because he said he would kill me and come
10 after me.

11 MR. DEJONG: Your Honor, again, I hate to
12 interrupt, but what in the world does this have to do with
13 identification? That's what we're here for. This is a Niel
14 versus Biggers hearing. We're not trying this case.

15 MR. THEM: Your Honor, if you look at the case,
16 the time between the identification, the time between the
17 assault, the time she had to observe the thing, the
18 conditions, her emotions, those are all Niel versus Biggers
19 factors that are listed in the case.

20 THE COURT: All right. I'll allow you the leeway.
21 You may continue your examination.

22 MR. THEM: Thank you.

23 Q. When did you notify the -- did you ever notify the
24 police that something happened?

25 A. Yes.

1 Q. When?

2 A. It was either the next day or day after. I'm not
3 really sure. That next day.

4 Q. All right. And who did you notify?

5 A. Pickens County.

6 Q. Okay. And as a result of that did anyone come out to
7 your house?

8 A. Yes, they did.

9 Q. Okay. Did they interview you and take a statement from
10 you?

11 A. Yes, they did.

12 Q. In that statement and interview, did you tell them
13 about the fair clothing, the uniform?

14 A. Yes, I did.

15 Q. Okay. Did they -- what did they do after that, the law
16 enforcement people that came to your house?

17 A. Depending on what time you're talking -- I mean.

18 Q. Okay. After they interviewed you the first time, what
19 did they do? How long did they stay, what time did they ---

20 A. Oh, they were out there at the house probably a few
21 hours and then they went.

22 Q. Okay. Did they ever come -- when they left that day
23 did they ever come back?

24 A. Yes.

25 Q. Same day?

1 A. Yes.

2 Q. Did you go any place with them?

3 A. Yes.

4 Q. Where did y'all go?

5 A. To the fairgrounds.

6 Q. Okay. When you got to the fairgrounds, what did y'all
7 do?

8 A. Walked around to see if I could identify the person
9 that attacked me.

10 Q. What, if any, instructions or statements or things were
11 made to you by law enforcement when you went out to the
12 fairgrounds?

13 A. Just asked me to see if I could identify him and see if
14 I could recognize him. That's all.

15 Q. What area of the fairground did y'all walk around?

16 A. The main part when you first come in the front gate.
17 It's like a horseshoe like and you walk around in a circle
18 like.

19 Q. What kinds of things are in there?

20 A. Games, rides.

21 Q. Okay.

22 A. A few places.

23 Q. And what time of day was it when y'all went out there,
24 roughly?

25 A. Lunchtime, maybe twelve, one. I'm not really sure of

- 1 the exact time.
- 2 Q. All right. And roughly how many people were in that
- 3 horseshoe described area?
- 4 A. There was more than a hundred. There was probably two
- 5 hundred or more.
- 6 Q. How many times did you walk around there?
- 7 A. Two or three times.
- 8 Q. Okay. Did you observe anyone that looked familiar on
- 9 your first walk-around?
- 10 A. There was one guy I thought was him, but then I looked
- 11 again and it wasn't. Kind of resembled, but it wasn't.
- 12 Q. On your second walk-around did you see anyone that
- 13 looked like your attacker?
- 14 A. I believe it was the second time I seen him. I'm not
- 15 really sure if it was the second or the third.
- 16 Q. And on the third time did you see someone that you
- 17 thought ---
- 18 A. Yes.
- 19 Q. -- resembled your attacker? Did you point that person
- 20 out to law enforcement?
- 21 A. Yes.
- 22 Q. Okay. And did law enforcement ask you how sure you
- 23 were of your identification?
- 24 A. Yes, they did.
- 25 Q. What did you tell them?

1 A. I told them fifty, fifty percent, I'm not -- I wasn't
2 really positive.

3 Q. And do you see anyone in court today that resembles ---

4 MR. DEJONG: Objection, Your Honor, to the
5 question of resembles. I might resemble Santa Claus, but
6 I'm not.

7 THE COURT: All right. Rephrase your question if
8 you would, please, Mr. Them.

9 MR. THEM: Your Honor, can I be heard on that?

10 THE COURT: Yes, sir.

11 MR. THEM: She's not going to identify somebody
12 proof positive. But I think she's entitled to talk about is
13 there someone in the courtroom that is included into the mix
14 of people that it could have been as opposed to excluded.
15 That's all I'm trying to get from this witness. I don't
16 believe she's going to be able to identify the Defendant
17 based on her fifty percent statement. I'm just trying to
18 find out, is there anybody in the courtroom that is in the
19 pool of suspects in her mind, based on physical
20 characteristics.

21 MR. DEJONG: That purely leads to speculation or
22 conjecture on the part of a jury that he resembled him.

23 THE COURT: Since the jury is not here I'm going
24 to allow it for the purpose of this hearing.

25 MR. DEJONG: And I understand that. And I guess I

1 can argue that when all is said and done. But I think Your
2 Honor understand where I'm going with that.

3 THE COURT: Yes, sir.

4 MR. DEJONG: Thank you.

5 THE COURT: You may re-ask the question.

6 MR. THEM: I think she understands the question.

7 A. Yes, sir. He resembles the guy sitting over at that
8 table on the left hand side of the room in the middle there
9 between the two attorneys.

10 Q. Okay. The gentleman with the light colored jacket or
11 the dark jacket?

12 A. Light colored jacket.

13 Q. Okay. Let the record reflect the witness is pointing
14 at the Defendant. All right. After you pointed at someone
15 that you thought resembled the person that assaulted you,
16 what happened?

17 A. They had an officer take me back to my home.

18 Q. Okay. Thank you, ma'am. I have no further questions.

19 THE COURT: You may cross examine the witness, Mr.
20 Dejong.

21 MR. DEJONG: Thank you, Your Honor. May it please
22 the court.

23 CROSS EXAMINATION

24 BY MR. DEJONG:

25 Q. So law enforcement came to your house, Ms. Jones?

- 1 A. Yes, sir.
- 2 Q. And they took you to the fairground?
- 3 A. Yes, sir.
- 4 Q. They asked you to walk around with them; right?
- 5 A. Yes, sir.
- 6 Q. They didn't turn you loose?
- 7 A. Not to my knowledge. I mean, I can't remember back
- 8 that far.
- 9 Q. Well, who set the pace when you were walking around the
- 10 fairground? Did you or did they? How fast ---
- 11 A. They did.
- 12 Q. Pardon?
- 13 A. They did.
- 14 Q. They did. So at one point in time they may have been
- 15 walking faster and another point in time they may have been
- 16 walking slower; right?
- 17 A. Walked slow, sir.
- 18 Q. Pardon me?
- 19 A. Walked slow. Wasn't walking in a fast ---
- 20 Q. I'm sorry. Didn't mean to interrupt you, ma'am. So
- 21 you're saying you walked the same speed all three times
- 22 around the fairground?
- 23 A. Pretty much, I would say.
- 24 Q. Pretty much. So that tells me ---
- 25 A. Yes, we did.

1 Q. I see. Okay. Now, was there any conversation between
2 you and the officer while you were walking around?

3 A. Just told me to take my time and see if I could
4 identify the person. That was all that was said to me at
5 the time we was walking around.

6 Q. Well, how many times did the officer tell you that?

7 A. I can't recall.

8 Q. More than once?

9 A. I can't recall.

10 Q. Did the officer tell you that when you finally said you
11 thought this gentleman that you pointed to was the person?

12 A. He asked me was I for sure? I said, I'm not for sure.

13 He said, how sure are you?

14 Q. I realize that. I'll come to that in a moment, ma'am.

15 When you were walking around you said on more than one
16 occasion he told you to take your time and see if you could
17 identify the person who you say assaulted you; right?

18 A. I said I know he said it one time. He might have said
19 it twice. Other than that I don't really recall.

20 Q. Well, then on the third time -- well, let me ask you
21 this. How many people did you make eye contact with when
22 you were walking around the fairground that three times?

23 One, two, fifty?

24 A. I have no clue, sir.

25 Q. Okay. And so on the third time around then you point

- 1 to Mr. Clayton; right?
- 2 A. It was either the second or third. I'm not quite sure
- 3 which time it was.
- 4 Q. Was the person you pointed out there on all three times
- 5 that you walked around?
- 6 A. I didn't point him out three times, sir.
- 7 Q. I'm sorry?
- 8 A. I only pointed him out one time, sir.
- 9 Q. Yes, ma'am. I understand that. What I'm asking you is
- 10 did you see that same person all three times?
- 11 A. No, sir.
- 12 Q. Pardon?
- 13 A. No, sir.
- 14 Q. Did you see him more than once?
- 15 A. Just the -- I seen him twice. I seen him once and then
- 16 walked back around. I was pretty sure it was him.
- 17 Q. So you saw him once, and after you saw him once you
- 18 walked all the way again around the fair and you came around
- 19 and you say you saw that person again; right?
- 20 A. That's when I told the officer that I was -- that I
- 21 thought that was him.
- 22 Q. Was the fair going on when you did this?
- 23 A. Yes.
- 24 Q. Was there a lot of people there?
- 25 A. Yes.

1 Q. Well, the second time, if I understand you correctly
2 that you say you identified this person, how many people
3 were still there in that area from the first time you saw
4 this person?

5 A. I don't remember, sir.

6 Q. Okay.

7 A. There wasn't a lot of crowd right around him. I got a
8 good look at him, if that's what you're trying to ask me.

9 Q. Well, how long did it take you to walk around the fair
10 from one complete lap? How long did that take you?

11 A. Ten, fifteen minutes.

12 Q. Okay.

13 A. Maybe twenty.

14 Q. All right. And then when you finally did say, that is
15 maybe the person -- that's pretty much what you said; right?

16 A. I said that looks like him. Yes.

17 Q. Yes, ma'am. And then either because they asked or you
18 volunteered, you said you were fifty percent sure; right?

19 A. I said I was fifty percent, fifty percent. I wasn't
20 positive.

21 Q. So there was a fifty percent chance it was him and a
22 fifty percent chance it wasn't him; right?

23 A. Correct.

24 Q. All right. On one of those laps you said you indicated
25 a different person; right?

- 1 A. It looked like him at first, but I looked again and it
2 was not him.
- 3 Q. Did you see that person ---
- 4 A. I didn't -- no, I didn't pay attention, sir.
- 5 Q. Okay. So you don't know if you saw that person again
6 or not?
- 7 A. No, sir. I don't think I did.
- 8 Q. All right. Well, when you say you were assaulted, was
9 the fair going on?
- 10 A. It was just -- they were at the end of closing.
- 11 Q. It was closed?
- 12 A. It was closing, sir.
- 13 Q. Pardon me?
- 14 A. It was closing. It wasn't completely closed.
- 15 Q. I see. So I gather that people were leaving, but there
16 was nobody coming in ---
- 17 A. Yes, sir.
- 18 Q. -- is what you're telling me? All right. So it was
19 closing. And you say this took place within thirty feet of
20 the gate?
- 21 A. I don't know how many feet it was, sir. I could still
22 see the lights in the front gate parking lot and all that
23 stuff.
- 24 Q. All right. This was nighttime; right?
- 25 A. Yes, sir.

1 Q. And did law enforcement ask you whether he had any
2 distinguishing marks or characteristics or anything?

3 A. Yes, I believe they did.

4 Q. And you told law enforcement no; right?

5 A. I didn't see anything that caught my eye, no, sir.

6 Q. I believe they even asked you about facial hair; did
7 they not?

8 A. Yeah.

9 Q. And you told them he had no facial hair?

10 A. No, I didn't tell them that. He didn't have a beard.
11 He had a mustache.

12 Q. All right. One moment, please ma'am. That's all I
13 have. Thank you.

14 THE COURT: Any redirect?

15 MR. THEM: None, Your Honor.

16 THE COURT: All right. Thank you, Ms. Jones. You
17 may step down.

18 MR. THEM: Recall Detective Fowler.

19 THE COURT: Let me remind you, you're still under
20 oath, ---

21 DETECTIVE FOWLER: Yes, sir.

22 THE COURT: -- Detective Fowler.

23 DETECTIVE FOWLER: Yes, sir.

24 **REPLY DIRECT EXAMINATION**

25 **BY MR. THEM:**

1 Q. Were you with the group of people that went out to the
2 fairgrounds with the previous witness?

3 A. I was.

4 Q. What time of day was that?

5 A. It was late afternoon or early evening.

6 Q. Okay. After you finished that walk-around, did you
7 interview anybody?

8 A. I did.

9 Q. Okay. How quickly after the walk-around did the
10 interview take place?

11 A. Soon after we walked the victim around, we arranged for
12 her to return home and all. After I did that, I made
13 contact with Mr. Young to have him come to the area ---

14 Q. Okay.

15 A. -- to tell me if that was the same person that had
16 given -- told him about an incident. He said yes.

17 Q. All right.

18 A. At that point is when I made contact with Mr. Clayton.

19 Q. Okay. And can you tell me what time on the clock you
20 made contact with Mr. Clayton?

21 A. Not exactly.

22 Q. If I showed you State's Exhibit Number 1 and Number 2,
23 would that refresh your memory as to the time?

24 A. Yes. It was early after -- or later afternoon or early
25 evening. The time on the *Miranda* form is six fourteen p.m.

1 The time started on the statement was six fifty-eight p.m.

2 Q. Okay. I have nothing further of this witness.

3 THE COURT: Mr. Dejong.

4 MR. DEJONG: Please the court. Thank you, Your
5 Honor.

6 REPLY CROSS EXAMINATION

7 BY MR. DEJONG:

8 Q. Let's talk about the walk-around. You were walking
9 around with the alleged victim?

10 A. I did.

11 Q. And what time of the day was that?

12 A. It was late afternoon, early evening. It was a
13 simultaneous ---

14 Q. What date was that?

15 A. On September the 1st.

16 Q. Do you know what day of the week September the 1st was
17 on?

18 A. From memory I believe it was a Saturday.

19 Q. All right. So that I'm clear, it was a Saturday;
20 correct?

21 A. I believe it was. I had weekend duty.

22 Q. All right. So certainly no school was going on on
23 Saturday; right?

24 A. Not to my knowledge.

25 Q. So were there a number of people there in the fair when

1 you walked around?

2 A. I did notice that it was open at the time and there was
3 customers and the attractions were operating.

4 Q. People moving about?

5 A. Yes, sir.

6 Q. And you walked around once?

7 A. Yes, sir.

8 Q. No identification?

9 A. No, sir.

10 Q. Well, let me ask you this. Did you know who Mr.
11 Clayton was before you started the walk?

12 A. At that time, I did.

13 Q. You did?

14 A. Yes.

15 Q. And just so I'm clear, you knew who he was before you
16 ever started walking Ms. Jones around the fairground?

17 A. I did.

18 Q. All right, sir. Well, obviously Pickens County has
19 wires. Did you wire yourself when you were walking around
20 there?

21 A. No, sir, I did not.

22 Q. So the point of that is, we don't know what your
23 conversation with Ms. Jones was while you were walking her
24 around these three times; do we?

25 A. Not word for word, no, sir.

- 1 Q. Did you talk?
- 2 A. I did.
- 3 Q. Did you talk once?
- 4 A. I'm sure it was more than once.
- 5 Q. Did you point people out to her ---
- 6 A. No, I ---
- 7 Q. -- to look at?
- 8 A. No, I did not.
- 9 Q. And you say that you walked the same steady pace the
- 10 three times you walked around there?
- 11 A. I would say it was consistent, yes.
- 12 Q. Slow, fast?
- 13 A. A leisure.
- 14 Q. Pardon?
- 15 A. A leisure walk.
- 16 Q. All right. Now, did you know where Mr. Clayton was
- 17 before you started walking around?
- 18 A. I did.
- 19 Q. Okay. And was there any conversation as you approached
- 20 him?
- 21 A. Not suggestive conversation, no.
- 22 Q. Pardon me?
- 23 A. Not suggestive conversation to him or toward him.
- 24 Q. I wasn't asking whether it was suggestive or not. I
- 25 was asking you if there was conversation?

1 A. There may have been. I can't say for sure.

2 Q. Well, do you recall what the conversation was?

3 A. The only conversation I really had was with the victim
4 and my purpose was to ensure that she look at as many fair
5 employees or people otherwise to see if she recognized who
6 she alleged assaulted her.

7 Q. Well, which lap was it she quasi identified somebody
8 else?

9 A. I noticed on the second walk-around, it appeared to me
10 as though she made eye contact with the Defendant.

11 Q. Then what did you do when it appeared to you that she
12 made eye contact?

13 A. I just waited for her response.

14 Q. You didn't say anything?

15 A. I didn't -- I don't recall saying anything to her.

16 Q. Well, let me ask you this. On the second round, she
17 made eye contact with the person?

18 A. It appeared to me that she ---

19 Q. Well, who is the person that she appeared to make eye
20 contact with?

21 A. It appeared that she noticed the Defendant. The ---

22 Q. Well, then tell me this. It appeared to you that she
23 made eye contact with the Defendant as you walked -- that
24 was the second time around; right?

25 A. Yes.

1 Q. So you had made basically a lap and a half at that
2 point in time? Would that be fair to say?

3 A. We had made one complete circle and we had started to
4 walk around again.

5 Q. All right. Well, before she made eye contact with what
6 you described as the Defendant, how many other people did
7 she make eye contact with? That it appeared to you that she
8 made eye contact with?

9 A. I would have to guess hundreds, in the hundreds. I
10 mean there ---

11 Q. Why was it particularly significant on this time that
12 you noticed she made eye contact with the Defendant if she
13 was making eye contact with hundreds of people?

14 A. Because I knew where the Defendant was and I was
15 watching her response when we were in that area.

16 Q. Right. The point.

17 A. Yes.

18 Q. But you said there was nothing suggestive about that?

19 A. I said I didn't -- I did not say anything to suggest
20 look over at that person.

21 Q. But there were certainly other ways of making
22 suggestions, slowing down, waiting for her -- did you stop
23 when she made eye contact?

24 A. I basically waited on her reaction.

25 Q. My question is, did you stop walking when she made eye

1 contact?

2 A. It's possible that we did.

3 Q. Okay. Now, at that point in time -- the first time she
4 made eye contact, she said nothing; did she?

5 A. Well, she -- the first time I felt that it appeared she
6 made eye contact was the second walk-around. The first
7 walk-around she never said anything indicating that she saw
8 the Defendant or thought that he was the person.

9 Q. Right.

10 A. And I did not notice any action such as eye contact or
11 reaction.

12 Q. Okay. But in your report you say the second time she
13 made eye contact; right?

14 A. It appeared that she did. It appeared to me that she
15 did.

16 Q. Appeared to you that she did. Did she say anything at
17 that point in time to you?

18 A. She said that she believed that the Defendant was the
19 suspect.

20 Q. Okay. So now you walk around, again, one complete
21 circle around the fair from where that eye contact was made
22 all the way around the fair again; right?

23 A. Yes. Three times.

24 Q. Well, let's narrow it down to that point. How many
25 times in that last walk-around did she appear to you to make

1 eye contact with people?

2 A. Again, I would have to say hundreds.

3 Q. Well, my question is this. What was so significant if
4 she was making eye contact with hundreds of people, what was
5 so significant about her making eye contact with the
6 Defendant?

7 A. It appeared to me that she focused on that person more
8 so than anyone else just as she noticed one other person ---

9 Q. All right.

10 A. -- that she stated had the same or similar hair color.

11 Q. What now?

12 A. Had the same or similar hair color as the alleged
13 attacker or as the assault person.

14 Q. Okay. Well, let's go back. I'm confused now. You say
15 she made eye contact on the second time around and that's
16 when she said the Defendant had similar hair color?

17 A. No, sir.

18 Q. Okay.

19 A. The only other person that I got a verbal reaction
20 from, as far as identification, was one other person that
21 was on the other side of the fair to which the victim stated
22 they had similar hair color. It was a different person, but
23 she said she did not feel it was that person. I basically
24 waited on a reaction from the victim.

25 Q. Well, on that person, did you ask her how sure or

- 1 unsure she was?
- 2 A. Yes. I believe I did.
- 3 Q. And what did ---
- 4 A. She said she did not think that that was the suspect.
- 5 Q. She didn't say it was fifty percent or twenty-five
- 6 percent or anything like that?
- 7 A. She said she didn't think that that was the person.
- 8 Q. The first time you walked around, did you, knowing Mr.
- 9 Clayton, did you see Mr. Clayton?
- 10 A. I believe I did.
- 11 Q. All right. The second time around, you, not the
- 12 alleged victim, you, did you see Mr. Clayton?
- 13 A. I did.
- 14 Q. The second time you walked around was he in the same
- 15 place that he was the first time you walked around?
- 16 A. Same area, same attraction.
- 17 Q. All right. The third time you walked around, you, not
- 18 the alleged victim, did you see Mr. Clayton?
- 19 A. I did.
- 20 Q. Was he in the same area?
- 21 A. Yes.
- 22 Q. So you walked around three times?
- 23 A. Yes.
- 24 Q. How many other people were in the same area each time
- 25 you walked around and Mr. Clayton was in that area?

1 A. I would say most, if not all, of the employees that --
2 were operating the same attractions. They were each
3 responsible for their attractions.

4 Q. All right. You told her to look at everybody; didn't
5 you?

6 A. That's what I wanted her to do. Yes.

7 Q. Now, when all was said and done, she reported to you at
8 best that she was fifty percent sure?

9 A. Yes.

10 Q. Those were her words?

11 A. Yes, sir.

12 Q. Thank you, sir.

13 THE COURT: Any redirect?

14 MR. THEM: None, Your Honor.

15 THE COURT: Thank you, Mr. Fowler. You may step
16 down.

17 MR. THEM: I have nothing further on this
18 particular issue other than an argument at the appropriate
19 time.

20 THE COURT: Any witnesses that you wish to put up,
21 Mr. Dejong?

22 MR. DEJONG: I do not, Your Honor.

23 THE COURT: Be glad to hear from you, Mr. Them.

24 MR. THEM: Your Honor, the matter that we're
25 looking at, pretrial identification lineups, basically the

1 stuff of *Niel versus Biggers*, 409 U.S. 188, as well as *State*
2 *versus Cheeseboro*, which is a South Carolina case, 552
3 S.E.2d 300 (2001). Those cases stand for the proper ---

4 MR. DEJONG: Your Honor, I don't mean to
5 interrupt, but would the solicitor be so kind as to give me
6 a copy, please.

7 MR. THEM: I'm not going to hand one up to the
8 court. I don't have but one. I'll just give it to --
9 that's why I gave you the cite, so you can look it up.

10 Your Honor, those cases stand for the proposition that
11 the test for due process in pretrial identification
12 procedures is, number one, was the identification procedure
13 conducted in a manner that was unduly suggestive. Number
14 two, if so, was the procedure so suggestive as to give rise
15 to a very substantial likelihood of irreparable
16 misidentification under the totality of circumstances
17 involved. The burden of proving that is on the Defendant,
18 not on the State.

19 The factors that the court needs to look at are, number
20 one, witness's opportunity to view the subject at the time
21 of the crime. The witness talked about she looked at the
22 Defendant's face across a knife blade stuck to her throat on
23 two different occasions. She talked to him up at the gate.
24 The second factor to talk about is the witness's degree of
25 intention. I think for sure everyone would agree that when

1 someone's holding a knife to your throat they certainly have
2 your attention and you are -- I just think you're just
3 staring at them burning a hole through them.

4 There's also a case, *State versus Brown*, 508 S.E.2d 38
5 that says, a person in fear of their life presumably has a
6 more acute degree of attention to his surroundings than a
7 mere passerby. *State versus Gambrell*, 266 S.E.2d 78, said
8 this is also presumed to be true for victims of criminal
9 sexual conduct. The Defendant in this case is indicted for
10 criminal -- for assault with intent to commit criminal
11 sexual conduct in the first degree.

12 The accuracy of the witness's prior identification of
13 the criminal, she described him in terms of height, weight,
14 hair color. The Defendant matches that. The length of time
15 between the crime and the confrontation, depending on whose
16 clock we use, the assault probably occurred about one
17 o'clock in the morning, twelve, one, two, in that general
18 area and the identification, from what I understand of the
19 numbers, took place roughly forty hours later, five to six
20 o'clock in the afternoon the day following the post midnight
21 assault.

22 She's not going to be able to flat out identify this
23 person. The courts have talked about unless the pretrial
24 identification procedure creates a very substantial
25 likelihood of irreparable misidentification, the

1 identification is admissible and its weight is for the jury
2 to discover -- to consider. I'm sorry. That's from *Manson*
3 versus *Brathwaite*, a United States Supreme Court case at 432
4 U.S. 98, a 1977 case.

5 Your Honor, she can't positively identify this person.
6 She can say, it looks like him. And there's been no attempt
7 to hide that's a fifty percent opinion. It's not a hundred
8 percent or sixty, not most probably, I'm pretty sure. It
9 looks a lot like him. I'm about fifty percent sure. There
10 is no irreparable harm when she says it looks like him if
11 the next sentence is, I'm about fifty percent sure.

12 The jury ought to be able to understand that this
13 person fits the physical criteria of the person who
14 assaulted her, even if she can't positively identify this
15 person. The fair co-worker will be the major identification
16 witness. And that's all I'm going to try to get out of this
17 lady, is that basically she was assaulted and this gentleman
18 fits the general physical criteria.

19 And I maintain I should be allowed to go into that.
20 It's obviously something for cross examination. And I plan
21 to bring out that fifty percent figure in my direct
22 examination, Your Honor. Thank you.

23 THE COURT: Yes, sir, Mr. Dejong.

24 MR. DEJONG: Well, Your Honor, if she can't
25 identify him, she can't identify him, and that's what we're

1 talking about. We're talking about in court identification.
2 I fully suspect Your Honor would allow him to give a
3 description of the person that she says assaulted her.
4 Beyond that, I think that is a jury issue. You can't say,
5 can you identify the person who assaulted you on the night
6 of August 31st and she points at the Defendant and she says,
7 well, I think that's him, it resembles him, I'm fifty
8 percent sure that that's him. No. That is not an
9 identification. I think he can, he can get the description
10 of it out. I think he can do all of that.

11 But when somebody comes in -- number one, they have to
12 walk around the fairground three times. This man is
13 basically in the same place every time they walk around the
14 fairground. Now, Your Honor, we're not quite in the area of
15 eye witness identification, but now we're getting close.
16 Because if nothing else was suggestive, I would submit that
17 they walked him around three times. What conversation there
18 was, we don't know. I'm not impugning Detective Fowler's
19 integrity. They have wires. Why didn't they wire them so
20 we would have known what the conversation was, if any. We
21 don't know -- and it could be a psychological thing, Your
22 Honor, that maybe even Detective Fowler was not aware of.
23 But he knew, by his own testimony, who the suspect was in
24 this case. We don't know what, if anything, he did
25 knowingly or unknowing to communicate somehow to this victim

1 that this may be the guy.

2 And I suggest, Your Honor, that very well could have
3 possibly happened because when all is said and done, she's
4 only fifty percent sure that this is the guy. That is not
5 identification, Your Honor. And I do not believe that she
6 is entitled during the course of this trial to point to this -
7 Defendant and make a courtroom identification saying, that's
8 the man that assaulted me. Thank you.

9 THE COURT: Yes, sir, Mr. Them.

10 MR. THEM: Your Honor, the burden of proof is on
11 the Defendant to show by the preponderance of evidence that
12 the identification procedure was initially suggestive.
13 Counsel keeps saying, I don't know, I don't know, we don't
14 know. So he hasn't met his burden of proof to show that it
15 was suggestive.

16 Witnesses testify all the time in this court, well, I
17 think that looks like him, or yeah, this looks like my
18 watch, or yeah, this could be my watch or this could be my
19 car or my goat or my dog or whatever. But that's all she's
20 doing. She's just putting him in the category of people
21 that match the general physical description of her
22 assailant.

23 THE COURT: All right. Thank you very much.

24 Let's take about a ten minute break. I want to read
25 that Henry case. I'm going to make sure on the Sixth

1 Amendment issue that I understand -- I understood your
2 argument, Mr. Dejong. I want to understand the case a
3 little better, so let me have about ten minutes. Or either
4 I can let you know in the morning on these rulings. Give me
5 ten minutes and I'll see. Okay.

6 MR. DEJONG: If Your Honor wishes to take
7 overnight I don't have a problem with that, but I do have
8 two other issues I need -- well, three other issues.

9 THE COURT: Okay. Well, I'll let you know
10 tomorrow about all these issues.

11 MR. DEJONG: That'll be fine.

12 THE COURT: Y'all are prepared for trial anyhow.
13 All right. Let me hear your other issues, Mr. Dejong.

14 MR. DEJONG: Your Honor, one of them ---

15 THE COURT: I apologize I didn't ask you. I
16 thought you said they were encompassed in these others
17 before we met, but I know things change.

18 MR. DEJONG: We get blinders on sometimes. I
19 don't know that it'll be an issue or not, but in Detective
20 Fowler's report, and reading from his report, I'm certainly
21 not saying -- I'm not saying his report is inaccurate. I'm
22 saying the substance may not be accurate. On page, looks
23 like page eight, while en route to the Pickens County
24 Sheriff's Office, Clayton stated he had been charged with
25 having sex with his sixteen year old -- sixteen years of age

1 when he was twenty-seven years of age. He maintained that
2 he had not been involved in this incident. I'm not, I'm not
3 concerned about he maintaining he had not been involved in
4 this incident. However, I would move to suppress any
5 reference to the first part of that statement, while en
6 route of the Pickens County Sheriff's Office ... There was
7 no record to substantiate that at all. I'm sure that
8 Pickens County probably combed his record quite thoroughly.
9 I don't think it's relevant. Obviously it's not accurate
10 and I would move to suppress that, Your Honor.

11 MR. THEM: I would be the first to agree that
12 being charged is not impeachable information. Conviction is
13 what counts, and I don't have a record of one.

14 MR. DEJONG: Thank you.

15 THE COURT: All right. Just to make sure that the
16 witness knows -- I don't know how the case is going to
17 develop tomorrow, but I don't want to read from your
18 statement -- that won't come out.

19 MR. THEM: Whose statement?

20 THE COURT: That's in the incident report, I
21 understand.

22 MR. DEJONG: Detective Fowler's report on the top
23 of page eight. The only other issue I have, Your Honor,
24 goes back to tomorrow afternoon that I think was an issue
25 raised, and to my knowledge that is an unresolved issue, and

1 that is with regard to the indictment on the possession of a
2 weapon during a violent crime. My understanding, you gave
3 Mr. Them the opportunity to do more research on that. Your
4 Honor had not made a ruling on it. I think I argued that to
5 the court yesterday. I'll be more than happy to argue it
6 again if necessary. I just don't know what the status of
7 that indictment is at this point in time.

8 THE COURT: Mr. Them.

9 MR. THEM: To save us from Mr. Dejong's argument,
10 I will withdraw that indictment from consideration in this
11 trial.

12 MR. DEJONG: Your Honor, that is not good enough.

13 THE COURT: Yeah, I understand where you're ---

14 MR. DEJONG: It's not going to be just withdrawn.
15 It's either going to be dismissed with prejudice or I'll ask
16 Your Honor to quash that indictment. I don't want it coming
17 back to haunt my client three years from now. So I'm simply
18 inquiring of the Solicitor if he's going to dismiss it, that
19 it is a dismissal with prejudice.

20 MR. THEM: I do not plan on dismissing with
21 prejudice. His problem with the indictment was that he just
22 got served with it. I have every opportunity, should I so
23 desire, and I haven't begun to make a decision on what's
24 going to happen or anything like that. But if his problem
25 is the timing, him getting the indictment and lack of

1 preparation, we can resolve that. He's got a copy of it.
2 And ninety days down the road, should we see fit, I believe
3 we should have the right to try it.

4 THE COURT: I believe his other argument was that
5 he's going to be prejudiced by a prior crime when he's
6 retried. I'm going to not allow them to present this case
7 on the weapon charge in this trial starting tomorrow. I'll
8 defer till after this trial to make any ruling otherwise.
9 But I can appreciate your argument and I don't know if I'll
10 be the trial judge or not or whether we will move in advance
11 after the end of this case. But certainly I think that's a
12 valid argument to make if you win this case and it ever is
13 brought up. And it may not -- I guess the only way it could
14 be brought up would be if there's a conviction in this case.

15 MR. DEJONG: Yes, sir.

16 THE COURT: And if there is a conviction in this
17 case, then I -- if I'm trying the case, I'm not going to let
18 them get into evidence of a prior conviction.

19 MR. DEJONG: I'm not arguing with Your Honor's
20 ruling, but as I understand it, there's not going to be --
21 that indictment will not be presented to the jury tomorrow.
22 I mean, he can put up any testimony he wants to, but that
23 indictment will not be presented to the jury for
24 consideration.

25 THE COURT: The indictment is not going to be

1 presented and it's really another day as to whether or not
2 this case can be used in a trial if there is a weapons trial
3 down the road.

4 MR. DEJONG: Very well, Your Honor.

5 THE COURT: Anything else?

6 MR. DEJONG: The only other thing, I think Mr.
7 Ball has had some conversation potentially about the record
8 of the alleged victim.

9 MR. BALL: We got that resolved.

10 MR. DEJONG: Got that resolved. Do you have
11 anything else ---

12 THE COURT: Everybody knows where we are on that
13 then. Need anything on the record on that about prior
14 charges ---

15 MR. THEM: I am told that Ms. Ball has records
16 from various Magistrates Courts which are not courts of
17 record that he is going to get certified letters certified
18 as true copies signed by some of the appropriate court
19 officials that he's going to attempt to show that the
20 complaining witness in this case has some fraudulent check
21 charges. My agreement with him is, I haven't discussed that
22 issue with her, but his method of presenting the evidence
23 showing the worthless check charges signed by the court, I
24 have agreed to accept in lieu of any indictment or anything
25 like that.

1 MR. BALL: There was no indictment to begin with.
2 I showed him one from Easley and he agreed that that was
3 good enough. It was a copy.

4 THE COURT: For impeachment purposes of that
5 witness.

6 MR. THEM: For impeachment purposes only.

7 MR. BALL: Oh, yeah, we're not going to try the
8 check case or the shoplifting.

9 THE COURT: All right. I'll review these cases
10 and let you know something in the morning about what's going
11 to come in. Y'all have a good evening. We'll be adjourned
12 until nine in the morning.

13 MR. DEJONG: Thank you, Your Honor.

14 THE COURT: Let me ask you this about the jury
15 real quick. One alternate enough? Have y'all got a witness
16 list? I'll need a witness list and any special voir dire
17 that you have.

18 MR. DEJONG: I can hand that up now, Your Honor.

19 THE COURT: You can have that in the morning. I
20 just want -- I know we'll remember to do that. One
21 alternate or two alternates?

22 MR. THEM: One will be fine, Judge.

23 MR. DEJONG: I think -- I haven't seen the State's
24 witness list, nor have they seen mine, but I wouldn't
25 anticipate this trial testimony, evidence-wise, going beyond

1 a day. I don't know.

2 MR. THEM: Depends on these fellows here, Your
3 Honor. If the case goes a day and a half, I think one
4 alternate is plenty.

5 THE COURT: Strikes be ten and five; right? Five
6 and ten?

7 MR. DEJONG: That is what the Statute says, Your
8 Honor. The problem I have with that Statute is this, it
9 does not address assault with intent to commit criminal
10 sexual conduct in the first degree. It does address
11 criminal sexual conduct in the first degree. Criminal
12 sexual conduct in the first degree carries a maximum penalty
13 of thirty years. Assault with intent to commit carries a
14 maximum penalty of thirty years. I cannot stand here and
15 tell Your Honor that that is a specific crime in the code
16 section that gives us ten. However, I would ask the court
17 to consider the fact that since the Legislature gave
18 criminal sexual conduct in the first degree that carries
19 thirty years, this offense is almost identical, with I guess
20 lack of penetration, and also carries thirty years. So I'm
21 not trying to mislead the court. It is not in the Statute,
22 but I think it is so close we should be entitled to ten,
23 Your Honor.

24 THE COURT: Do you agree with that, Mr. Them?

25 MR. THEM: Had you asked me I would have said ten

1 and five, Your Honor. I nodded my head when you said ten
2 and five.

3 MR. DEJONG: Okay. Ten and five.

4 THE COURT: Ten and five.

5 MR. DEJONG: Ten and five it is. Thank you, sir.

6 MR. THEM: Thank you, Judge.

7 THE COURT: Two and one on the alternate.

8 MR. DEJONG: Thank you, Your Honor.

9 (WHEREUPON, the court was adjourned for the day at
10 approximately 4:34 p.m.)

11 (WHEREUPON, the court was reconvened on October 22,
12 2008 at approximately 9:16 a.m.)

13 THE COURT: All right. Ladies and gentlemen,
14 we're now ready to begin the trial of the next case. The
15 indictment has been handed to me and as before we need your
16 assistance in helping resolve this conflict, to find the
17 truth and be finders of the fact. The State of South
18 Carolina has brought this charge. The charge is one of
19 assault with intent to commit criminal sexual conduct. It's
20 brought against a Mr. Kent Clayton. And the allegations by
21 the indictment state that on or about August 31st, 2007 that
22 Mr. Clayton did commit assault upon a Aleatha Jones with the
23 intent to commit a criminal sexual conduct and it was
24 accompanied by one of the following circumstances, the
25 defendant was allegedly armed with a knife at the time.

1 This is in violation of the state law of South Carolina.
2 What the State of South Carolina, what Mr. Clayton desire to
3 have are fair and impartial jurors to hear this case to
4 determine just what the facts are. They deserve to have
5 fair and impartial jurors. And you've been qualified, of
6 course, to serve as jurors this week, but I need to ask you
7 some questions about this particular case because Mr.
8 Clayton has entered a plea of not guilty to this charge and
9 the State of South Carolina, of course, has the burden of
10 proving his guilt beyond any reasonable doubt. He's
11 presumed innocent until the State can meet that burden.
12 I'll be the judge of the law in this case. We need a panel
13 of fair and impartial jurors to be the judges of the facts
14 in the case.

15 Is there any member of the jury panel aware by any
16 firsthand information about this particular incident by a
17 news article, radio report, having been there, heard
18 anything about it in the community? This would be based
19 upon the facts set forth in the indictment. Do you have any
20 firsthand knowledge about this matter, any member of the
21 panel? If so, would you please stand.

22 (No response.)

23 THE COURT: Thank you. There's no response.

24 Is any member of the jury panel related by blood or
25 marriage to Mr. Kent Clayton? If so, would you please

1 stand.

2 (No response.)

3 THE COURT: Thank you. There is no response.

4 Is there any member of the panel have a close business,

5 a social or a personal relationship with Mr. Kent Clayton?

6 If so, would you please stand.

7 (No response.)

8 THE COURT: Thank you. There is no response.

9 There's potential witnesses who have been listed that
10 may be called upon to testify in this case. They may not

11 be, but I'm going to read you a list of those names then

12 I'll need to ask you some follow-up questions about those

13 possible witnesses. Among the witnesses who may be called

14 upon to testify would be an individual named Steve Young,

15 individual named Keith Cochran, Detective Kett Fowler with

16 the Pickens County Sheriff's Offices -- Office, Deputy

17 Anthony Raines of the same agency, Captain Phil Sargent,

18 Pickens County Sheriff's Office, Aleatha Jones, William

19 Giese, Scott Smith from Clemson University, Brian Gibson,

20 David Lee Jones, Jr. Is there any member of the jury panel

21 related by blood or marriage to any of these potential

22 witnesses? If so, would you please stand.

23 (No response.)

24 THE COURT: Is there any member of the panel who

25 has a close business, a social or a personal relationship

1 with any of these potential witnesses? If so, would you
2 please stand.

3 (No response).

4 THE COURT: Thank you. There is no response.

5 Is there any member of the jury panel who is aware of
6 any bias or prejudice that would interfere with your ability
7 to be a fair juror in this case? If so, would you please
8 stand.

9 (No response.)

10 THE COURT: Is there any member of the jury panel
11 who has expressed or formed an opinion about the facts in
12 this particular case in anyway? If so, would you please
13 stand.

14 (No response.)

15 THE COURT: At this time I'll ask the attorneys if
16 you would, please, to stand and introduce yourself to the
17 jury.

18 MR. THEM: My name is Peter Them. I'm with the
19 Solicitor's office.

20 MR. BALL: Dallas Ball. My office is right across
21 the street.

22 MR. DEJONG: I'm John Dejong. I practice law here
23 in Pickens County and I'm co-counsel with Mr. Ball on this
24 case.

25 THE COURT: Thank you, gentlemen, very much.

1 Is there any member of the jury panel related by blood
2 or marriage to any of these attorneys? If so, would you
3 please stand.

4 (No response.)

5 THE COURT: Is there any member of the jury panel
6 who has a close business, a social or a personal
7 relationship with any of these attorneys? If so, would you
8 please stand.

9 (No response).

10 THE COURT: Is there any member of the jury panel
11 ever been involved in any litigation of any kind in which
12 any of these attorneys represented you or represented the
13 opposing side in that litigation? If so, would you please
14 stand.

15 (No response.)

16 THE COURT: Thank you. There's no response.

17 Is there any member of the jury or a member of your
18 immediate family in law enforcement? If so, would you
19 please stand.

20 If you would, please state your name and the
21 relationship of the family member.

22 JUROR: Charles Brown. My daughter.

23 THE COURT: Yes, ma'am, in the back, your name,
24 please.

25 JUROR: Tammy Cassell. My husband and brother-in-

1 law.

2 THE COURT: Your husband and ...

3 JUROR: Brother-in-law.

4 THE COURT: Brother-in-law. Yes, ma'am, your
5 name, please.

6 JUROR: Holly Steed. My son.

7 THE COURT: And yes, sir, your name.

8 JUROR: Chris Gagnon. My brother.

9 THE COURT: All right. Those of you who are
10 standing and have a relative who's in law enforcement, would
11 the fact that your relative is in law enforcement, would
12 that interfere in anyway with your ability to be a fair
13 juror in this case? Could you base your decision, if
14 selected, on the facts that you hear in this courtroom and
15 that along, with the law that I give you? If you believe
16 you could not be a fair juror, would you please remain
17 standing? Otherwise, would you be seated.

18 (WHEREUPON, all standing were seated.)

19 THE COURT: Thank you. Let the record reflect
20 that all the jurors have been seated.

21 Is there any member of the jury panel who is a
22 contributing member of any organization that has as its
23 primary concern the promotion of law enforcement or victim
24 right? That would be organizations such as MADD or SADD or
25 CAVE or CADRE, those kind of organizations. Any of you a

1 member, contributing members of those organizations, would
2 you please stand?

3 (No response.)

4 THE COURT: Thank you. There's no response.

5 Is there any member of the jury panel who has worked
6 for any organization or agency or business which would
7 investigate or counsel victims of sexual abuse or victims of
8 any type of sexual crimes? If you've ever been a part of an
9 organization like that that counsels individuals who've been
10 victims, would you please stand?

11 Yes, sir. Yes, ma'am.

12 JUROR: I was a guidance counsel for Pickens
13 County School District for twenty years.

14 THE COURT: Okay. As a guidance counselor
15 obviously you had an opportunity to work with students.
16 Would that fact alone interfere with your ability to be a
17 fair juror in this case? Do you believe you could be fair
18 to the State and to the Defendant?

19 JUROR: Yes.

20 THE COURT: You believe you could?

21 JUROR: Yes.

22 THE COURT: And your name, please.

23 JUROR: Mary Beth Ellison.

24 THE COURT: All right. Thank you, Ms. Ellison.

25 Is there any member of the jury panel who has ever made

1 a complaint or been a victim of any sexual assault or have
2 you ever been accused of such an event -- offense? If you
3 either made a complaint or had a sexual assault upon you or
4 if you've ever been accused of such an act, would you please
5 stand?

6 (No response.)

7 THE COURT: Thank you. There is no response.

8 Ladies and gentlemen, as I stated to you earlier, these
9 parties deserve and desire to have fair and impartial
10 jurors. Is there any member of the panel aware of any
11 reason whatsoever that you believe in this particular case
12 you could not be a fair juror and give both the State of
13 South Carolina and the Defendant a fair trial? If for any
14 reason you believe you could not serve on this jury, would
15 you please stand?

16 JUROR: I would just reiterate from Monday about,
17 you know, I had a niece that was raped and murdered.

18 THE COURT: All right, sir. Thank you very much.
19 And your name again, please, sir.

20 JUROR: Willie Tutt.

21 THE COURT: Mr. Tutt, we'll excuse you from the
22 trial of this case. Thank you. If you would just be
23 seated.

24 Any other questions from the State?

25 MR. THEM: Nothing on behalf of the State, Your

1 Honor.

2 THE COURT: From the Defense?

3 MR. DEJONG: None.

4 THE COURT: All right. Let's empanel a jury.

5 Again, ladies and gentlemen, we'll have a little bit of

6 a down time while the computer randomly selects the names

7 for the jury in this case, if you'll just bear with us for a

8 few minutes.

9 (Pause.)

10 THE COURT: All right. Let's empanel a jury.

11 MADAM CLERK: When I call your name, please stand

12 up where you're at, please.

13 MR. THEM: Call the number also.

14 MADAM CLERK: Number 80, Daniel H. Obryant.

15 What says the State?

16 MR. THEM: Present the juror.

17 MADAM CLERK: Defense.

18 MR. BALL: Swear him.

19 MADAM CLERK: Please come around and be seated.

20 Number 122, Mark D. Walsh. What says the State?

21 MR. THEM: Present the juror.

22 MR. BALL: Swear him.

23 MADAM CLERK: Come around and be seated, please.

24 Number 90, John T. Pittinger.

25 MR. THEM: You said 90?

1 MADAM CLERK: Yes, sir.
2 MR. THEM: Present the juror, please.
3 MADAM CLERK: Defense.
4 MR. BALL: Swear him.
5 MADAM CLERK: Come around, please, sir.
6 25, Ryan E. Chappell. What says the State?
7 MR. THEM: Present the juror.
8 MADAM CLERK: Defense?
9 MR. BALL: Just one second. Excuse the juror.
10 MADAM CLERK: Please be seated.
11 Number 55, Janie M. Jones. What says the State?
12 MR. THEM: Present the juror.
13 MR. BALL: Swear her.
14 MADAM CLERK: Please come around and be seated,
15 ma'am.
16 Number 22, Tammy L. Cassell.
17 MR. THEM: Present the juror.
18 MADAM CLERK: Defense.
19 MR. BALL: Excuse her, please.
20 MADAM CLERK: Be seated.
21 Number 37, April L. Edward Galloway. What says the
22 State?
23 MR. THEM: Present the juror.
24 MADAM CLERK: Defense.
25 MR. BALL: Just a second. Swear the juror.

1 MADAM CLERK: Come around and be seated.

2 Number 97, Adam S. Robinson. What says the State?

3 MR. THEM: Present the juror.

4 MR. BALL: Swear him.

5 MADAM CLERK: Come around and be seated, please.

6 Number 8, Robert J. Beckham, Jr. What says the State?

7 MR. THEM: Present the juror.

8 MADAM CLERK: Defense?

9 MR. BALL: One second. Swear him.

10 MADAM CLERK: Come around and be seated, please.

11 Number 76, Ingrid J. Mode. What says the State?

12 MR. THEM: Present the juror.

13 MR. BALL: Swear her.

14 MADAM CLERK: Come around and be seated, please.

15 Number 78, Charles P. Mount. What says the State?

16 MR. THEM: Present the juror.

17 MADAM CLERK: Defense?

18 MR. BALL: Excuse him.

19 MADAM CLERK: Be seated.

20 Number 110, Holly M. Steed. What says the State?

21 MR. THEM: Present the juror.

22 MADAM CLERK: Defense?

23 MR. BALL: Excuse her.

24 MADAM CLERK: Please be seated.

25 Number 106, Junius R. Smith, III.

1 MR. THEM: Present the juror.

2 MADAM CLERK: State? I mean, Defense? Excuse me.

3 MR. BALL: Swear him.

4 MADAM CLERK: Please come around and be seated.

5 Number 85, Mark J. -- Mark K. Pfeiffer. What says the

6 State?

7 MR. THEM: Present the juror.

8 MADAM CLERK: Defense?

9 MR. BALL: Swear him.

10 MADAM CLERK: Please come around and be seated.

11 Number 101, Ricky K. Searcy. What says the State?

12 MR. THEM: Present the juror.

13 MADAM CLERK: Defense?

14 MR. DEJONG: What number, Madam Clerk, please?

15 MADAM CLERK: 101.

16 MR. DEJONG: Thank you, ma'am.

17 MR. BALL: Swear him.

18 MADAM CLERK: Come around and be seated, please.

19 Number 59, Teresa E. Lesley. What says the State?

20 MR. THEM: Present the juror.

21 MADAM CLERK: Defense?

22 MR. BALL: Excuse her.

23 MADAM CLERK: Please be seated.

24 Number 38, Mary B. Ellison. What says the State?

25 MR. THEM: Present the juror.

1 MADAM CLERK: Defense?

2 MR. BALL: Excuse her.

3 MADAM CLERK: Please be seated.

4 Number 98, Stewart R. Robinson. What says the State?

5 MR. THEM: Present the juror.

6 MADAM CLERK: Defense?

7 MR. BALL: Swear him.

8 MADAM CLERK: Come around and be seated, please.

9 THE COURT: One alternate.

10 MADAM CLERK: We're going to pick one alternate.

11 Number 58, Kathy A. Landers. What says the State?

12 MR. THEM: Present the juror.

13 MADAM CLERK: Defense?

14 MR. BALL: Swear her.

15 MADAM CLERK: Please come around and be seated.

16 THE COURT: May I see the attorneys just for a

17 minute?

18 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball

19 approached the Bar.)

20 MADAM CLERK: We're going to do one more

21 alternate. For the second alternate, number 44, Pamela Y.

22 Gambrell. What says the State?

23 MR. THEM: Present the juror.

24 MADAM CLERK: Defense?

25 MR. BALL: Excuse her.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Jury Voir Dire

109

1 MADAM CLERK: Number 34, Stephanie Doll. What
2 says the State?

3 MR. THEM: Present the juror.

4 MADAM CLERK: Defense?

5 MR. BALL: Swear her.

6 MADAM CLERK: Please come around and be seated.

7 THE COURT: Any legal matters we need to take care
8 of as far as selection of the jury in this case?

9 MR. THEM: Nothing on behalf of the State, Your
10 Honor.

11 MR. BALL: None from the Defense.

12 THE COURT: Ladies and gentlemen who were not
13 selected for the trial of this case, I can excuse you for
14 the day. If you would, please, call back tonight after six
15 o'clock. There will be further instructions for you then as
16 to when to call back or when to come back in. Thank you
17 very much for coming this morning. You've excused at this
18 time.

19 (WHEREUPON, the jury pool was excused at approximately
20 9:51 a.m.)

21 THE COURT: Ladies and gentlemen, before we start
22 the trial of the case, I've got a couple of matters I need
23 to take care of with the attorneys, so I'm going to ask you
24 to go back to your jury room. Of course, don't discuss the
25 case. When you come back, the last two jurors who were

1 picked will always sit in those seats. I'm going to appoint
2 Mr. Smith as the foreperson of this jury. He'll occupy the
3 seat on the front row closest to the witness stand here.
4 That doesn't mean he has more votes than anyone else. But
5 he's going to be the one who will be the contact on behalf
6 of the fellow jurors.

7 While you're out there you may have a special need.
8 Let the bailiff know that. You can write that out, the
9 foreperson would write it out on behalf of the juror, the
10 question you have or need you have, get it to the bailiff
11 and then we'll try to resolve it. He's sort of as a liaison
12 with the Court. He'll be the one who will be your presiding
13 officer, so to speak. The foreperson will occupy that seat
14 always. The rest of you can sit anywhere you like and the
15 alternates will occupy their seats.

16 The foreperson obviously is going to be the one who
17 will be the facilitator when you start your discussions in
18 this case after all the evidence is in and I've instructed
19 you on the law to help everyone have their say about what
20 transpired during the course of the trial as far as their
21 view of the facts in the case so that you can reach a
22 verdict. Obviously while you're back in the jury room and
23 we're taking care of business out here, I'll have some more
24 comments to say about that as the case progresses, but you
25 shouldn't be talking about this case. You've made a

1 commitment. You've seen the process by which you were
2 selected and you've made a commitment that you're going to
3 be impartial jurors and only make a decision on what facts
4 you hear and the law that I give you. And of course any
5 speculation you now have about the case would be merely
6 that. So don't talk about the case. You can get to know
7 each other. We'll call you back in just a few minute and
8 we'll be ready. I'll have some remarks to make to you and
9 then the attorneys will be ready to open with their cases.
10 I'll ask you to go back to your jury room at this time.

11 (WHEREUPON, the jury exited the open court at
12 approximately 9:55 a.m.)

13 MR. THEM: Excuse me, Your Honor.

14 THE COURT: Yes, sir.

15 MR. THEM: Prior to ruling on the Sixth Amendment
16 issue, I was never served with a motion about that, so I
17 wasn't as prepared as I would have liked to have been.
18 After having had the evening to get prepared and read Mr.
19 Dejong's cases, I'd like to have a couple of minute argument
20 if I could.

21 THE COURT: Be glad to hear from you and Mr.
22 Dejong and Mr. Ball, too, if they would like to be heard.
23 Yes, sir. This is on the Sixth Amendment issue?

24 MR. THEM: Yes, sir.

25 THE COURT: All right, sir.

1 MR. THEM: Your Honor, I was unfamiliar with the
2 Henry case until Mr. Dejong was kind enough to give me a
3 copy of it yesterday. I know that the Henry case has some
4 age on it and that in the Henry case, although it's not
5 crystal clear, it appears when you look at the facts that
6 the Defendant in the Henry case already had a lawyer
7 appointed to represent him when the government enlisted the
8 help of a contingent fee confidential informant to talk to
9 this guy. So it would seem to be a rather clear
10 infringement of the Sixth Amendment right when somebody had
11 a lawyer and you went around behind the lawyer.

12 Well, that's not the case we have here, Your Honor.
13 This case is eminently distinguishable from Henry. In this
14 case he signed a written waiver of his right to counsel in
15 the document you saw in the Jackson v. Denno hearing and
16 here about there, there was no request for appointed counsel
17 prior to the visit with the witness that testified
18 yesterday. And I believe Detective Fowler testified
19 yesterday that that visit took place on or about September
20 7th, 2007.

21 In going through my file last night I found a letter
22 from the Clerk of Court, which is the standard letter that
23 they put out about appointment of counsel. It says, please
24 be advised on the 13th of the month, September, that they
25 would determine to appoint counsel. In a telephone

1 conversation with my investigator and Amy from the Clerk's
2 office, we are led to believe that he was appointed counsel
3 on the same day that he requested counsel. So he was not
4 represented by counsel when the cooperating witness went up
5 to see him at the Defendant's request. We didn't slide this
6 fellow in and dangle bait in front of him. My witness was
7 sent for, ostensibly for the purpose of crafting an alibi
8 out of thin air. So there's no government intrusion.
9 Government followed in alongside of a person that was
10 invited into this deal by the Defendant. He was not
11 represented by counsel at the time, therefore I don't think
12 the Henry case would apply. Thank you.

13 THE COURT: Thank you, sir.

14 MR. THEM: I'd like to make this a Court's
15 exhibit, if I could, Your Honor.

16 THE COURT: Any objection to this exhibit, Mr.
17 Dejong?

18 MR. DEJONG: Yes, Your Honor, there is. I don't
19 think that particular document is relevant. That was when
20 he was appointed. The relevant document, in my opinion,
21 would be when he requested. We do not have that document.
22 I'll be happy to put someone from the Clerk's office on the
23 witness stand to share with the Court that on that date of
24 appointment is not the date it was requested. The date on
25 that appointment sheet is the date that the person from the

1 Clerk's office actually goes after the client and jail
2 requests that they be appointed counsel. So I think that --
3 all that statement shows is on the 13th of, I believe,
4 November, ---

5 THE COURT: September.

6 MR. DEJONG: -- if I looked at it correctly. On
7 the 13th of November, he was ---

8 THE COURT: September, I think.

9 MR. DEJONG: September. I'm sorry. I stand
10 corrected. On the 13th day of September he was given
11 appointed counsel. It doesn't say when he requested. And I
12 think what the State is trying to show by that document,
13 that that's the date he requested. And I don't think that
14 is accurate. And I don't think, as a result of that, it is
15 relevant with when he was -- actually requested counsel.

16 THE COURT: All right.

17 MR. THEM: As luck would have it, Amy's right
18 here. We could put her on the stand right now, Your Honor.

19 THE COURT: I'll let you put whatever you need
20 that you want to present to me in argument. I'll be glad to
21 hear from you if you want to ---

22 MADAM CLERK: No, no, I did.

23 MR. THEM: You did. I'm sorry. Would you step up
24 then. Excuse me.

25 (WHEREUPON, the witness was duly sworn.)

1

CHERYL WATSON,

2

being duly sworn, testified as follows:

3

DIRECT EXAMINATION

4 BY MR. THEM:

5 Q. Did you have a conversation with Elizabeth Brock in my
6 office -- from my office this morning about the appointment
7 of counsel for Mr. Clayton?

8 A. I did.

9 Q. And what questions was asked of you by Ms. Brock?

10 MR. DEJONG: Your Honor, I'm going to object to
11 that. That's hearsay.

12 MR. THEM: I have to get the question so she can
13 tell what the answer was, Your Honor.

14 MR. DEJONG: And that's hearsay, Your Honor.

15 THE COURT: Well, what's the purpose of her
16 testimony?

17 MR. THEM: Her testimony, according to what Ms.
18 Brock told me she said, was ---

19 THE COURT: Well, why don't you just ask her what
20 happened on that matter, rather than through Ms. Brock. If
21 she knows what the answers are, then she can testify.

22 Q. Have you ever seen a document like that before?

23 A. Yes, sir.

24 Q. And did you do any checking this morning or look at any
25 documents this morning so that you can tell us when Mr.

- 1 Clayton was appointed counsel?
- 2 A. I looked at this document.
- 3 Q. Okay.
- 4 A. And this is the date that someone went and actually
- 5 talked with him.
- 6 Q. Okay. So would that be the day he requested counsel or
- 7 would he have requested it earlier, or when?
- 8 A. It could have been that day or it could have been
- 9 earlier. We do not document that.
- 10 Q. Well, what did you tell Ms. Brock this morning?
- 11 A. That this would be the day that someone went and talked
- 12 with him.
- 13 Q. Okay. How do we find out what day he actually
- 14 requested counsel?
- 15 A. I don't know that there's any way to find that out.
- 16 Because they usually have a sign-up sheet down there.
- 17 Sometimes they fill out a form. Sometimes they don't fill
- 18 out a form.
- 19 MR. THEM: Nothing further from this witness, Your
- 20 Honor.
- 21 THE COURT: Any questions?
- 22 MR. DEJONG: No cross, Your Honor.
- 23 THE COURT: Thank you, Ms. Watson. You may step
- 24 down.
- 25 MR. THEM: Your Honor, back to my argument on the

1 motion. I think it's incumbent on the Defendant to prove he
2 asked for counsel. He's the moving party in this motion.
3 And all the documentation we have indicates that he did not
4 request counsel or we can find no documentation that he did
5 request counsel. So I think the court is left with a
6 situation that they have failed to prove that he had invoked
7 his right to counsel.

8 The first knowledge we had of him invoking his right to
9 counsel was after he was confronted by a police officer,
10 Detective Fowler, Mirandize to talk to him about the actual
11 crime after he was arrested, after jail, after the visit.
12 At that point in time, he invoked his right to an attorney.
13 He didn't say that, you know, I'm going -- I have requested
14 one. He says, I want to talk to my lawyer. So we maintain
15 that he did not have counsel and that therefore the *Henry*
16 case would not be applicable.

17 THE COURT: Thank you, sir. Do you want to be
18 heard on anything, Mr. Dejong?

19 MR. DEJONG: On that issue I would like to be
20 heard, Your Honor.

21 THE COURT: All right, sir. Be glad to hear from
22 you.

23 MR. DEJONG: Number one, in the *Henry* case, I
24 don't particularly read that the same way that Mr. Them
25 does. They do talk in *Henry* about post indictment. But

1 then I think if you go back to Kirby, K-i-r-b-y, versus
2 Illinois, 406 U.S. 682, it comes as to when the right to
3 counsel attaches. And in Kirby they go through a bit of
4 litany in there, but obviously going back to Henry, I think
5 they're talking about when the right to counsel attaches.
6 You come back to Kirby there's been a lot of confusion over
7 the years in the Supreme Court, the United States Supreme
8 Court has looked at it to say pre-indictment line-up,
9 preliminary hearings, all of those things are crucial parts
10 of the case where the right to counsel attaches.

11 In this case, Your Honor, I think we go further in that
12 the Miranda warning that was given was superfluous because
13 it was pre-arrest. He was not Mirandize. I submit, and I
14 had all this stuff tucked away over there, didn't know I was
15 going to need it again. I don't remember if it is Kirby or
16 Henry that discusses it, but I believe it is in one of those
17 cases the Court says, when the -- actually my eye just fell
18 on it. It is in Kirby. And that was Mr. Chief Justice
19 Burger's concurrent opinion. I agree, quoting from that
20 case, Your Honor, I agree that the right to counsel attaches
21 as soon as criminal charges are formally made against an
22 accused and he becomes a subject of a, quote, criminal
23 prosecution. Therefore I join the plurality opinion and in
24 the judgment of that opinion.

25 So I submit, Your Honor, if we say, in this case,

1 argument -- taking the argument for a moment that he was
2 Mirandize, which I don't agree with, but for purposes of
3 this argument, if he was Mirandize, the way law enforcement
4 went about trying to get their confession, as Detective
5 Fowler testified to, that totally circumvents my client's
6 right to counsel, which I submit attached at the time he was
7 arrested. It didn't attach when he was out there at the
8 fairground being questioned. He had no right to counsel at
9 that point in time. I would be the first to admit that.
10 But I think his right to counsel attached when they made
11 that formal charge against him by arresting him. They did
12 not Mirandize him, and even had they Mirandize him, they
13 would have certainly done everything, and did everything in
14 their power to circumvent his right to counsel by putting in
15 this surreptitious jailhouse snitch to go get that -- to
16 attempt to get that confession. Thank you, Your Honor.

17 THE COURT: All right. Let me briefly address the
18 other issues and then I'll come back to this in a little
19 bit.

20 The *Miranda* argument, I think we had three issues
21 yesterday, *Miranda* that flowed into the Sixth Amendment and
22 then also on the *Biggers*. Let me just address the
23 identification issue first. I think based upon the factors
24 set forth under our law for the opportunity to view and the
25 degree of attention and the accuracy of the description,

1 level of certainty, the time between the confrontation and
2 the offense, all those factors I think are sufficient to
3 find that the walk-through was not suggested and that there
4 is certainly a jury question as to the reliability of the
5 identification. I think the jury can certainly hear that.
6 I don't think there's anything that I heard on the record to
7 negate the ability of the State to present that evidence for
8 the jury to determine just how strong the identification is
9 of the -- by the victim of the Defendant. As far as the
10 *Miranda* argument ---

11 MR. DEJONG: Your Honor, I ---

12 THE COURT: Yes, sir.

13 MR. DEJONG: I apologize for interrupting. I
14 would request a point of clarification. I'm not arguing
15 with your ruling.

16 THE COURT: Okay, sir.

17 MR. DEJONG: I would not argue with your ruling
18 that they can get into the description and all of that. I
19 think that is certainly a jury issue. But my question is,
20 are you ruling if the Solicitor asks, is the person who
21 assaulted you present in the courtroom, under your ruling
22 are you saying that she can point to my client, our client,
23 and say that's the man that did it?

24 THE COURT: I didn't hear any ---

25 MR. DEJONG: That was really the tenor of my

1 argument.

2 THE COURT: I didn't hear any testimony yesterday
3 that said she could do that. I think the thing was
4 resemblance, and I don't know who's going to be sitting in
5 the courtroom at that time. There might be several people
6 in here that you can use in your cross examination, whoever
7 is sitting in the audience as far as size and so forth. But
8 I don't believe -- I didn't hear anything from the State
9 that there was going to be a positive identification. Maybe
10 ---

11 MR. THEM: I'm going to ask her to do that, Your
12 Honor.

13 THE COURT: To identify him?

14 MR. THEM: Yes, sir. It's my understanding, based
15 on my discussions with her, she will point at the Defendant
16 but she will say that she's only fifty percent sure. She's
17 allowed to identify something that she believes is the
18 person to do something. Anything else goes to the strength
19 of that identification, not to the ability to make the
20 identification. I think someone could testify from the
21 stand, yeah, that looks like him over there. I think, yeah,
22 I think that's him, yeah. I think a person can say that.
23 It's not a very good identification. It's ripe for cross
24 examination. But as far as the threshold issue, can they
25 point and say that, I think they can under our laws.

1 MR. DEJONG: And that's what I vehemently disagree
2 with, Your Honor.

3 THE COURT: You don't believe it's a question for
4 the jury as to weight?

5 MR. BALL: Mr. Them had told me he would not ---

6 MR. THEM: Excuse me, Your Honor. They can't Mutt
7 and Jeff. One of them's got to argue a point. They can't
8 both argue.

9 THE COURT: I'll be glad to hear from both of them
10 right now. Okay.

11 MR. BALL: All I'm saying is that he had told me
12 that he would not be having that lady try to do an in-court
13 identification. Didn't you, Mr. Them?

14 MR. THEM: I don't recall telling you that. When
15 did I tell you that?

16 MR. BALL: Thursday, Monday, whenever I first got
17 in the case and you said ---

18 MR. THEM: I talked about what she was going to
19 say, then I thought I talked about the fifty percent
20 situation.

21 MR. BALL: You said, I'm not about to have
22 somebody that's only fifty percent sure try to identify
23 somebody in the courtroom.

24 THE COURT: Mr. Dejong.

25 MR. DEJONG: That issue aside, Your Honor, I think

1 courtroom identification goes to a witness saying, that is
2 the person. Not that they resemble, not that they look
3 like, not that I'm fifty percent sure. I don't think they
4 can do that.

5 Now, I think under what Your Honor has already ruled,
6 and I'm not arguing that ruling, they can elicit testimony
7 from her from what she said out there at the fairground.
8 But based on that she cannot sit in here in this courtroom
9 and point to my client and say, that's the guy that did it
10 or that he resembled the guy that did it. That's not
11 identification. We're talking about in-courtroom
12 identification. We're saying, that's the guy that did it.
13 And my argument is, based on what you have heard, that she
14 cannot do that. She can say, I think, that she saw a person
15 at the fairground that she was fifty percent sure of. But I
16 don't think she can point to that man and say, that's the
17 guy that did it. Nor can she say he resembles him. There
18 was somebody else at the fairground that she first thought
19 might be the guy.

20 THE COURT: Well, that's all -- yes, sir, Mr.
21 Them.

22 MR. THEM: Your Honor, when they asked her point
23 blank, do you see the man that assaulted you? She pointed
24 at the Defendant. They then asked her, how sure are you of
25 that? She then said, fifty percent. She didn't say, I'm

1 fifty percent or I'm wishy-washy. She pointed at him and
2 then when she was pinned down, I guess out of some sense of
3 fairness or honesty, whatever you want to call it, she said,
4 I'm fifty percent sure.

5 THE COURT: I'll see -- my inclination is to let
6 the jury make this determination. I'll see -- I'll have to
7 listen to the question. You can certainly make your
8 objection if you need to when I -- I don't know how the case
9 is going to develop and what questions he's going to ask or
10 what statements she's going to say, but you make your
11 objection when you need to.

12 MR. DEJONG: And I'm in the same predicament with
13 Your Honor, I guess, if Your Honor is in a predicament.
14 Maybe not. I am. But I think some of that he can get into
15 and some of it he can't. But really to preserve my issue
16 for the record, I think I'm -- where we stand now, I'm going
17 to have to object to all of it, Your Honor.

18 THE COURT: Then I'll allow you to make your
19 objections, then we'll work on that as we go through.

20 MR. DEJONG: Thank you, Your Honor.

21 MR. BALL: Judge, may I be excused to run to the
22 bathroom?

23 THE COURT: Yes, sir.

24 MR. THEM: Excuse me, Your Honor. I'm an old man
25 too, can I accompany him?

1 MR. DEJONG: Your Honor, if we're doing that, I
2 don't need to use the bathroom for once in my life, but the
3 Statewide Grand Jury Clerk of Court is bugging my office to
4 death right now. They apparently had some big drug round-up
5 and he wants me Friday. Could I just run to my office and
6 see if I can call him.

7 THE COURT: We'll take a ten minute break.

8 MR. DEJONG: Thank you, Your Honor.

9 (WHEREUPON, Court Exhibit Number 1 was marked for
10 identification.)

11 (WHEREUPON, the court stood at recess for a short
12 break.)

13 THE COURT: All right. Before we had the bathroom
14 break, I just wanted to make sure you understood, I believe
15 the threshold for *Biggers* has been met and it'll go to
16 weight and not admissibility. So that's my ruling. And
17 then we'll decide on the objections as they're made. As far
18 as the argument on the *Miranda*, I'm denying the Defense
19 motion that there was a *Miranda* violation in anyway on this
20 matter.

21 Before we get into the other thing, before I forget,
22 we've got two juror needs. I just want to make sure this is
23 on the record. One of the jurors' husband was here, wasn't
24 going to be able to stay the day, he was her transportation.
25 Our bailiff, Mr. Smith, knows her in Liberty, I can't

1 remember the juror's name now ---

2 BAILIFF: Mrs. Jones.

3 THE COURT: Mrs. Jones. Offered to give her a
4 ride home tonight. We can have a deputy take her, as we
5 normally would. Is there any objection to the bailiff --
6 and of course he understands he does not talk with her about
7 this case in anyway whatsoever -- would give her a ride home
8 since he lives in Liberty and she lives in Liberty? Is
9 there any objection from the State or the Defense that he
10 give her that transportation? Or we can make other
11 arrangements.

12 MR. THEM: None from the State. That seems an
13 appropriate thing.

14 MR. DEJONG: I have no problem with the -- not
15 that I have a problem with any of it. But I noticed Your
16 Honor looking at Mr. Smith, Your Honor, I have no problem,
17 nor does Mr. Ball.

18 THE COURT: I understand also while we were taking
19 a break that Juror Ms. Mode, I think is her name, did have a
20 problem with childcare today. So I propose that -- we had a
21 bench conference on that. She's the juror who is not exempt
22 from jury service because her children are older, but her
23 mother had -- who normally takes care of the children had to
24 leave to go out of state to care for, I think, her sister
25 who has been diagnosed with cancer. So she came today as I

1 instructed her to do, but I was hoping she would let us know
2 that she didn't have childcare before we picked her. So I'm
3 proposing -- by two thirty she's going to need to -- she's
4 going to have some concerns or either we're going to need to
5 take care of her children. Any objection that she be
6 dismissed and one of the alternates then taking her place?

7 MR. THEM: That'll be fine with the State, Your
8 Honor, to dismiss her.

9 MR. DEJONG: We have no problem with that as far
10 as the Defense is concerned.

11 THE COURT: As I understand the law, we'll
12 randomly select one of the two alternates if y'all could put
13 those in the computer and have one name come out of the two
14 alternates, that one will be the juror and the other one
15 will remain the alternate. Or we can put two names in a hat
16 and draw it out, ever how you want to do that.

17 MR. THEM: That'll be fine with the State, Your
18 Honor.

19 THE COURT: Just write the two names down in the
20 hat and we'll let the Clerk pull one of the names out and
21 that'll be the alternate or that'll be the serving juror,
22 whichever name is pulled out, and the remaining one will
23 remain as an alternate.

24 MR. THEM: Excuse me, Your Honor, while she's
25 doing that, I believe I need an affirmative finding on the

1 record of voluntariness, at least as a threshold matter,
2 from the court.

3 THE COURT: On the ---

4 MR. THEM: On the *Jackson v. Denno* matter.

5 THE COURT: On the first statement?

6 MR. THEM: Yes, sir.

7 THE COURT: On the first state, which I believe
8 there was no objection to, I do find it was voluntary and
9 I'll allow that statement in, again, for the jury to
10 determine the validity of the statement as they normally
11 would.

12 MR. THEM: I think I also need a similar finding
13 on the statements made from the Defendant to the visitor as
14 to the issue of voluntariness. I understand what you ruled
15 on the Sixth Amendment thing. Just on the issue of
16 voluntariness, I think I need a threshold ruling from the
17 Court.

18 THE COURT: Well, I haven't ruled on the Sixth
19 Amendment. I thought I just said that, that as far as the
20 voluntariness of the statement that I uphold the statement
21 from a *Miranda* standpoint. It was voluntary. I think the
22 first statement that was handwritten, there was no objection
23 to. The other statement does not meet the threshold of
24 involuntary in anyway. So I'm ---

25 MR. THEM: That would suffice. Thank you very

1 much.

2 MR. DEJONG: Again, Your Honor, I'm simply asking,
3 just so the record is clear, you're denying my motion to
4 suppress both on Sixth Amendment and the *Miranda* issue, is
5 that ---

6 THE COURT: I'm about to address the Sixth
7 Amendment.

8 MR. DEJONG: I'm sorry.

9 THE COURT: I've jumped around a good bit because
10 I did want to find out about these jurors. Have y'all got a
11 name picked for me yet?

12 The name of the juror, that'll be Stephanie Doll will
13 be the sitting juror. Ms. Landers will continue to be an
14 alternate.

15 Have Ms. Mote come out, please.

16 (WHEREUPON, Juror Mote entered the open court.)

17 THE COURT: Ms. Mote, thank you for coming today.
18 And I'm sorry that we went through the process. I didn't
19 know your name would come up. If you would have just let us
20 know, I certainly had promised you that we would take care
21 of your childcare needs because of the emergency in your
22 family. Certainly the lawyers are aware of that too. So
23 I'm going to excuse you for the week. You don't need to
24 come back. I don't expect we'll have another trial. We'll
25 have one of the other alternates take your place. Thank you

1 very much for coming today.

2 JUROR: Thank you.

3 THE COURT: You're excused at this time.

4 (WHEREUPON, Ms. Mote exited the open court.)

5 THE COURT: All right, gentlemen, as I told you
6 yesterday when we left, I did have some trouble with the
7 Sixth Amendment issue. I spent a little time last night
8 looking at the law myself in regard to *Henry* and other
9 cases. I reviewed *Kirby* and *Perkins*, State law. I've
10 looked at *Quattlebaum, State v. Quattlebaum*. Another case
11 that I believe is pertinent is *Rothgery v. Gillespie County,*
12 *Texas*, a United States Supreme Court case that was just
13 cited this summer.

14 Based on the record that I have before me, I have a
15 hard time finding that the Sixth Amendment did attach,
16 although I think that might very well have attached
17 based on that case. I didn't have any particular evidence
18 to know when his bond hearing might have been or when he
19 actually asked for an attorney. But even assuming, and I
20 think there's a strong case that can be made if the record
21 were more complete, that under the *Gillespie County* case,
22 the Sixth Amendment did attach. Even assuming that, I
23 believe that particularly in light of *Quattlebaum*, that the
24 factors that are before us now would not lead me to believe
25 that there was a violation in anyway. I tried to weigh the

1 factors in the Henry case with those of this particular
2 case, from what I heard, and again just based on the record,
3 the initiation of this entire matter was not on behalf of
4 law enforcement, but it was on behalf of Mr. Young, the
5 citizen, and as the Quattlebaum case articulated, whatever
6 the motive might have been, conscience or curiosity or
7 whatever else, it was a citizen initiation and not an
8 initiation from law enforcement. He certainly wasn't paid
9 in anyway. They didn't, based on the record, they didn't
10 give him any list of questions to ask or information to
11 elicit. It was merely on his volition that this took place
12 based upon the call that the Defendant had made to him to
13 come see him. I think the time of this is important too.
14 Again, I don't have a complete record there, but based upon
15 the date of the incident, the waiving of the *Miranda*, then
16 the interview and then later asserting the rights, all
17 within several days, I gather he was arrested sometime after
18 the weekend.

19 The statement, of course, was made. The Defense makes
20 -- and I can understand the argument of the wiring and that
21 being part of the police participation, but I think the
22 wiring can be a two-edge sword because that really preserves
23 the evidence. There might very well have been some
24 exculpatory comments made. And I think the reasoning for
25 the wiring is just for preservation of the evidence. And

1 under *Brady*, if exculpatory statements had been made, then
2 they're there to help either side, depending on where the
3 facts lie as far as what the statements -- what it included.

4 I believe that even if the Sixth Amendment did attach
5 that there's no violation of that right to counsel based
6 upon the facts that I have before me and the record that I
7 have. So I will allow the statement into evidence, not
8 being violative of *Miranda*, being a voluntary statement, and
9 not being violative of Sixth Amendment rights, even if they
10 have attached.

11 MR. DEJONG: And obviously, Your Honor, meaning no
12 disrespect, I'm going to have to object during the course of
13 the trial.

14 THE COURT: I would expect you to.

15 MR. DEJONG: Thank you. Hopefully I will. If I
16 simply object without -- I hate to say objection based upon
17 prior argument. I think that's a little prejudicial, if I
18 have to say that in front of the jury. So if I just object,
19 I think that would be sufficient to preserve my objection on
20 the record, Your Honor.

21 THE COURT: Perhaps I've made enough ruling to
22 give you both grounds to appeal. I really believe that the
23 Sixth Amendment has attached based upon the *Gillespie County*
24 case, even though I don't have all the facts I would like to
25 have from the hearing to make that determination, but just

1 based upon what I expect to have happened in those few days
2 after the arrest. But certainly the State can appeal that
3 ruling and my finding favorable to the State based on
4 Quattlebaum that the facts would not show a violation of
5 that right. So you're certainly protected on this hearing.
6 Again, you can make your objection when you see fit during
7 the course of the trial.

8 All right. Are we ready to begin?

9 MR. DEJONG: Only other thing I have, Your Honor,
10 I would move to sequester the witnesses.

11 MR. THEM: I have no objection to that. I have
12 another problem, too, Your Honor.

13 THE COURT: Okay.

14 MR. THEM: I'm informed by Mr. Dejong and people
15 in my office that he has an eleven thirty hearing in Family
16 Court.

17 MR. DEJONG: I do. You know, only thing I would
18 ask on that, Your Honor, as I always do, if the two judges
19 can get together, I'll be wherever I am told to be. I hate
20 to interrupt this proceeding with a jury. I mean no
21 disrespect to Judge Verdin. I would be more than happy if
22 they can run that eleven thirty into the lunch hour. I'll
23 forego my lunch hour and do that so we don't have to disrupt
24 the jury. I'll just leave that to Your Honor.

25 THE COURT: We'll try to work around that. How

1 long do you expect your first witness to be?

2 MR. THEM: My first witness is going to be the
3 victim, Your Honor, and guesstimating cross examination, I
4 would think she would be an hour, hour and fifteen minutes.

5 THE COURT: Mr. Duncan, do you -- are they
6 operating Family Court now? Could he go now, you think? Is
7 your client there?

8 MR. DEJONG: I don't know, Your Honor. I see Ms.
9 Munson chomping at the bit to answer that question.

10 MS. MUNSON: I'm just making myself available to
11 the Court. I am going to be representing the State in those
12 hearings. I did let Judge Verdin know that we might have a
13 problem here. There are two other hearings that we could
14 start with.

15 THE COURT: Have any started now?

16 MS. MUNSON: Not yet, Your Honor. Well, Family
17 Court is in session right now, but not for the juvenile
18 matters.

19 THE COURT: Okay. So no juvenile trials have
20 started yet?

21 MS. MUNSON: Correct.

22 THE COURT: Do you think there's availability
23 right now for him to go do his?

24 MS. MUNSON: I can run down there right now and
25 find out, Your Honor.

1 THE COURT: Let's see. That way we can just -- if
2 we can -- I hate to keep the jury waiting, but if we can
3 spend fifteen minutes now and then not have any other
4 interruptions today, that would be great.

5 MR. THEM: For purposes of the record on the
6 sequestration order that I consented to, I maintain that the
7 Defendant -- excuse me, that the victim and her husband have
8 the right to be here under the Victims Rights Bill. I also
9 maintain that my chief investigating officer has the right
10 to be here.

11 THE COURT: Her husband is not testifying; is he?

12 MR. THEM: He is going to testify, yes.

13 MR. DEJONG: I think under that, Your Honor, if
14 we're going to sequester, he does not have -- I don't
15 dispute that Detective Fowler can be here and the victim can
16 be here throughout the proceeding. But anybody else that's
17 going to testify under the sequestration order, I think
18 we're entitled to have them sequestered.

19 MR. THEM: Your Honor, I put the victim's husband
20 on there, not knowing what cross examination's going to be,
21 just in case he had to clean up something. He is basically
22 here to support his wife who is very upset about everything
23 and the proceedings and what happened to her, plus she's
24 under a doctor's care for nerves and anxiety, takes
25 medication. He's here much more of a support person rather

1 than to listen to the testimony so he can get a leg up on
2 the Defense. And I think she's entitled to some sort of
3 support, given ---

4 MR. DEJONG: Where's Ms. Roper?

5 MR. THEM: -- given those things to be true.

6 MR. DEJONG: Ms. Swanson is a victim witness
7 advocate of the Solicitor's office, Your Honor. I think she
8 can provide all the support necessary.

9 THE COURT: All right. I'll allow him to stay in
10 as long as you -- if you intend to put him up, you'll need
11 to put him up immediately after -- you said she was going to
12 testify first?

13 MR. THEM: Yes, sir. That would be the only way I
14 think he would become a witness, if ---

15 THE COURT: Well, if he doesn't testify right
16 after her, then he will not be a witness in the case.

17 MR. THEM: He would not be a witness in -- but he
18 would stay in the courtroom, but he would not be a witness?

19 THE COURT: If he's not going to be a witness he's
20 welcome to stay in the courtroom.

21 MR. THEM: Okay.

22 THE COURT: So if there's any testimony he'll
23 give, it'll be immediately after hers.

24 MR. THEM: Yes, sir.

25 THE COURT: I'll allow him to stay.

1 MS. MUNSON: Your Honor, they're in the middle of
2 a hearing at the moment.

3 THE COURT: Okay.

4 MS. MUNSON: And another problem is the case
5 involving Mr. Dejong has a victim on it who has been present
6 throughout the whole thing, was notified to be here at
7 eleven thirty and she is not here as of right yet.

8 THE COURT: Okay. How many of those cases do you
9 have?

10 MS. MUNSON: We have a total of three.

11 THE COURT: Is Mr. Dejong ---

12 MS. MUNSON: Mr. Dejong just has one.

13 THE COURT: One of them?

14 MS. MUNSON: Yes, sir.

15 THE COURT: Let us know when the other two are
16 done. We'll save him for last and maybe we can be at a
17 break at twelve fifteen or so. We'll try to work with you.

18 MS. MUNSON: Thank you, sir.

19 THE COURT: All right. Are we ready to proceed?

20 MR. THEM: I think so, sir.

21 THE COURT: All witnesses have been sequestered?

22 MR. BALL: Judge, we would ask, too, when each
23 witness testified that they be told they can't discuss what
24 the testimony was.

25 THE COURT: All right. You remind me if I don't.

26 MR. BALL: All right, sir.

1 THE COURT: All right. Let's bring our jury in
2 and get them sworn.

3 (WHEREUPON, the jury entered the open court at
4 approximately 10:43 a.m.)

5 THE COURT: Ms. Doll, if you would, move on over
6 please. Well, you can come down and take a front seat if
7 you would like. One of your jurors had a problem with
8 childcare, so we took care of that while you were out too.
9 And so with the consent of the attorneys -- she had an
10 emergency in her family that created this problem. With the
11 consent of the attorneys she's been excused. We have one
12 alternate now who will always occupy that seat, the foreman
13 in his seat and the rest of you, again, will be full members
14 of the jury, along with the alternate.

15 You can administer the oath to the jury now, Madam
16 Clerk.

17 MADAM CLERK: Please stand and raise your right
18 hand. After I administer the oath, please say I will.

19 (WHEREUPON, the jury was duly sworn.)

20 MADAM CLERK: Thank you.

21 THE COURT: Ladies and gentlemen, let me just give
22 you a brief overview of what we'll be doing here. This is
23 in no way to be considered an instruction on the law. I'll
24 do that at the end of the case. But I appreciate your
25 willingness to serve as jurors in this matter. I'm honored

1 to have an opportunity to work with you. You're obviously
2 here to sacrifice of your own time and as judges you're
3 going to be deciding what the facts are in this case. You
4 may have some apprehension about this title I've given you
5 to be a judge because you're going to be every bit as much a
6 judge as I am. We're just going to be operating in
7 different fields. I'll be the judge of the law and you'll
8 be the judge of the facts.

9 In spite of whatever nervousness you may have about
10 that title, let me assure you that you have every skill
11 you're going to need to be judges of the facts in this case
12 because you bring into this courtroom your everyday
13 experiences, the good common sense with which you've been
14 blessed and that's what's going to serve you well in making
15 the decisions that you're going to need to make. You're
16 going to be judging credibility of the witnesses, the same
17 sort of skills you use everyday in your home and workforce
18 to judge what is the truth.

19 You've made a commitment. It makes me proud that
20 you've made that commitment to these parties to be fair and
21 impartial, to weigh the evidence totally and completely
22 before you reach your decision. As a judge of the law,
23 you'll have to -- I'll give you the law at the end of the
24 case and your responsibility is to accept that law and apply
25 the law as I state it to you.

1 Part of my job also is to preside over the course of
2 the trial and we'll -- you've already had a fairly long
3 break before we started. We'll try to take breaks every
4 hour, hour and fifteen minutes, sometimes an hour and thirty
5 minutes, depending on the testimony that's going forth.
6 Obviously, if we haven't taken a break when you need a
7 break, you need to let us know that. Raise your hand, let
8 one of the bailiffs know that you need a break and we'll
9 certainly take that break when necessary. You've met the
10 bailiffs. I'm confident Mr. Smith back at the door and Ms.
11 Brown up here, they'll be able to assist you in anyway. Ms.
12 Watson who administered the oath to you, Ms. Gilstrap, both
13 assistants in the Clerk's office, they'll be here to help in
14 anyway. The young lady seated in front of me is Ms. Hanks,
15 Ms. Danette Hanks. She's the court reporter. She's going
16 to be taking down everything that's said during the course
17 of the trial to make sure the record is full and complete.
18 Seated beside me, the young man, is Buckley Warden. He's my
19 law clerk and he's a valuable asset to me. You may see him
20 coming and going during the course of the trial, taking care
21 of other matters that may be needing attention at the
22 office. But any of these folks, the bailiffs, will
23 certainly be of assistance to you if they can.

24 Part of my job also is to rule on the admissibility of
25 evidence. A question may be asked and one lawyer may make

1 an objection. We have rules of evidence by which we're all
2 -- the lawyers are trained to follow and often I can rule on
3 that objection easily here by saying overruled or sustained,
4 and we can move on. Sometimes, as you've already seen, we
5 may have a bench conference here where the lawyers come up
6 here and we whisper and try to resolve something of a legal
7 nature. But as a judge of the law sometimes it might
8 necessitate you being excused from the courtroom to go back
9 to your jury room while we discuss a matter of law. The
10 lawyers may bring up that they have a matter to take care
11 of. Or it may just be the time of trial that we have to
12 take care of legal matters.

13 I want to do the very best job I can as the judge of
14 the law. I want to try not to make any errors to make sure
15 that each side has a fair trial. And sometimes in order for
16 me to know what the law is, I have to hear some matters that
17 would not be presented before you. Factual matters that may
18 not be presented into evidence or legal matters that would
19 have no concern to you. So it's necessary that you be
20 excused while I resolve those legal matters. It's very
21 similar, after all the evidence is in and you're back in
22 your jury room deliberating and doing the job that you have
23 to be the judge of the facts, I'm not back there with you
24 giving you my ideas about what the facts are because that's
25 not my responsibility at all. That's your responsibility

1 and yours alone to determine what the facts are. We each
2 have -- we're each judges, but we each have different roles
3 to fulfill.

4 Trials take place in stages. You may have never served
5 as a juror before and your experience with trials might be a
6 favorite TV program or a movie or a John Grisham novel. I
7 doubt very seriously if there are going to be moments of
8 high drama. Your job as the fact finders is to be good
9 listeners. It's a slow deliberative process by which
10 questions are asked and answers are given.

11 After opening statements of the attorneys, then there
12 will be testimony given. After all the testimony -- there
13 may be some exhibits placed into evidence. After all that's
14 in, then I'll have an opportunity to instruct you on what
15 the law is. And it's then that you start your
16 deliberations, you start talking about the case, not until
17 then.

18 You've taken an oath to seek the truth, to render
19 justice to both sides and I look forward to working with you
20 in this case, ladies and gentlemen. At this time, in order
21 to protect the record, I need to ask if there's any
22 objection from the State as to the comments made. Any from
23 the State?

24 MR. THEM: Not on behalf of the State, Your Honor.

25 THE COURT: Any from the Defense?

1 MR. DEJONG: Nothing on behalf of the Defense,
2 Your Honor.

3 THE COURT: All right. Solicitor, you may make
4 your opening statement. I urge you to listen carefully as
5 these attorneys address you. While it's not evidence, I'm
6 sure they can give you some insights as you listen to this
7 trial.

8 OPENING STATEMENT

9 BY MR. THEM:

10 Good morning. The case that we're about to begin is a
11 case involving the charge of assault with intent to commit
12 criminal sexual conduct. If we were trying this exact same
13 case ten, twelve years ago, the charge would have been
14 attempted rape. The law has changed the names of this.

15 The evidence in this case is going to show on the night
16 of August 30th, last year, at the Upstate Fair, right down
17 at the race track in Easley -- between Easley and
18 Greenville, a Ms. Jones, who lived in the neighborhood
19 walked over to the fair, walked around the midway area where
20 they have all the rides and food and the games and all of
21 that, and as it was getting later in the evening, she walked
22 out to the front gate. While she was out there, she smoked
23 a cigarette, talked to some people. A gentleman came up and
24 talked to her. She said something to the effect, well, I
25 have to go now. This gentleman offered to walk her across

1 the park. The evidence will show after she got a very short
2 distance away, he pulled a knife on her, wrestled her to the
3 ground and made statements to her that he was going to rape
4 her. She fought, scratched, clawed, probably bit, kicked,
5 did everything in the world, and she come loose from him.
6 However, shortly -- she ran a short distance and he caught
7 her again and took her to the ground. She evidently made so
8 much noise and fought so hard that he decided to change his
9 mind and voluntarily let her go. But not before he
10 threatened her life if she told anybody. To make sure that
11 he could make his get-away, he took her cell phone.

12 Well, the crime was not reported by the victim, and
13 she'll tell you why, until the next day. Now, understand
14 when I say the next day, she went up there on the night of
15 the 30th. When midnight came, it became the 31st. The
16 crime happened shortly after midnight. She didn't report
17 the crime until the next day. And as luck would have it,
18 the Sheriff's office, the evidence will show, got a phone
19 call on the morning -- it was later in the morning on the
20 day the crime was alleged to have occurred and it was from a
21 witness who had had a very strange conversation with the
22 Defendant. That witness is here. He's going to testify to
23 that conversation. He contacted the Sheriff's office. They
24 went down and talked to him, wrote a report, and filed a
25 report. They had a report that said that soemone had

1 committed a crime, but they didn't have a victim. So they
2 filed the report away. The next day when the victim called,
3 they compared those two reports and, bang, it fit together
4 like the gears in a clock. They went down and interviewed
5 the victim based on some information they told her and she
6 told them, they thought there was a -- the police thought
7 there was a possibility that the person that assaulted her
8 worked at the fair because of some of the clothing that was
9 described.

10 They took her over to the fair and she walked around
11 that midway area, walked around three times. They asked
12 her, do you see the person that assaulted you? She pointed
13 at a person. Let me tell you now, it was not a proof
14 positively, that's absolutely the person. Matter of fact, I
15 think what the evidence is going to be is, how sure are you
16 that that's the person? About fifty percent. That's not
17 enough to convict. But when you hear the testimony of that
18 witness and you see the documents and the time in which they
19 were created, you will be satisfied beyond a reasonable
20 doubt that the Defendant confessed to this witness that he
21 had done it long before the crime was even reported.

22 When you listen to this evidence, bear in mind at the
23 end of this case you're going to have to make an extremely
24 important decision, both to the victim and to the Defendant.
25 When you get to make that decision, if you're not satisfied

1 he's guilty beyond a reasonable doubt, turn him loose. On
2 the other hand, if the evidence leaves you firmly convinced
3 that he is guilty of attempting to rape this woman at knife
4 point, vote him guilty, let him be held responsible. Thank
5 you.

6 THE COURT: Mr. Dejong, you may address the jury.

7 MR. DEJONG: Thank you, Your Honor. May it please
8 the court.

9 OPENING STATEMENT

10 BY MR. DEJONG:

11 Ladies and gentlemen, this is our opportunity to come
12 to you before you hear any testimony and evidence to briefly
13 discuss with you certain points of applicable law and
14 discuss where we think the case will go. Now, I believe His
15 Honor has already shared with you that the statements we
16 make, either as to the facts in this case or what we believe
17 the facts will be, that is not evidence anymore than the
18 applicable law we might discuss with you, although
19 personally I would not try to lead you astray. But as His
20 Honor has said, he has the law in this case.

21 I really don't want to talk to you at this point in
22 time about specific law that would be applicable to this
23 case. But I would like to take a few moments to share with
24 you some points of law that are so fundamental, perhaps even
25 to use the word basic, but yet so vitally important in a

1 trial such as this. A few moments ago, before y'all were
2 selected to sit in these seats, His Honor asked each of us
3 attorneys to stand and introduce ourselves. Ladies and
4 gentlemen, my name is not important today. What I want to
5 share with you is this. Today I have the pleasure of
6 representing the innocent Kent Clayton. And in your mind,
7 as I say those words and you hear those words, you may say,
8 how in the world, innocent? He was arrested. But we can
9 take the arrest warrants and stand here and rip them to
10 shreds because that arrest warrant and that arrest is
11 meaningless at this point in time. And as I say, I
12 represent the innocent, along with Mr. Ball, innocent Kent
13 Clayton. A different thought may race through your head, he
14 was indicted by the Pickens County Grand Jury. Yes, he was.
15 But indeed, like the warrant, ladies and gentlemen, we can
16 stand here as far as facts go and tear the indictment up,
17 because it is meaningless where we stand at this point in
18 time. His Honor read you the indictment. Those indictments
19 are not facts. The allegations of the indictment are not
20 facts. They are merely allegations. The indictment is
21 simply the piece of paper that brings this case to court.

22 So having said -- and maybe you questioned in your
23 mind, how does that white haired man stand there and say he
24 is representing the innocent Kent Clayton, is because of
25 this fundamental principal of substantial constitutional

1 right of every citizen of Pickens County, of every citizen
2 of the United States of America, and that is called
3 presumption of innocence. That is not legal theory, ladies
4 and gentlemen. It is not legal mumbo-jumbo. It ain't words
5 that lawyers just liberally throw around. It is a
6 fundamental right of every citizen, a substantial
7 constitutional fundamental right. What does it mean? What
8 that means is, ladies and gentlemen, Mr. Clayton sits at
9 counsel table at this point in time presumed innocent under
10 the law. Not an inference, a presumption. He is presumed
11 innocent. And sometimes we talk about the presumption of
12 innocence and we will say it's likened to a cloak of
13 righteousness draped around the shoulders of the Defendant.
14 I like to go a step further and say, look at Mr. Clayton,
15 don't look at his clothes, look at what he's wrapped in from
16 the very top of his head to the very soles of his feet, he
17 is wrapped in presumption of innocence and that presumption
18 of innocence, ladies and gentlemen, does not leave when I
19 sit down over at counsel table in a few minutes. That
20 presumption of innocence does not leave after the first
21 witness testifies or the fifth or the fifteenth. Indeed,
22 that presumption of innocence follows my client back into
23 this jury room when you walk back in there to deliberate.
24 What goes then with the presumption of innocence? It's
25 what we call burden of proof. The burden of proof in this

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Opening Statement of Mr. Dejong

149

1 case is solely right here, at this table. The burden of
2 proof is on the State. Because of that presumption of
3 innocence, ladies and gentlemen, Mr. Clayton has nothing to
4 come in to prove to you today. Whether he testifies or
5 doesn't testify makes no difference at this point in time,
6 or at any time in this trial. He has nothing to prove.

7 So as we go through the trial, we'll probably talk a
8 little bit more about the law when we come to the conclusion
9 of this case and perhaps develop some issues a little
10 further. But I would sincerely ask you to remember the
11 principal, that substantial right of presumption of
12 innocence and the burden of proof is on the State to prove
13 this crime.

14 Now, as far as talking about the facts at this point in
15 time of what's going to be presented or what's not going to
16 be presented, I am not going to sit here or stand here,
17 excuse me, and talk about that. The thirteen of you are
18 going to sit in this courtroom with me and everybody else
19 and we're going to listen and see what comes forward as it
20 unfolds. Now when the case is over and I have an
21 opportunity to come back and address you again, or Mr. Ball,
22 one of us, we do a closing, then we will address with you
23 what we've heard and give you our slant or our theories on
24 the facts according to the law.

25 On behalf of Mr. Clayton, ladies and gentlemen, I thank

1 you for being here. Your service is so fundamental to our
2 system, to our society. Indeed you are a very cornerstone
3 of our entire judicial system, but certainly in a criminal
4 case such as this. I believe it was the great Winston
5 Churchill one time said, a jury service is the highest
6 service a citizen can perform for their country as a non-
7 combatant or in times of peace -- I forget exactly how he
8 put it. We are not in a time of peace in our society, I
9 understand that. We all do. But certainly it's the highest
10 service you can perform for your country and your community,
11 your county, by sitting in this box. I am sure if I had to
12 call you, which I cannot, nor do I wish to, but there are
13 probably a thousand or more places you would rather be than
14 sitting in this jury box. But today, until this trial
15 concludes, and I don't know when that will be, you are the
16 cornerstone of Mr. Clayton's case. Listen intently, which
17 you have so far, and I sincerely appreciate it. And I
18 believe, ladies and gentlemen, that when we come to the
19 conclusion of this case that presumption of innocence
20 follows my client into the jury room, you can discharge your
21 oath of honesty and fairness and bring back a verdict of not
22 guilty. Thank you.

23 THE COURT: You may call your first witness,
24 Solicitor.

25 MR. THEM: I call Aleatha Jones.

1 ALEATHA JONES,

2 being duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 BY MR. THEM:

5 Q. Would you spell your first name for us so the court
6 reporter can get it right?

7 A. A-l-e-a-t-h-a.

8 Q. Okay. And where do you live, Ms. Jones?

9 A. Easley.

10 Q. Okay. Do you live anywhere near the fairgrounds?

11 A. Yes, sir.

12 Q. How close to the fairgrounds do you live?

13 A. A block, two blocks, maybe a little further.

14 Q. Do you live in Pickens County?

15 A. Yes.

16 Q. Are the fairgrounds in Pickens County?

17 A. Yes.

18 Q. Okay. Let me call your attention to the night before
19 midnight of August 30th of last year. I don't mean two or
20 three months ago. I mean a year and two or three months
21 ago. Did you have the occasion to go to the fair?

22 A. Yes.

23 Q. Okay. What time of the day did you go up there?

24 A. It was probably eight thirty, nine o'clock at night.

25 Q. Okay. And why did you go up there that late at night?

- 1 A. That's mainly when everybody goes. Me and my husband
2 had a little argument and I just went to cool off.
- 3 Q. All right. Your husband, is he in court today?
- 4 A. Yes, sir..
- 5 Q. Would you point him out to us, please?
- 6 A. There.
- 7 Q. How tall is he?
- 8 A. Probably six one.
- 9 Q. How much does he weigh?
- 10 A. About two, two forty.
- 11 Q. Okay. Now, when you went to the fair tell me what you
12 did at the fair?
- 13 A. We just walked around and looked at the rides and the
14 games and stuff like that.
- 15 Q. Okay. And how late did you stay at the fair?
- 16 A. Probably eleven thirty, twelve o'clock, I would think.
- 17 Q. How were you going to get home?
- 18 A. Walk back.
- 19 Q. Okay. How far was it from your house to the fair?
- 20 A. A few blocks.
- 21 Q. Okay. And when you left the inside of the fairgrounds,
22 what did you do?
- 23 A. I stopped at the front gate and talked to some guy
24 named Keith for a second and then another guy was standing
25 there. And I was walking out fixing to walk out the gate.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Direct Examination by Mr. Them

153

- 1 Q. Okay. And guy was standing there and what?
- 2 A. And I was fixing to leave.
- 3 Q. Okay. All right. And when you left, what happened?
- 4 A. He said, I'll walk you out.
- 5 Q. Who said that?
- 6 A. The other guy that was standing at the gate.
- 7 Q. Not the first guy, but the ---
- 8 A. The second guy.
- 9 Q. Okay. All right. And did he do so?
- 10 A. Yes. I told him I was fine, but yes, he did.
- 11 Q. Okay. On the way home did any problems develop?
- 12 A. Yes, they did.
- 13 Q. What?
- 14 A. He started to walk beside me and then the next thing I
- 15 know he had a knife to the side of him. And I asked him
- 16 what it was. The next thing I know he had it to my throat
- 17 and ---
- 18 Q. Wait a minute. Slow down. How far had you gotten from
- 19 the front gate of the fair to when you first saw the knife?
- 20 A. Probably maybe fifty yards, thirty, forty, fifty yards.
- 21 Q. Okay. Can you approximate it in things that you can
- 22 see here or out the window or anything?
- 23 A. Probably to that tree right there from that window out
- 24 there.
- 25 Q. Okay. What, on this side of the street or the other

- 1 side?
- 2 A. This side, I guess.
- 3 Q. Okay. So you saw this knife. What did you say about
- 4 that?
- 5 A. I got scared. And then the next thing I know he had it
- 6 to my throat and I was on the ground. That's all I ---
- 7 Q. What kind of knife was it?
- 8 A. It was a long shiny silver thing.
- 9 Q. Do you know the difference between a pocket knife ---
- 10 A. Yeah.
- 11 Q. -- and a sheath knife?
- 12 A. Uh-huh (affirmative).
- 13 Q. What kind of knife was it?
- 14 A. It wasn't a fold-up little knife. It was a long knife.
- 15 Q. Okay.
- 16 A. I guess with handles on the ...
- 17 Q. How did you get to the ground?
- 18 A. I guess he threw me to the ground.
- 19 Q. Okay. And where did he point the knife?
- 20 A. Right there on my neck.
- 21 Q. Did he actually touch you?
- 22 A. Yes, it did.
- 23 Q. What was he saying to you during this time?
- 24 A. That he was going to rape me.
- 25 Q. Okay. Did he say anything else in the beginning?

1 A. Not that I can recall.

2 Q. What were you doing during this time?

3 A. Trying to get loose. At first when he put the knife to
4 my neck, I just was scared and he moved and I started
5 fighting and screaming and he put his hand over my mouth to
6 keep me from screaming.

7 Q. Okay. Were you able to get away?

8 A. Yes, I was.

9 Q. Then what happened?.

10 A. He come after me and grabbed me and threw me back down
11 the second time.

12 Q. How far were you able to run between the time you got
13 loose and when he caught you the second time?

14 A. Not far at all. Probably a few steps.

15 Q. Okay. What happened the second time?

16 A. He just got -- laid back -- straddled me and put the
17 knife back to my neck. And I kept screaming and fighting
18 and he finally said, I'm gonna let you go. He took my cell
19 phone and -- so I wouldn't call for help. And told me he
20 would kill me if I reported it and he would come after me.

21 Q. The man sitting on top of you holding a knife to you,
22 threatened to kill you, how does that make you feel?

23 A. Scared.

24 Q. Did you believe him?

25 A. Yes.

1 Q. Did you receive any injuries in this?

2 A. Some bruises.

3 Q. Okay. Let me show you these photographs here. They're
4 marked State's Exhibit Number 3, Number 4 and Number 5 and
5 there's four pictures to a page. Would you look at these
6 photographs and then I want to ask you a question. Who's
7 the subject of those photographs?

8 A. Bruises, they're me -- on me.

9 Q. And do those photographs fairly and accurately reflect
10 the condition of your body a day or two after this assault?

11 A. Yes.

12 MR. THEM: Your Honor, I would move these into
13 evidence at this point in time.

14 THE COURT: Show them to the Defense counsel.

15 MR. DEJONG: May we approach, Your Honor?

16 THE COURT: Yes, sir.

17 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
18 approached the Bar.)

19 MR. THEM: Your Honor, at this point in time I
20 would move to admit the three photographs on State's Exhibit
21 Number 3, the four photographs on State's Exhibit Number 4
22 and the four photographs on State's Exhibit Number 5.

23 THE COURT: Any objection?

24 MR. DEJONG: May I see, after our bench
25 conference, please? Without objection, Your Honor.

1 THE COURT: Without objection, Exhibits 3, 4 and 5
2 are into evidence.

3 (WHEREUPON, State Exhibit Numbers 3, 4 and 5 were
4 entered into evidence.)

5 MR. THEM: Let me let this warm up, please, Your
6 Honor.

7 Q. Let me hand you State's Exhibit Number 3, and would you
8 describe what these pictures show, please?

9 A. Bruising on the face and arms and the body.

10 Q. Okay. I'm going to show you the four photographs on
11 State's Exhibit Number 4 and ask if you can tell me what
12 those four photographs show?

13 A. The bruising on the arms, face and the legs and --
14 yeah.

15 Q. Okay. And now I'm going to hand you Number 5, four
16 photographs there?

17 A. Bruising on the face, hands, face.

18 Q. Okay. Now, after the Defendant -- after that person
19 caught you the second time, took you to the ground, made
20 those statements to you, how did you get away?

21 A. I ran.

22 Q. And where did you run to?

23 A. Home.

24 Q. Okay. What was your emotional state at this point in
25 time?

- 1 A. Hysterical.
- 2 Q. Ma'am?
- 3 A. Hysterical, screaming, crying.
- 4 Q. Okay. Did you tell your husband what happened?
- 5 A. Yes, I did.
- 6 Q. Did you contact law enforcement?
- 7 A. Not then.
- 8 Q. Did you wait a day to contact them?
- 9 A. Yes, I did.
- 10 Q. Why did you wait that day?
- 11 A. Because he said he would kill me and come after me. I
- 12 was scared.
- 13 Q. What were your nerves like in that day?
- 14 A. They were all tore to pieces.
- 15 Q. Do you have any medical problems for which you are
- 16 taking -- excuse me -- were taking medication at that time?
- 17 A. Anxiety and nerves.
- 18 Q. Okay. Who -- do you take prescribed medications?
- 19 A. Yes, I do.
- 20 Q. Who is the doctor that prescribes those?
- 21 A. Pickens Mental Health.
- 22 Q. Okay. And what kind of doctor is that?
- 23 A. Psychiatrist.
- 24 Q. Okay. When this person is on top of you with this
- 25 knife at your throat talking to you, are you able to see his

- 1 face?
- 2 A. Yes.
- 3 Q. How far away is his face from you?
- 4 A. About like this. It was close.
- 5 Q. Can you describe the person?
- 6 A. He had blonde hair, mustache, probably a little bit
- 7 taller than my husband, six something.
- 8 Q. So that would make him how tall?
- 9 A. Six one, six two.
- 10 Q. Okay. And his weight?
- 11 A. Probably two hundred, two -- like two hundred, two
- 12 forty, two twenty. I don't ...
- 13 Q. What was the race of this person?
- 14 A. White.
- 15 Q. And what was the approximate age?
- 16 A. Late forties, early fifties.
- 17 Q. Okay. Now, when you contacted law enforcement did they
- 18 come out to your house?
- 19 A. Yes, sir.
- 20 Q. Did they interview you at length?
- 21 A. Yes, they did.
- 22 Q. When they left your house, did they return later?
- 23 A. Yes.
- 24 Q. When they returned the second time, what happened?
- 25 A. They took me to ---

- 1 Q. Did they come back the same day?
- 2 A. Yes, they did.
- 3 Q. How long were they gone in between?
- 4 A. I can't tell you the exact time, sir. I don't ---
- 5 Q. It doesn't have to be exact.
- 6 A. Few hours. Few hours.
- 7 Q. Okay. When they came back the second time what
- 8 happened?
- 9 A. They took me to the fairground to try to identify the
- 10 person that attacked me.
- 11 Q. Okay. Now, when you went to the fairgrounds, what --
- 12 who took you there?
- 13 A. Detective Fowler and ---
- 14 Q. You're pointing to this gentleman right here?
- 15 A. Yes.
- 16 Q. Detective Fowler. Okay.
- 17 A. And the Sargent, I don't know who -- I can't remember.
- 18 He done most of the ...
- 19 Q. Was his last name Sargent or his rank was sergeant?
- 20 A. Last name was Sargent, I think.
- 21 Q. Okay. Now, when you were taken to the fairgrounds,
- 22 what instructions were you given?
- 23 A. Just asked me to walk around, just took my time and see
- 24 if I could identify the person that assaulted me.
- 25 Q. Any other instructions they give you?

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Direct Examination by Mr. Them

161

- 1 A. No.
- 2 Q. Anything else they told you about what you might expect
3 to find over there?
- 4 A. No.
- 5 Q. Okay. So how many times did you walk around that area?
- 6 A. Two or three times.
- 7 Q. Did you see anybody you recognized the first time?
- 8 A. Yes, I did. It looked like the person that attacked
9 me, but it -- and I looked again and it wasn't.
- 10 Q. Okay. Did you see anybody -- I sorry, I didn't mean
11 ---
- 12 A. I knew for a fact that it wasn't.
- 13 Q. Did you see anybody the second time around?
- 14 A. I can't remember if it was second or third time.
- 15 Q. Okay.
- 16 A. But between those two times, yes, I did.
- 17 Q. So you walked around three times?
- 18 A. Yes.
- 19 Q. Anymore than that?
- 20 A. Uh-uh (negative).
- 21 Q. Okay. And did you see a person that you recognized on
22 either the second or third trip?
- 23 A. Yes.
- 24 MR. DEJONG: Your Honor, at this point in time,
25 I'm going to object.

1 THE COURT: I overrule your objection. I'll allow
2 the question to be asked.

3 MR. DEJONG: Thank you, Your Honor.

4 THE COURT: And an answer given.

5 Q. When was ---

6 MR. DEJONG: I'm sorry, Your Honor, and that will
7 be a continuing objection.

8 THE COURT: Yes, sir.

9 MR. DEJONG: So I don't have to keep objecting.

10 THE COURT: Yes, sir.

11 MR. DEJONG: Thank you, sir.

12 THE COURT: Objection is noted.

13 Q. Where was this person when you saw him?

14 A. Standing at one of the game things.

15 Q. Okay. And where had you seen this person before?

16 A. The night when I was attacked, I believed it was him.

17 Q. He was the -- you believed he was the person that
18 attacked you? Do you see that person in the courtroom
19 today?

20 A. I'm not really for sure that that's him.

21 Q. Would you point out the person that you're talking
22 about?

23 A. Right over there at the -- between the two lawyers.

24 Q. Okay. When you pointed him out to the police did they
25 ask you any further questions?

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Direct Examination by Mr. Them

163

- 1 A. They asked me how sure I was.
- 2 Q. What did you tell them?
- 3 A. I told them I really wasn't quite sure. Fifty/fifty
- 4 percent sure. I'm not ...
- 5 Q. Okay. What happened after that? Did you have anymore
- 6 involvement that day with the police or Mr. Clayton?
- 7 A. Uh-uh (negative). They come out and took me back home.
- 8 Well the -- yeah.
- 9 Q. All right. Just one second, please. Have you ever had
- 10 a problem with bouncing checks?
- 11 A. Yes, I have.
- 12 Q. In fact, have you been criminally charged about ten
- 13 times for bouncing checks?
- 14 A. Yes, sir. They've been taken care of.
- 15 Q. Were you convicted?
- 16 A. Well, I wouldn't say I was convicted. I took care of
- 17 them before I ever went to court.
- 18 Q. Okay. And have you ever been accused of another crime?
- 19 A. Yeah, shoplifting.
- 20 Q. Were you found guilty of that?
- 21 A. Yes.
- 22 Q. Did you plead guilty?
- 23 A. Yes, I did.
- 24 Q. I have nothing further of this witness, Your Honor.
- 25 THE COURT: Mr. Dejong, Mr. Ball, you may cross

1 examine the witness.

2 MR. DEJONG: Thank you, Your Honor. May it please
3 the court.

4 CROSS EXAMINATION

5 BY MR. DEJONG:

6 Q. You were convicted of the fraudulent checks; weren't
7 you, Ms. Jones?

8 A. I don't know if I was convicted or not. I know I took
9 care of the checks when I went to court. I don't know if
10 they found me guilty or not. I don't know how y'all do
11 things.

12 Q. All right. Well, ...

13 A. What has that got to do with me being assaulted?
14 That's what I don't understand.

15 MR. DEJONG: Your Honor, I would ask the court to
16 instruct the witness that I ask the questions and she
17 answers.

18 THE COURT: Just answer the questions ---

19 WITNESS: Yes, sir.

20 THE COURT: -- that the lawyers ask of you, ma'am.

21 Q. August the 30th of 2007 you were having a fight with
22 your husband?

23 A. Yes.

24 Q. That had been an ongoing fight for some period of time?

25 A. What are you talking about, some period of time?

- 1 Q. On that particular day?
- 2 A. I wouldn't say all day long we was fighting, no, sir.
- 3 We just had a disagreement and I just left to cool off.
- 4 Q. Okay. So as a result of that fight, then about eight
- 5 thirty, nine o'clock, you go to the Upper South Carolina
- 6 State Fair?
- 7 A. That's correct.
- 8 Q. And how did you get there?
- 9 A. I walked.
- 10 Q. Now, when you went into the fair, did you just go into
- 11 the front gate?
- 12 A. Yes.
- 13 Q. Okay. I guess so that I'm sure, we don't have any
- 14 pictures of that, but that would be the gate if you were
- 15 looking from Highway 123?
- 16 A. Correct.
- 17 Q. That's the gate ---
- 18 A. Correct.
- 19 Q. -- you would be looking at? Share with me, if you
- 20 would, please, ma'am, the lighting around that gate?
- 21 A. It's lit up pretty good.
- 22 Q. Pardon me?
- 23 A. It's lit up pretty good.
- 24 Q. Okay. And so you get to the fair around eight thirty
- 25 or nine o'clock and you walk around?

- 1 A. Correct.
- 2 Q. Do you ride any rides?
- 3 A. No.
- 4 Q. Play any games? Please answer?
- 5 A. No, sir.
- 6 Q. Thank you, ma'am. I'm not trying to be ugly. The
- 7 court reporter has got to get down your answer.
- 8 A. Yes, sir.
- 9 Q. Eat any food? Did you have anything to eat?
- 10 A. I can't remember, sir.
- 11 Q. Had you been drinking?
- 12 A. No, sir.
- 13 Q. Okay. So during the course -- well, until you met up
- 14 with these two people that you say were at the gate, did you
- 15 talk to any other people?
- 16 A. No, sir.
- 17 Q. So in that period of time, which was several hours, you
- 18 only talked to two people?
- 19 A. Far as I can remember, yes, sir.
- 20 Q. Okay. Now, was the -- when you went to the front gate
- 21 to leave, were the rides still operating?
- 22 A. Some of them were still going, I believe. I'm not for
- 23 sure.
- 24 Q. Still people around, though?
- 25 A. A few people, yes, sir.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Cross Examination by Mr. Dejong

167

- 1 Q. Still cars in the parking lot?
- 2 A. There was a few. Not a whole lot.
- 3 Q. Okay. And so then you say you met these two people at
- 4 the gate?
- 5 A. That's correct.
- 6 Q. How long did you stand there and talk with those
- 7 people?
- 8 A. I -- probably maybe ten minutes. I don't even know. I
- 9 don't even know if it was even that long, sir.
- 10 Q. Well, when you were leaving the fair out the front
- 11 gate, would you have gone straight towards 123, would ---
- 12 A. No. I went out the back way, sir.
- 13 Q. You went out the back way?
- 14 A. Yes, sir, it was closer to where I live.
- 15 Q. Okay. Now, I'm a little confused but that's okay. You
- 16 went out the front gate of the fair; right?
- 17 A. I left out the back gate of the fair, sir.
- 18 Q. The back gate of the fair?
- 19 A. Correct.
- 20 Q. Okay. All right. Now, so you talked to people at the
- 21 front gate, but then you went out the back gate?
- 22 A. That's correct. It's closer going out the back way to
- 23 my house.
- 24 Q. And when you go out -- well, tell me about the lighting
- 25 there around the back gate?

1 A. It's still pretty lit up where I was at. You could see
2 real good.

3 Q. Flood lights?

4 A. Yeah, I would imagine that's what they are. I'm not --
5 I don't -- I'm not a light expert. I don't know.

6 Q. Around the back gates, are there rides and that type of
7 thing?

8 A. There was food things right there around the gate and
9 all that stuff.

10 Q. All right. Lights coming from off of that?

11 A. Sure.

12 Q. Okay. And again, people were still around there;
13 right?

14 A. Yes.

15 Q. All right. The two people at the front gate, were
16 those two people there the entire time?

17 A. I don't know, sir. I can't remember.

18 Q. Well, now you were there?

19 A. I was there for a few minutes. I don't know if it was
20 two minutes, three minutes, I can't give you a certain how
21 long I was standing there, sir.

22 Q. All right. Well, then you say one of those people just
23 out of the blue said they were going to walk you home?

24 A. That's ... I guess that's the way it happened. I
25 really can't remember back that far. You had -- I mean,

1 everything that happened, my nerves have got bad, I had a
2 knife to my neck. I mean, I can't tell you exactly what
3 time I stood there, how long I stood there, every second, I
4 can't tell you that. I don't remember. If you have a knife
5 stuck to your neck you might not either.

6 Q. Well, either one of those people or the person that you
7 say assaulted you, did you ever offer to trade them Lortab
8 for crack cocaine?

9 A. No, I did not.

10 Q. I see. And getting back to this person that said they
11 were going to walk you home. Now it's in the early morning
12 hours of August the 31st right now; is it not?

13 A. Can you repeat the question?

14 Q. Yes, ma'am. You say this person that they were going
15 to walk you home, that's the early morning ---

16 A. He didn't say he was walking me home, sir. He was
17 walking me out. And I said, I'm fine, I can walk myself.
18 Then he proceeded to walk beside me. I didn't ask him to
19 walk me anywhere.

20 Q. All right. Well, when you were doing that, were you
21 still walking on the fairground?

22 A. Yes, I was.

23 Q. How far is it from the front gate to the back gate?

24 A. It ain't probably fifty yards or ...

25 Q. All right. So then if I understood you when you were

1 talking to Mr. Them, you said you had went about fifty
2 yards; is that correct?

3 A. I said twenty, thirty, forty, fifty yards, something
4 like that.

5 Q. All right. Well, and now you're saying you went about
6 fifty yards from the front gate; right?

7 A. You asked me was there -- how far it was from the front
8 gate to the back gate. I said probably fifty yards, twenty
9 to fifty yards or so.

10 Q. Yes, ma'am. So then I believe he asked you how far you
11 had gone before you thought something was wrong or something
12 ---

13 A. Just a few feet, sir.

14 Q. I'm sorry, ma'am?

15 A. Just a few feet.

16 Q. Okay. So you were still on the fairground at that
17 point?

18 A. Yes, sir. I never left the fairground when I was
19 attacked.

20 Q. Okay. So did I understand you then, you say you were
21 assaulted on the fairground?

22 A. That's correct.

23 Q. I see. Okay. And do I understand you correctly that
24 you never made it out the back gate?

25 A. That's correct.

- 1 Q. The, what you said was a knife, when the Solicitor
2 asked you to describe it, you said it was long and shiny;
3 right?
- 4 A. That's correct.
- 5 Q. But then you don't -- were you sure it was even a
6 knife?
- 7 A. Yes, I am. It was to my neck, sir.
- 8 Q. Did you -- was there pressure applied ---
- 9 A. Yes, sir.
- 10 Q. -- with that knife? Okay. Can you point out to me on
11 any of these exhibits any cuts?
- 12 A. No, I can't, because I don't believe there's any cuts
13 on my neck. There's just a red mark there. There was no
14 cuts. It was just the pressure against the knife that made
15 it red.
- 16 Q. A red neck on your mark; right?
- 17 A. A red neck on my mark?
- 18 Q. I mean, a red mark on your neck? It doesn't always
19 come out quite right. All there was was a red mark on your
20 neck; right?
- 21 A. From him holding the knife to my neck, sir.
- 22 Q. From him holding the knife on your neck. Is that what
23 you said?
- 24 A. He was holding the knife on my neck.
- 25 Q. Okay. I see.

1 A. On my neck, at my neck. I can't tell you exactly where
2 -- how he was holding it.

3 Q. All right. So then you say -- I don't want to mish-
4 mash these at this point in time. I'm trying to keep them
5 straight. Okay. You say you guess he threw you to the
6 ground; right?

7 A. He did throw me to the ground.

8 Q. I see. Okay. And at that time he was bending over you
9 with a knife to your throat ---

10 A. Uh-huh (affirmative).

11 Q. -- as you say?

12 A. Yes. That's what happened.

13 Q. Then you -- you say you got away?

14 A. Yes. I got away the first -- one time -- first time he
15 threw me down.

16 Q. Now when you got away, now, you're still on the
17 fairgrounds; right?

18 A. Yes, that's correct.

19 Q. The rides are still going?

20 A. Far as I'm concerned. I don't remember if the rides
21 were still going, if they wasn't going. I don't know. I
22 was leaving.

23 Q. Okay. And so when you say you got away from him, which
24 direction did you head?

25 A. I was headed out the back gate home when I was

- 1 attacked. He threw me on the ground, put the knife to my
2 neck, I got up, I ran just a few feet, he threw me back down
3 on the ground again.
- 4 Q. All right, ma'am.
- 5 A. I was still on the fairground, going out the back,
6 fixing to head out the back gate.
- 7 Q. I'm sorry, but I've got to take this a bit at a time.
8 Okay? Now you say he threw you to the ground, bent over
9 you, held a knife to you, you got away, and you ran; right?
- 10 A. A few feet.
- 11 Q. About two feet. Well, my question is, the two feet
12 that you say you ran, what direction did you run? Did you
13 run back ---
- 14 A. I told you I was headed to the back gate. I did not go
15 back inside the fair. I was headed out the back gate when I
16 was attacked. I did not go back any other way.
- 17 Q. All right, ma'am. And then you say he threw you down
18 again?
- 19 A. Correct.
- 20 Q. Okay. And you're still on the fairground?
- 21 A. Yes, sir.
- 22 Q. Okay. And then -- let's back up a little. You start
23 out the front gate, you stay on the fairground and you have
24 this man walking beside you; right?
- 25 A. He walked up beside me like I testified just a few

1 minutes ago.

2 Q. And in all of that you never went to anybody or said
3 anything?

4 A. How could I go to anybody? I had a man standing beside
5 me with a knife and put it to my neck. I screamed. That's
6 all I could do.

7 Q. Okay. Did anybody come?

8 A. No.

9 Q. Okay. And at what point did you say this person said,
10 I'm going to rape you?

11 A. When he threw me on the ground the first time.

12 Q. I'm sorry, ma'am?

13 A. When he threw me down the first time on the ground with
14 a knife to my neck, that's when he said he was going to do
15 it.

16 Q. All right, ma'am. And you got away. And you said he
17 threw you down again; is that correct?

18 A. That's right.

19 Q. All right. Now, after that second time, he in essence
20 said, I'm not going to do anything; right?

21 A. Because I kept screaming and fighting and he finally
22 said, I'm gonna let you go. He took my cell phone so I
23 couldn't call for help. Said he would kill me and come
24 after me.

25 Q. Did you, to your knowledge, ever scratch him?

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Cross Examination by Mr. Dejong

175

- 1 A. I don't know. I don't know. I really don't know if I
2 scratched him or what, and I really don't care.
- 3 Q. All right. Well, you were -- you said you were
4 fighting. Were you fighting him or ---
- 5 A. I was kicking and screaming. He had -- I was
6 screaming, he put his hand over my mouth to try to stop me
7 from screaming. That's when -- the second time he let me go
8 because I was screaming.
- 9 Q. Well, the second time he threw you to the ground,
10 again, he was straddling you; right?
- 11 A. I guess that's the way he had me down, sir. Whatever.
- 12 Q. Bending over ---
- 13 A. Yes.
- 14 Q. -- still had -- very good. Thank you, ma'am. Now,
15 when he turned you loose, where did you go?
- 16 A. Home.
- 17 Q. Pardon me?
- 18 A. Home.
- 19 Q. Home. And you didn't call anybody?
- 20 A. I called my husband. Went home.
- 21 Q. Was he not at home?
- 22 A. Yeah, he was at home.
- 23 Q. Okay. But as far as reporting anything to the
24 authorities, you did not do that?
- 25 A. No, I didn't.

1 Q. Well, you said this person said they were going to kill
2 you ---

3 A. If I reported it to the officers.

4 Q. Yes, ma'am. Did you ever give that person your
5 address?

6 A. No.

7 Q. When that person said, I'm gonna let you go and you ran
8 home, did you see -- well, let me ask it this way. Did that
9 person attempt to follow you?

10 A. I don't think so.

11 Q. Okay. I think I asked, but you never gave him your
12 address?

13 A. No.

14 Q. Okay. And then what day, if you can recall, Ms. Jones,
15 did you report it?

16 A. I was thinking it was the next day or maybe the day
17 after. I don't know exactly what day it was.

18 Q. Okay. When you were there on the fairground, to back
19 up a little bit, do you recall any other person walking up
20 to you when this person you said assaulted you was with you
21 or around you?

22 A. Excuse me.

23 Q. When you were on the fairground, do you recall speaking
24 to any other person other than the person who assaulted ---

25 A. There was another person at the front gate that his

- 1 name was Keith is all I can tell you.
- 2 Q. Anyone other than that?
- 3 A. No.
- 4 Q. Okay. Now, did the -- well, let me back up to where I
- 5 was on that. So you finally called law enforcement maybe a
- 6 day late; right?
- 7 A. Correct.
- 8 Q. Morning or afternoon?
- 9 A. It was probably afternoon, lunch time. I don't know to
- 10 tell you exactly what time it was.
- 11 Q. So it was about roughly thirty, thirty-six hours after
- 12 the fact that you ---
- 13 A. I don't know exactly what time it was, sir.
- 14 Q. Yes, ma'am. Okay. Well, on -- do you remember what
- 15 the date was when you talked to the law enforcement
- 16 officers?
- 17 A. I don't know the correct date. Can't remember.
- 18 Q. If I said September the 1st, would that help ---
- 19 A. That might be it.
- 20 Q. Well, who first came to your house?
- 21 A. Detective Fowler and Captain Sargent, whatever his --
- 22 Sargent, Captain -- I mean, Fowler and Sargent.
- 23 Q. All right, ma'am. Now did you give them a description?
- 24 A. Yes. What I could of, yes.
- 25 Q. Do you recall the description you gave them?

- 1 A. Yeah, blonde hair, kind of long, mustache.
- 2 Q. And did they ask you about any unusual markings?
- 3 A. Yes.
- 4 Q. And did they ask you about any facial hair?
- 5 A. Yes.
- 6 Q. Do you remember what you told them?
- 7 A. I told them he had a mustache, but he didn't have no
- 8 beard.
- 9 Q. You're sure of that?
- 10 A. I'm pretty sure I did.
- 11 Q. Okay. These pictures that were taken, they were taken
- 12 beyond the time, even longer -- let me start all over on
- 13 that. That's not coming out either. So you reported it and
- 14 then after you reported it, some hours later these pictures
- 15 were taken; right?
- 16 A. Yes.
- 17 Q. Okay. So now there's probably about thirty-six more --
- 18 or more hours between the time ---
- 19 A. I don't know, sir, if it was that long or not.
- 20 Q. Okay. The -- you reported, cops come out. Is that
- 21 when they took the picture or was it the second time around
- 22 that they ---
- 23 A. The second time, I just stated that a while ago, that
- 24 they took the pictures the second time they come out. They
- 25 went to the fairground.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Cross Examination by Mr. Dejong

179

- 1 Q. Okay. So the pictures were taken the second time?
- 2 A. Yes, sir.
- 3 Q. Okay. And the second time ---
- 4 A. Second time, third -- they come out and took the
- 5 report. They went to the fairground, come back, made me go
- 6 back and do a walk-around and then they come back and took
- 7 pictures. Or vice versa.
- 8 Q. So they took you for the walk-around and then after
- 9 that they took the pictures?
- 10 A. I'm not sure if it was that way first. Yeah. I don't
- 11 -- I'm not really sure if it was that -- afterwards they
- 12 took the pictures, I believe. I'm not really sure.
- 13 Q. Okay. Well, let's talk about this walk-around here a
- 14 little bit. Do you recall what time of the day or night it
- 15 was when they took you on the walk-around?
- 16 A. I just told you earlier I do not remember what time it
- 17 was, what day, time it was or nothing like that. It was
- 18 around lunch time, something like that. Sometime lunch or
- 19 after. That's all I can tell you.
- 20 Q. All right, ma'am. So when you did the walk-around, was
- 21 both Detective Fowler and Captain Sargent with you on the
- 22 walk-around?
- 23 A. Captain Fowler was. And the Sargent guy was there too.
- 24 He wasn't there with the walk-around. He drove us down
- 25 there.

- 1 Q. Well, my question is, who was on the walk-around?
- 2 A. Fowler, Officer Fowler.
- 3 Q. Just you and Fowler?
- 4 A. Yes. I believe.
- 5 Q. So let me ask you this. I know you don't know the date
- 6 and I know you don't know the time. Was the fair up and
- 7 running when they took you for this walk-around?
- 8 A. Yes.
- 9 Q. There were people there?
- 10 A. Yes.
- 11 Q. People riding the rides?
- 12 A. I believe so.
- 13 Q. People playing the games?
- 14 A. Yes.
- 15 Q. Okay. So when Fowler took you there, did y'all go in
- 16 the front gate or the back gate?
- 17 A. I don't remember which gate it was. I think it was the
- 18 front side gate. Yeah, the front gate. Front gate.
- 19 Q. Well, did Fowler and Sargent come and pick you up at
- 20 your house?
- 21 A. Yes, sir, I just stated that.
- 22 Q. Was there discussion between you and Fowler and Sargent
- 23 on the way to the fairground what was going to happen or
- 24 what you were going to do when you got there?
- 25 A. They just asked me to walk around the fairground and

1 see if I can identify the person that attacked me.

2 Q. All right. So you walked around once. And when we say
3 you walked around once, did you take the complete trip
4 around the fairground?

5 A. Yes.

6 Q. Okay. How long did that trip take? Do you remember?

7 A. I would say fifteen, twenty minutes. I don't know
8 exactly how long it took.

9 Q. I just want to make sure my question was -- so one time
10 it took you -- one trip around took you fifteen ---

11 A. I'm not for sure, sir.

12 Q. Okay. All right. So then how many trips around did
13 you take?

14 A. I think it was two or three.

15 Q. Okay. Now while you were walking around there, was
16 there any conversation between you and Detective Fowler?

17 A. Just asked me to take my time and to see if I could
18 point the -- identify the person that attacked me.

19 Q. So the first time you went around, you identified no
20 one; right?

21 A. There was a guy that looked almost like the person that
22 attacked me, but I looked again and it wasn't. I looked
23 twice at him at that time and it wasn't him.

24 Q. Okay.

25 A. And I spoke of that with Mr. Fowler.

1 Q. And so that first time you went around, that person, he
2 was never questioned, nobody ever talked to him to your ---

3 A. That's exactly right, because it wasn't him.

4 Q. All right. And then you walked around again; right?

5 A. Correct.

6 Q. Did you identify anybody that time?

7 A. I don't remember if it was the second or third time
8 when I identified the person. It could have been. It could
9 have been the third. I believe it was the third. If you
10 want to put it that way.

11 Q. Yes, ma'am. And where was this person that you was
12 fifty percent sure of?

13 A. He was standing at one of the games holding a
14 basketball, to be exact. I remember that now. I'm starting
15 to remember that it is really him, too, now.

16 Q. All right. So you then say that might be the person;
17 right?

18 A. I said, it looks just like the person.

19 Q. Okay. And then they asked you how sure you were and
20 you said, fifty percent sure; right?

21 A. I said, fifty/fifty percent, yes.

22 Q. So fifty percent right or fifty percent wrong; right?

23 A. I said fifty percent it was, fifty percent it wasn't.

24 I don't -- that's what I said.

25 Q. So I'm clear, Ms. Jones, excuse me, when you walked up

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Cross Examination by Mr. Dejong

183

1 to the front gate and talked to the two people, no assault
2 or alleged assault had occurred at that point in time; had
3 it?

4 A. That's correct.

5 Q. And then you were walking through the fairground to the
6 back gate; right?

7 A. The back gate and front gate is right there close
8 together. I wasn't walking through the fairground. Walking
9 back -- walking to the back gate.

10 MR. DEJONG: One moment, please, Your Honor.

11 THE COURT: Yes, sir.

12 Q. The guy standing at the front gate, did you know any --
13 either one of them?

14 A. No, I didn't.

15 Q. Not by name or anything else?

16 A. No, I didn't.

17 Q. Okay. Do you recall what -- and again, this gets a
18 little tricky. Do you recall what day of the week it was on
19 the -- the 30th was on?

20 A. No. I believe it was a Saturday. I'm not really sure.
21 Friday, Saturday.

22 Q. All right. Were you on any kind of substances at all
23 that night, ---

24 A. No, sir.

25 Q. -- Ms. Jones?

1 A. No, I wasn't.

2 Q. Thank you, ma'am.

3 REDIRECT EXAMINATION

4 BY MR. THEM:

5 Q. In response to the last question he asked, were you
6 taking your regularly prescribed medication by your ---

7 A. Yes, I was.

8 Q. -- doctor that day? And how often do you take that
9 medicine?

10 A. I take it -- well, sometimes twice a day. Most of the
11 time once.

12 Q. Okay. Did the -- does that medication have any effect
13 on your ability to see and understand what's going on?

14 A. No, it don't.

15 Q. Are you on the medication right now?

16 A. Yes, I am.

17 Q. Okay. Now, let's go back and talk about some things
18 that were brought up. You said something about you and your
19 husband were fighting. Were y'all arguing or hitting each
20 other?

21 A. Arguing.

22 Q. Okay. Did you ever get hit by your husband that night?

23 A. No, sir.

24 Q. When you start talking about back gates, are you
25 talking about the back gate to the parking lot out to the

1 highway or are you talking about the back gate to the closed
2 area where the midway is? Tell me which back gate you're
3 talking about?

4 A. It's a side street. It's where the back -- there's a
5 road beside the -- toward the back side of the race -- of
6 the fairground. This side of it.

7 Q. So does this gate lead out of the midway area ---

8 A. Uh-huh (affirmative).

9 Q. -- or out of the parking lot area to the street?

10 A. Out of the parking lot area and the -- out of the
11 parking lot area.

12 Q. So at the end of the fair when you said you went up to
13 the front gate and you smoked a cigarette, now tell me where
14 that gate is? If I was standing on 123, the big highway
15 between Easley and Greenville, would I be able to see that
16 front gate?

17 A. Yes.

18 Q. Okay. Now, when you say the back gate, tell me, are
19 you talking about the back gate to the enclosure or to the
20 parking lot?

21 A. To the parking lot.

22 Q. Okay. Where is that back gate if I'm standing there on
23 123 looking at the front gate?

24 A. Go in the front gate and look to the left and right out
25 that way. Well, don't even go in the front gate, just go

1 around on the outside and around the -- to the left.

2 Q. Now, when you were assaulted were you in the enclosed
3 area where the midway was or were you in the parking lot
4 area?

5 A. Parking lot area.

6 Q. Okay. Do you have any recollection as to how long the
7 fair had been in town the day you went up there?

8 A. Just a day or so, I believe.

9 Q. Okay. When law enforcement came out to your house the
10 first time after you called them, was it on the same day?

11 Did they come out the same day you called them?

12 A. Yes, it is.

13 Q. And did you go to the fair on the same day? I mean to
14 walk around with law enforcement?

15 A. Yes, I did.

16 Q. Okay. Thank you very much. I have no further
17 questions, ma'am.

18 MR. DEJONG: A couple of brief ones, Your Honor.

19 **RECROSS EXAMINATION**

20 **BY MR. DEJONG:**

21 Q. So that I understand, Ms. Jones, you were under
22 psychiatric care before you say this incident ever happened;
23 right?

24 A. Yes. I've always had anxiety and nerves.

25 Q. Yes, ma'am. And you take medication?

1 A. Correct.

2 Q. Were you taking medication that day?

3 A. Sure am.

4 Q. Thank you, ma'am.

5 THE COURT: All right. Thank you, ma'am. You may
6 step down.

7 MR. THEM: May we approach, Your Honor?

8 THE COURT: Yes, sir.

9 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
10 approached the Bar.)

11 MR. THEM: Your Honor, might we excuse the last
12 witness?

13 THE COURT: Any objection to the last witness
14 being excused?

15 MR. DEJONG: May I have a moment to confer with
16 co-counsel, Your Honor?

17 THE COURT: All right. While they're talking
18 about that, ladies and gentlemen, I'm going to give you a
19 break if you'll go back to your jury room. Don't discuss
20 the case among yourselves. You can talk about other
21 matters, but not this case. We'll call you back in just a
22 few minutes. We have some other matters I need to take care
23 of not involving this case. So as soon as we can we'll call
24 you back. Just take a break at this time.

25 (WHEREUPON, the jury exited the open court at

1 approximately 11:56 a.m.)

2 MR. DEJONG: No objection to that witness being
3 excused, Your Honor.

4 THE COURT: Without objection, then that witness
5 can be excused.

6 Mr. Dejong, if you feel like you're running into time
7 limits up there, let Mr. Duncan or somebody know. I might
8 just go ahead and send the jury to lunch. I'd like to go on
9 and get a little more testimony in and go to about one
10 o'clock if we can.

11 All right. We'll be at ease for fifteen minutes or so.

12 (WHEREUPON, the court stood at recess for a short
13 break.)

14 THE COURT: I had an estimate originally from the
15 Family Court that Mr. Dejong would be there maybe ten
16 minutes or so. He just sent word that it might take longer
17 than he thought. So I'm going to let the jury go to lunch,
18 be back at -- I don't know how long Mr. Dejong -- we need to
19 give him a little break also. I'll just have them be back
20 at a quarter of two. That'll be an hour and a half.
21 That'll give him time to finish what he's got and get a
22 quick bite to eat. So he's not here. Mr. Ball is here and
23 Mr. Them is here. I'll just have the jury come back out and
24 I'll instruct on that and I'll explain to them.

25 MR. THEM: Your Honor, you notice I was squatting

1 down. My knees are starting to bother me after standing up
2 for two or three days. So when the jury is not in the room
3 is it okay with you if I -- I didn't want to be
4 disrespectful.

5 THE COURT: That's fine. All right. I'll bring
6 the jury back and then we'll have another matter to take
7 care of when Mr. Dejong gets here.

8 All right. Bring the jury in, please.

9 (WHEREUPON, the jury entered the open court at
10 approximately 12:14 p.m.)

11 THE COURT: Ladies and gentlemen, I try my very
12 best to predict timing and sometimes I don't succeed. I
13 believe the matter that involves us is going to take a
14 little longer than I thought, so I don't want you to just
15 have to sit there. I'm going to give you a lunch break now
16 and ask you to be back at a quarter of two. That'll give
17 you about an hour and a half. That'll give us time to get
18 the matters taken care of that we need to take care of
19 involving different procedures than what you're involved in
20 now. But I apologize that this had to take place now.
21 We're going to let you have an hour and a half lunch break.
22 We'll be ready to start back at that time if you'll all just
23 be back then. We'll certainly take care of any other
24 matters we need to take care of during that time.

25 Again, let me remind you not to discuss the case with

1 each other, with other folks that may you see -- you may see
2 during the course of your lunch break. You may want to talk
3 to family members or have lunch with them or co-workers. It
4 would be improper for you to discuss this case with them in
5 anyway. They're obviously curious and you might want to
6 share your experience. When the case is over will be the
7 time that you'll have to share that, not while the case is
8 going on. I don't believe anyone would approach you about
9 wanting to talk about the case, but if that were to happen,
10 let that person know that you've been instructed not to talk
11 about the case. And if anyone were to persist, wanting to
12 give you information or get information from you, please
13 excuse yourself. If you know the name of that person, get
14 it, report it back to me and we'll take care of that. I
15 don't expect anything like that to take place. Have a good
16 lunch, ladies and gentlemen, and I'll see you back at a
17 quarter of two.

18 (WHEREUPON, the jury exited the open court at
19 approximately 12:16 p.m.)

20 THE COURT: All right. We'll be at ease till a
21 quarter of two.

22 (WHEREUPON, court stood at recess for a lunch break.)

23 THE COURT: Before we took our lunch break I
24 mentioned after we were off the record with the attorneys
25 privately, one of the jurors feels like that he may have

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Aleatha Jones - Recross Examination by Mr. Dejong

191

1 some professional relationship with the one who just
2 testified as well as an employee of the public defender's
3 office. I've shared that with the attorneys. I don't know
4 whether y'all have talked about that or not during the lunch
5 hour. One of the other jurors had an automobile accident
6 and thought he was not going to be coming back, but he is
7 back now. So I'm proposing to bring the jurors out and just
8 basically state to them at any time -- the fact that they
9 know someone does not disqualify them from being a juror,
10 but if at any time they feel that because of that knowledge
11 about a witness or an individual that they feel they could
12 not be fair to both sides, then they should let us know that
13 and then we'll take that up at that time. Otherwise we'll
14 proceed until the next break, if he wants to write another
15 note then we'll take it up at that time. Be glad to hear
16 from you -- either of you if you have any other alternatives
17 about that ---

18 MR. THEM: That's fine with the State.

19 THE COURT: I'll acknowledge his note to me.

20 MR. DEJONG: That is fine with us. We had made a
21 decision, depending on what the solicitor did, we were
22 perfectly willing to allow the doctor to stay on, Your
23 Honor.

24 THE COURT: It seems like the jury has been a
25 little snake bit already. We don't want to let folks go

1 till we have to.

2 MR. THEM: Could we take them into protective
3 custody?

4 THE COURT: All of them?

5 MR. THEM: All of them.

6 THE COURT: Well, maybe we'll just keep working
7 till about eleven o'clock tonight and make sure we get
8 everything in. Not have to come back tomorrow.

9 MR. DEJONG: My dance ticket isn't full.

10 THE COURT: We'll proceed with the trial. You're
11 ready for your next witness?

12 MR. THEM: Yes, sir.

13 THE COURT: All right. Let's bring our jury in,
14 please.

15 (WHEREUPON, the jury entered the open court at
16 approximately 1:53 p.m.)

17 THE COURT: All right. Thank you very much for
18 being patient with us as we try to get this case underway.
19 It has started and we're now ready to proceed with the next
20 witness. I wanted to let all of you know that, you know,
21 sometimes jurors get picked and they'll realize that they
22 may know something that they thought they didn't know. The
23 fact that you know a witness or an individual that may have
24 some involvement in the case in someway, that would not be a
25 disqualifying factor. Folks are entitled to have a jury of.

1 their peers of the county. But if at anytime any of you
2 feel that because of knowledge about a witness or a party or
3 a lawyer or staff or anyone else that you feel that that
4 interferes with your ability to be fair and just to both
5 sides, please let me know and we can certainly take that up
6 privately with the attorneys and others. But if you know
7 someone that -- I appreciate you letting me know that, but
8 the mere fact that you do have knowledge about folks and it
9 doesn't interfere with your ability to be a fair juror, then
10 certainly you can continue to serve. If at anytime you feel
11 that it is creating a problem for you, we'll certainly take
12 it up.

13 All right, Solicitor, you may call your next witness.

14 MR. THEM: Mr. Scott Smith, please.

15 SCOTT SMITH,

16 being duly sworn, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. THEM:

19 Q. Just so we can test the microphone and all that, would
20 you tell us your name and in what city you live?

21 A. Scott Smith. I live in the outskirts of Greenville,
22 South Carolina.

23 Q. Okay. What kind of work do you do, sir?

24 A. I'm a broadcast engineer with Clemson University.

25 Q. And what do you do as a broadcast engineer?

1 A. I work on edit systems, audio, video. I work on a lot
2 of different audio, visual systems.

3 Q. Would you tell us something about your training after
4 high school? Let me back up. Strike that. Tell us
5 something about your formal education after high school?

6 A. I did about a year at Greenville Tech and a year and a
7 half at Spartanburg Technical College as an electronic
8 engineer. But the majority of it is probably on-the-job
9 training, working at various jobs.

10 Q. And when you finished your formal education, where did
11 you go to work?

12 A. SCI Electronics is a place that I worked at. We
13 installed sound systems and boardroom type systems, we did
14 projectors, a lot of church audio systems.

15 Q. What did you do with sound systems? Did you install
16 them, repair them, what?

17 A. Installation, equalizing, making sure that there's no
18 feedback and taking care of the sound.

19 Q. And how long did you work with that company?

20 A. About three years.

21 Q. Okay. Where did you go when you left there?

22 A. WYFF TV.

23 Q. Okay. And what did you do there?

24 A. I was a broadcast engineer working on getting stuff out
25 for the television, working on audio, video, microwave

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Scott Smith - Voir Dire Examination by Mr. DeJong

195

1 systems.

2 Q. And how long did you do that?

3 A. About seven, eight years.

4 Q. Okay. And where did you go when you left there?

5 A. Clemson University.

6 Q. And what do you do there?

7 A. I'm a broadcast engineer. I work on audio systems,
8 video systems, editing, do some field recording.

9 Q. Okay. And how long have you been at Clemson?

10 A. Six -- about six and a half years.

11 MR. THEM: Your Honor, at this point in time I
12 would move to qualify this gentleman as an expert in the
13 field of sound engineering with a subspecialty of masking
14 out noise on recordings so as to get to the real matter
15 that's being recorded.

16 THE COURT: Any objection or any voir dire from
17 the defense?

18 MR. DEJONG: I would like to do some voir dire,
19 Your Honor, if I may.

20 THE COURT: All right. You may question the
21 witness.

22 MR. DEJONG: I'll reserve my right to object at a
23 later time.

24 VOIR DIRE EXAMINATION

25 BY MR. DEJONG:

1 Q. So when you went to Greenville Tech, what did you study
2 there, Mr. Smith?

3 A. Electronic engineering.

4 Q. Tell us a little bit about what electronic engineering
5 is?

6 A. Electronic engineering is studying AC/DC circuitry, how
7 circuits go through circuit paths and understanding
8 electronics.

9 Q. Maybe to use a colloquialism, but that's kind of the
10 nuts and bolts; right?

11 A. Yes, sir.

12 Q. And when you went to, I believe, Spartanburg; right?

13 A. Yes, sir.

14 Q. And what did you -- was that Spartanburg ---

15 A. Spartanburg Technical College.

16 Q. Okay. And did you study the same thing there?

17 A. Yes, sir.

18 Q. And again, that would have been a nuts and bolts type

19 ---

20 A. Yes, sir.

21 Q. -- circuit boards and ---

22 A. Circuit boards and circuit paths.

23 Q. And then when you went to work for STI, if I'm ---

24 A. SCI.

25 Q. -- basically you installed sound systems?

1 A. Yes, sir.

2 Q. Okay. And by installing sound systems, you would have
3 installed something that produced sound, put in equalizers
4 and that ---

5 A. Yes, sir.

6 Q. -- type thing?

7 A. Yes, sir.

8 Q. Put up speakers?

9 A. Speakers, video projectors, microphones.

10 Q. All that type thing?

11 A. Yes, sir.

12 Q. And then again that was a nuts and bolts type thing;
13 right?

14 A. Yes, sir.

15 Q. Okay. And then when you went to YFF, again you worked
16 with audio, video and microwaves; right?

17 A. Yes, sir.

18 Q. But more from an engineering nuts and bolts aspect;
19 right?

20 A. Yes, sir.

21 Q. Okay. Again, installation, maintenance of the
22 equipment or whatever; right?

23 A. And calibrating equipment.

24 Q. Okay. And then when you went to Clemson some few years
25 back, all that followed you and that's basically what you do

1 at Clemson?

2 A. Yes, sir.

3 Q. Right?

4 A. Yes, sir.

5 Q. Okay. Have you ever been involved in the recording
6 industry?

7 A. Well, no, sir, not music recording.

8 Q. Beg your pardon?

9 A. Not music business recording.

10 Q. Okay.

11 A. I've worked on some radio programs, television
12 programs.

13 Q. Thank you, sir.

14 MR. DEJONG: Now, Your Honor, at this point in
15 time I do object.

16 MR. THEM: Let me ask a few more questions.

17 THE COURT: All right, sir.

18 VOIR DIRE EXAMINATION

19 BY MR. THEM:

20 Q. In those positions you had at YFF and Clemson, did you
21 have any responsibilities for turning out qualify sound?

22 A. Yes, sir.

23 Q. Did you ever get involved in situations where sound had
24 noise in it?

25 A. Yes, sir, many times.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Scott Smith - Voir Dire Examination continued by Mr. Dejong

199

1 Q. Background noise that you had to clean up?

2 A. Yes, sir.

3 Q. How many times have you done that?

4 A. I couldn't count.

5 Q. Okay. Is that a fairly routine sort of thing in your
6 line of work?

7 A. It does -- yes, sir.

8 Q. Thank you very much.

9 MR. THEM: Move to qualify.

10 THE COURT: Any other questions?

11 VOIR DIRE EXAMINATION CONTINUED

12 BY MR. DEJONG:

13 Q. Did you ever have any specific training in that?

14 A. On-the-job training.

15 Q. Okay. And when you did that, you were looking for the
16 quality of the sound; right?

17 A. Yes, sir.

18 Q. All right. Not worried about anything but the quality
19 of the sound?

20 A. Yes, sir.

21 Q. Thank you.

22 MR. DEJONG: I still object, Your Honor.

23 THE COURT: And the basis of your objection?

24 MR. DEJONG: The basis of the objection is this,

25 Your Honor. His formal training has been from an

1 engineering background. His OJT training he just testified
2 only went to the quality of the sound that was being
3 produced. We don't know when he did this what, if any
4 effect, it had on the original, if anything was deleted,
5 omitted, enhanced, words changed, whatever. We don't know,
6 Your Honor, and he's had no specific training in that. I
7 don't know that -- it doesn't appear that he has ever been
8 qualified as an expert. I certainly don't fault the young
9 man for that, Your Honor. But I just don't think the
10 training that he has set forth before this court to be
11 qualified as an expert, what Mr. Them is offering now, I
12 would submit, Your Honor, he does not have it.

13 MR. THEM: Your Honor, Mr. Dejong has put the cart
14 before the horse. I'm trying to qualify this gentleman as
15 an expert in doing the process. After he's qualified as an
16 expert in doing the process, I'm gonna ask every single one
17 of those questions that Mr. Dejong talked about. This
18 gentleman is not gonna tell us what -- he's not gonna repeat
19 stuff off of the tape as far as words and things of that
20 nature.

21 THE COURT: All right. I'll allow -- overrule
22 your objection, Mr. Dejong, and allow him as an expert
23 witness.

24 Ladies and gentlemen, most of the time when a person
25 testifies in court they can't give opinions about anything.

1 But there is an exception to that for what we call an
2 expert. If because of training or experience a person is
3 qualified in any field or profession, then they would be
4 allowed to give an opinion. Of course, it's for you to
5 determine all the evidence and the validity of that
6 evidence. And I'll instruct you later about the expert
7 testimony. But you're to give it the value, the weight and
8 the effect that you think it deserves as long -- along with
9 all the other evidence that you hear.

10 Mr. Them, you may proceed.

11 **DIRECT EXAMINATION CONTINUED**

12 **BY MR. THEM:**

13 Q. When you're presented, say a compact disc that has a
14 recording on it and there is noise on the recording, ---

15 A. Yes, sir.

16 Q. -- would you tell us step by step the process that you
17 would go through to remove the noise so that we would only
18 have voices or music or whatever it was on that tape, on
19 that CD?

20 A. Yes, sir. You would analyze, quickly analyze, what
21 noise you want to remove. You would look at the spectrum
22 analysis of it, look at the frequencies involved and the
23 background ---

24 Q. Can you back that down in layman's language for me,
25 sir?

1 A. Yes, sir. Basically you look at the quiet areas where
2 there -- where no one is talking and where it should be
3 silence and you look at the different sounds that are within
4 that range of silence. And then you try to remove the --
5 what should be silence from the entire recording.

6 Q. And if you remove the noises that you hear when it
7 should be silent, like when no one is talking ---

8 A. Yes, sir.

9 Q. -- does that in anyway affect the -- or change the
10 recording of the voices?

11 A. It will slightly affect them. It can add a gurgly,
12 bubbly artifact in the background. I can -- there are
13 certain digital sounds that will come out of some kind of
14 artifacting. But the basic ---

15 Q. What is artifacting? I'm sorry.

16 A. A digital gurgling sort of sound that can appear when
17 you remove a broad band of noise something like air
18 conditioning or motor running or noise of that nature. It's
19 a broad spectrum, so it has low frequency noises up to high
20 frequency noises. And that broad range, within that range,
21 is the human voice. And so little tiny bits and pieces of
22 the human voice will be removed along with the noise, not
23 words and consonants, but small little chunks of -- and
24 we're talking in micro seconds of chunks of voices.

25 Q. Does removing noise using that process, would that

- 1 change the words that were left?
- 2 A. No, sir.
- 3 Q. Okay. So after you remove the noise, what would you be
- 4 left with?
- 5 A. You would be left with a largely clean recording of
- 6 what is being spoken.
- 7 Q. Okay. Have you ever seen this cassette, I mean, this
- 8 CD before?
- 9 A. Yes, sir.
- 10 Q. Where did you see it and when?
- 11 A. I created that I believe last June or July. I forget
- 12 the exact date.
- 13 Q. All right. Now, tell me what's on this CD?
- 14 MR. DEJONG: Your Honor, may we approach?
- 15 THE COURT: Yes, sir.
- 16 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
- 17 approached the bar.)
- 18 (WHEREUPON, State's Exhibit Number 6 was marked for
- 19 identification.)
- 20 Q. Is that your handwriting on this?
- 21 A. Yes, sir.
- 22 Q. Someplace on there it says track number one original?
- 23 A. Yes, sir.
- 24 Q. Tell me what that is. I don't want to know the subject
- 25 matter of it. I want to know what it is.

1 A. Yes, sir. That is the original recording as you
2 brought to me or an intern that you sent brought to me on
3 CD.

4 Q. Okay. And did you take it from that CD and put it
5 where?

6 A. I took it from that CD. I imported it into the
7 computer, copied it to the computer, and then when I made
8 this disc I put it back on as unaltered as it originally
9 was.

10 Q. Okay. So where it says track one original, is that an
11 absolute true and correct copy of the source CD that you
12 were given?

13 A. Yes, sir.

14 Q. All right.

15 A. That's an exact duplicate.

16 Q. Now, again, without going into the subject matter of
17 the information, what is number two noise reduction?

18 A. That is, I've taken the original, I've done noise
19 reduction, removing some of the background noise and written
20 the track back as track number two.

21 Q. Now, have you had the opportunity to visit the Pickens
22 County Law Enforcement Center where this was made?

23 A. Yes, sir.

24 Q. How would you evalua -- and were you taken to the place
25 where it was actually recorded?

1 A. Yes, sir.

2 Q. How would you evaluate that place as a sound engineer
3 as a -- as to the quality of sound you would expect to be
4 able to record in that environment?

5 A. It was a very noisy environment, concrete block walls,
6 glass walls, a very kind of narrow chamber, sound echoes
7 throughout. I mean, we're getting an echo in this room and
8 it's much more acoustically designed. Very reflective
9 surfaces. There was an air conditioner vent directly above,
10 a Coke machine down to one end and a very noisy water
11 fountain as well and these seemed to make a lot of broadband
12 noises, extremely loud.

13 Q. Is that a good environment or a bad environment to be
14 recording?

15 A. It's terrible.

16 Q. Terrible. Okay. Now, on track number two the noise
17 reduction one, ---

18 A. Yes, sir.

19 Q. -- when you finished with that were you able to remove
20 some of the noise?

21 A. I was able to remove some of the noise, not a lot of
22 it.

23 Q. Did you interfere with the audio that was actually
24 recorded on there other than noise?

25 A. No, sir. I applied noise reduction to it and I did not

1 alter it in any other way other than removing background
2 noise.

3 Q. Would you look at this and tell me whether or not that
4 appears to have been tampered in anyway since you gave it
5 over to us?

6 A. No, sir.

7 Q. I have no further questions of this witness, Your
8 Honor.

9 THE COURT: Any cross examination?

10 MR. DEJONG: Thank you, Your Honor. May it please
11 the court. So that we know we're clear, Your Honor, this is
12 a bit of a novel situation. I want the record clear that by
13 doing cross examination I am not waiving anything ---

14 THE COURT: You've made your objections.

15 MR. DEJONG: -- as to his expertise, Your Honor.

16 CROSS EXAMINATION

17 BY MR. DEJONG:

18 Q. How many times have you done this type of noise
19 reduction, Mr. Smith?

20 A. Probably over a hundred times.

21 Q. And how do you compare when you did the -- do the noise
22 reduction, how do you compare that product with the original
23 product?

24 A. In what way do you mean?

25 Q. Well, where is the quality control to say that you did

- 1 not alter any of the substance on the original source when
2 you took out the noise reduction?
- 3 A. Well, as I attempt to remove the noise, I listen to
4 it, I go back and forth. I try to do a good compromise
5 between any effect -- anything that would affect the main
6 subject matter. If it starts to affect it too much I'll
7 back down. There are a lot of little settings and different
8 things you can tweak to how you remove the noise. But it's,
9 it's -- the main thing is it's a removal process and you're
10 removing certain frequencies and you're looking at
11 frequencies. I don't -- to much degree I don't listen to
12 the subject matter so much as I listen to the background.
13 But I do compare them. I listen to samples throughout and
14 remove the noise from the original.
- 15 Q. So that would it be fair to say, if you don't listen to
16 the substances, you can't really say whether anything had
17 been altered or not; could you?
- 18 A. Knowing the tools that I use to do that, they would not
19 be altered.
- 20 Q. When you do this, does anybody check your work?
- 21 A. No, sir.
- 22 Q. Anybody come behind you and check your work?
- 23 A. No, sir.
- 24 Q. Don't compare the original source against the
25 duplicated source?

1 A. No, sir.

2 Q. And in your testimony you said, though, that there
3 would be bits and pieces and I think small little chunks
4 that would come out; right?

5 A. I may have said that. I don't know that chunks is
6 actually an appropriate term, but I probably did say that.

7 Q. All right, sir. Thank you, sir.

8

REDIRECT EXAMINATION

9 BY MR. THEM:

10 Q. As far as comparing the original to the noise reduced
11 copy ---

12 A. Yes, sir.

13 Q. -- if you had a CD player and State's Exhibit Number 6
14 for identification, would you be able to listen to the
15 original tape and the noise reduction tape?

16 A. Yes, sir.

17 Q. And compare them?

18 A. Yes, sir.

19 Q. Okay.

20 A. You could also see that they're -- the amount of time,
21 the length of the tracks are identical, so there's no pieces
22 of time removed from them.

23 Q. Okay.

24 A. You know, time-wise the entire track is still there.

25 Q. When you measure these things, what do you -- when you

1 talk about the time length, what do you use to measure that
2 time length?

3 A. Computer.

4 Q. And how small a unit of measurement do you use?

5 Inches? What? Minutes, seconds?

6 A. Fractions of fractions of seconds. It's a sample rate,
7 forty-one, forty-one point one kilohertz. So it's down to a
8 very small sample rate.

9 Q. Okay. Thank you very much.

10 A. Yes, sir.

11 Q. I have no further questions of this witness.

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

13 MR. DEJONG: No objection to him being excused,
14 Your Honor.

15 MR. THEM: Steve Young.

16 STEVE YOUNG,

17 being duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. THEM:

20 Q. So that we can test that microphone, tell us your name
21 and where you live?

22 A. My name is Steven Young. And I live in Princeton,
23 Florida.

24 Q. Okay. Do you actually live in Princeton or is that
25 your home of record?

- 1 A. That's my home of record and our base of operations.
- 2 Q. What kind of work do you do?
- 3 A. I am a ride foreman and right now assistant ride
- 4 foreman for Amusements of America.
- 5 Q. And can you tell us -- and I'm not trying to be smart
- 6 -- can you tell us in plain language what that is?
- 7 A. Yes, sir. I work for a carnival and I operate a ride
- 8 that's called the Wave Swinger.
- 9 Q. Okay. And how long have you been doing that kind of
- 10 work?
- 11 A. A little over a year.
- 12 Q. Okay. Now, do you know a man named Kent Clayton?
- 13 A. Yes, sir, I do.
- 14 Q. Do you see him in the courtroom today?
- 15 A. Yes, sir, I do.
- 16 Q. Could you point him out to me, please?
- 17 A. Yes. He's sitting over beside the gentleman with the
- 18 white beard and white hair. He has the short cropped hair
- 19 and looks like a mustache.
- 20 Q. Okay. And how long have you known him?
- 21 A. I met him back around the first of June last year.
- 22 Q. Okay. And where did you meet him?
- 23 A. Evansville, Indiana.
- 24 Q. Okay. How did you meet him?
- 25 A. Me and my ex-finance -- well, she wasn't my ex at the

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Steve Young- Direct Examination by Mr. Them

211

1 time -- was taking a little trip down by the bridge at the
2 Ohio River between Evansville and Henderson, Kentucky. And
3 we seen a gentleman with a Dobie and looked like a little
4 ---

5 Q. A Dobie?

6 A. A Doberman Pincer.

7 Q. A dog?

8 A. Yes. And he had a white van, Ford van, and he also had
9 a little, looked like a min pin, miniature Pincer.

10 Q. A dog?

11 A. Yes, sir.

12 Q. Did you strike up a conversation with him, get to know
13 him, or what?

14 A. Yes, sir. Me and my fiance walked up -- ex-fiance now
15 -- walked up and started to talk to him.

16 Q. Okay. And as a result of that meeting, did the two of
17 y'all become friends?

18 A. Yes, sir, we did.

19 Q. How long did you stay in that area before you moved on?

20 A. I think it was about the -- almost the end of July.
21 Maybe first of August.

22 Q. So how long were you there after you met him?

23 A. Almost two months.

24 Q. Okay. During that two months did you ever see him?

25 A. Yes, sir, I did.

1 Q. Where?

2 A. I got his phone number and I talked to him about work,
3 doing some work with me, because I had a side job -- side
4 work I did for myself and ---

5 Q. Why don't you slide your chair forward, please.

6 A. Yeah, that might help. But ---

7 Q. I'm going to stand way back here, so if you'll talk
8 loud to where I can hear you, everybody will hear you.

9 A. Okay. But I gave him some work and he helped me finish
10 a contract I had on an apartment there in Boonville,
11 Indiana.

12 Q. Okay. When that job ended did you move on?

13 A. Yes, sir, I did. Me and my fiance split up the end of
14 June and we -- I let him -- actually, he had been sleeping
15 in his van in parking lots and stuff and I let him start
16 parking the van behind the apartment where we was working at
17 so he had a place to park it. And his car also.

18 Q. Okay. And where did you move on to after that?

19 A. Well, we was doing that job. While we was finishing
20 that job up we went down to Madisonville, Kentucky.

21 Q. Back away just a little bit from the mike.

22 A. But we went to Madisonville, Kentucky and tore down a
23 ride there.

24 Q. When you say tore down a ride, what does that mean?

25 A. That means taking it apart and putting it back on the

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Steve Young- Direct Examination by Mr. Them

213

- 1 trailer so it can be transported to the next spot.
- 2 Q. Okay. So he went on to Kentucky with you?
- 3 A. Yes, sir.
- 4 Q. And how long were y'all there?
- 5 A. We was just there one night.
- 6 Q. Okay. Where did y'all go after that?
- 7 A. We went back home. We finished the work up on the
- 8 apartment and then I got on the internet and found out that
- 9 there was a carnival in Lebanon, Tennessee that was getting
- 10 ready to tear down. So we left, I think it was like on
- 11 Friday afternoon.
- 12 Q. You say we left, who is we?
- 13 A. Me and Mr. Clayton.
- 14 Q. Okay.
- 15 A. But we left, headed to Lebanon, Tennessee to tear down
- 16 rides there.
- 17 Q. Okay.
- 18 A. But we was in route to New Orleans. We discussed it
- 19 and we was gonna go down to New Orleans and go in on a cut
- 20 truck business together.
- 21 Q. A what?
- 22 A. Cut truck. It's these trucks that go around to job
- 23 sites with lunches and stuff in them and you feed the crews.
- 24 Q. Oh, okay. And where did y'all go when you left
- 25 Tennessee?

- 1 A. I'm not for sure. I'm thinking it was either
2 Lawrenceville or Greenville here.
3 Q. Lawrenceville, where is that?
4 A. It was in North Carolina.
5 Q. Suffice to say, did y'all eventually end up here in
6 South Carolina?
7 A. Yes, sir, we did.
8 Q. Who were you working with here in South Carolina when
9 you came here?
10 A. Amusements of America.
11 Q. Okay. And did Amusements of America provide the rides
12 and all that for the Upstate Fair down there in Easley or
13 that -- out by the speedway?
14 A. Yes, sir, we did.
15 Q. What day of the week did y'all get in to Easley or
16 Greenville, whichever you choose to call it?
17 A. Okay. Well, we tore down in -- the last spot on a
18 Sunday. Our ride took approximately sixteen hours to tear
19 down. And me and Kent worked with the foreman and his crew.
20 Q. Back off just a little. I'm sorry. I keep moving you
21 around.
22 A. Okay. But we worked with the foreman and his crew.
23 And we finished the ride. And the foreman seen how good we
24 worked and offered us a job on the ride.
25 Q. So did the two of y'all come to South Carolina to work

1 together?

2 A. Yes, sir, we did.

3 Q. And how long did it take y'all -- let me back up. What
4 day of the week did the fair open, not the immediate past
5 fair of a few months ago, but a year ago?

6 A. It opens on Thursday.

7 Q. Does it always open on Thursday here?

8 A. As far as I know. This was the first year I was here,
9 sir.

10 Q. How many days were y'all here before the fair opened?

11 A. We got here, I want to say it was probably Monday
12 night, maybe early Tuesday.

13 Q. Okay. And did y'all get your ride assembled?

14 A. Yes, sir, we did. We got it assembled, I'm thinking it
15 was like Thursday morning.

16 Q. Okay. And did Mr. Clayton continue to work with you?

17 A. No, sir, he didn't. He was a little bit older than me
18 and the other guys that worked on the crew and I suggested
19 to him, with his gift to gab, it would be better for him to
20 work in a joint.

21 Q. Work in a joint? What do you mean, in a joint?

22 A. Well, there are games that you, when you go around a
23 carnival they've got like basketball games that you shoot
24 baskets through hoops. You've got little fishponds where
25 you catch ducks and fish. And you give out stuffed animals.

1 Q. Okay. Joint is a slang name that carnival people use?

2 A. Yes, sir.

3 Q. Okay. And so did he go to work in one of those joints
4 as you call it?

5 A. Yes. He went to work in a longshot, which is a
6 basketball joint.

7 Q. Do you remember what day of the week he went to work
8 there?

9 A. I think it was that Thursday.

10 Q. Thursday. Okay.

11 A. The very first day.

12 Q. Where was your ride in -- compared to where his joint
13 was?

14 A. Well, I could stand on my front deck and see his booth.
15 But in relation to my ride we was right on the curve. As
16 you come in you walk down, you hit the first curve and go
17 back to the right and my ride sat right on the inside corner
18 and his was right -- his booth was right in the middle of
19 the midway. Probably fifty, sixty yards down.

20 Q. All right. So on this Thursday when the fair opened a
21 little over a year ago, how long had you and Mr. Clayton
22 been traveling around working together?

23 A. Let's see, this was the end of September, so it would
24 have been -- let me recall. Yeah, I think it was the end of
25 -- first of September. We worked ---

1 Q. Well, when did y'all get connected if this was around
2 the first of September? When did y'all get connected,
3 roughly?

4 A. Get connected? Excuse me.

5 Q. When did y'all meet each other at that bridge and
6 become friends and start working together?

7 A. Oh, it was the first of June.

8 Q. First of June. Okay.

9 A. That's when we met at the bridge. He probably didn't
10 start working for me -- with me for probably two weeks,
11 maybe three.

12 Q. In addition to being coworkers, would you have
13 characterized yourselves as friends?

14 A. Yes, I would. That's why I was helping him out and he
15 was helping me out.

16 Q. Now, the day after the fair opened -- you said the fair
17 opened on a Thursday?

18 A. Yes, sir.

19 Q. Did you have the occasion to see Mr. Clayton early
20 Friday morning? In other words, nighttime early Friday
21 morning?

22 A. No, I didn't. I might have seen him for a few minutes,
23 but after twelve thirty, I think, I don't think I seen him
24 at all.

25 Q. Okay. Did you later see him and have a conversation

- 1 with him?
- 2 A. No, not that night, but early that morning me and a
- 3 friend was talking and he come riding up on his bicycle.
- 4 Q. Okay. When you say early that morning, what morning
- 5 would that have been, Friday, Saturday?
- 6 A. That was Friday morning.
- 7 Q. Friday morning. Okay. I didn't ask the question good.
- 8 Friday morning did you see him?
- 9 A. Yes, sir.
- 10 Q. All right. Tell me about that conversation?
- 11 A. Well, he come riding up. Me and Danny, a guy that
- 12 worked on the Crazy Mouse, which was a roller coaster, was
- 13 sitting there drinking a beer. I had just put my foreman to
- 14 bed because he got a little too drunk and passed out on a
- 15 chair. But we was sitting there talking and Kent come
- 16 riding up on his bike and said he needed to talk to me. So
- 17 I told Danny, I need to talk to my friend, and he went on
- 18 home. I told him I'd catch up with him later. Kent come up
- 19 and he told me that if anybody asked that he was with me the
- 20 whole night. And I told him that I was with my foreman
- 21 drinking all night, I didn't know if my foreman would go for
- 22 that.
- 23 Q. What did he respond?
- 24 A. Well, I asked him why? And he told me that he half-
- 25 heartedly tried to rape somebody.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Steve Young- Direct Examination by Mr. Them

219

1 Q. Okay.

2 A. That kinda shocked me, but I knew he had probably been
3 out drinking and I really didn't take a lot of stock into
4 what he said, but I did some thinking on it.

5 Q. Okay. Did you agree to do it?

6 A. No, I did not, at that time.

7 Q. After having had an opportunity to think about what he
8 said, what did you do?

9 A. Well, I didn't get no sleep. It kept bothering me.
10 Because it just -- something like that, it just, it's not
11 right if he did do it and I just didn't know what to do, so
12 I followed my conscience and I went down to this gas station
13 which is called Sav-a-Ton and called 911 and asked for a
14 deputy to meet me there.

15 Q. Why did you go down to a gas station rather than use
16 the phones there at the fair?

17 A. Because I didn't want nobody to see me using the phone
18 and meeting with the police.

19 Q. Okay. And when you went to the Sav-a-Ton and called
20 911, did they send a deputy out?

21 A. Yes, sir, they did.

22 Q. Did you tell the deputy about the conversation with Mr.
23 Clayton?

24 A. Yes, sir, I did.

25 Q. Tell me what you told the deputy?

1 A. I told him exactly what I just said here in court, that
2 Mr. Clayton come up -- well, I didn't give Mr. Clayton's
3 name at the time, cause if he didn't do nothing if he was
4 drunk or, God forbid, he was on something, I didn't want
5 nobody getting in trouble that they didn't need to be. So I
6 just told him what he told me and told him where I -- where
7 I worked at and what ride I worked on and how to get in
8 touch with me.

9 Q. Give him your name?

10 A. Yes, sir, I did.

11 Q. Sometime after that did any law enforcement officers
12 come to talk to you?

13 A. Yes, sir, it was not that day but it was the very next
14 day, Detective, I think it was, Captain, and there was a
15 lady and two officers that come up. I think it was a
16 captain and Detective Fowler.

17 Q. This gentleman right here?

18 A. Yes, sir.

19 Q. What time of day did they come to you?

20 A. I can't be exact on that, sir.

21 Q. I'm not asking you to be exact. Approximately what
22 time is a better way to ask?

23 A. It may have been around noon or a little after. I'm
24 not sure. No, it -- see, this was Saturday. We open at
25 noon. So it was probably a little after noon.

1 Q. I don't want you to say what they said. Okay? I want
2 to know what you said to them when they came to you?

3 A. What ---

4 Q. In other words, you can't tell me what they said. Just
5 tell me what you said?

6 A. All right. Well, it's kinda hard. I was asked if I
7 was the person that called the police? And I told them
8 yeah. And I told them what had transpired the day before.
9 And between me and Mr. Clayton, what was said. And they
10 asked me if I knew where he was at, if I could tell them
11 where he was at? And I said, yes, I could. And my
12 supervisor was there at the time, which I gave them
13 directions, told them what booth he was at. And my
14 supervisor told them that if they needed him to point out
15 where he was at that he would help.

16 Q. Now, did the police leave at that point in time or did
17 y'all continue to talk?

18 A. No. I left. I had to go back to my ride. But they
19 stayed.

20 Q. Now, let's switch subjects a little bit. When you work
21 at the fair, do you have any kind of uniform that you wear?

22 A. Yes, sir, we do.

23 Q. What is it?

24 A. Well, we have two different color shifts. The ride
25 jobs, which is what I am, we work rides, wear a blue shirt

- 1 that has an A right here on the top that kind of trails off,
2 looks like two As. It stands for A of A.
3 Q. What does A of A stand for?
4 A. Amusements of America.
5 Q. All right.
6 A. If I had my ID I could show you what it looks like.
7 But then the jointies have a yellow shirt. And if they
8 can't have a yellow shift, then they get a blue one until
9 they're provided with a yellow one.
10 Q. Okay. And you wear that shirt to work?
11 A. Yes, sir, we do.
12 Q. Going back in time when Mr. Clayton came to see you
13 that morning to talk to you about saying where he was that
14 night, did he have on one of those shifts?
15 A. Yes, he still had his show shift on.
16 Q. Show shirt?
17 A. Yes, sir.
18 Q. Is that the uniform shirt?
19 A. Yes, sir, that's what we call them, show shift.
20 Q. What color was it, if you remember?
21 A. I don't remember.
22 Q. If you can't remember the color, how is it you remember
23 he had the show shirt on?
24 A. Cause he never did come back to the house where I was
25 at that -- or the van and the car where we stayed at. And

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Steve Young- Direct Examination by Mr. Them

223

- 1 I like I said, I hadn't seen him the rest of the night.
- 2 Q. Were y'all living together at that time?
- 3 A. Yes. I stayed in the car and he stayed in the van.
- 4 Q. How close were they parked together?
- 5 A. Right side by side almost.
- 6 Q. All right. Now, at some later point in the day that
- 7 same day that they came out to talk to you and asked you
- 8 where Mr. Clayton was, did they come back and talk to you?
- 9 A. Excuse me? After I talked to the officers at the
- 10 office?
- 11 Q. Yeah?
- 12 A. Well, they didn't come back and talk to me, but when
- 13 they arrested Mr. Clayton they come by the ride and Mr.
- 14 Clayton walked over, which Detective Fowler was with him,
- 15 and they walked over by the ride and Kent said something to
- 16 him and they walked over and Mr. Clayton handed me the keys
- 17 to his van and asked me to look after his animals.
- 18 Q. Okay.
- 19 A. And he told me he would get in touch with me at the
- 20 jail.
- 21 Q. Were his animals an important part of his life?
- 22 A. Well, I liked Dobie and -- yeah, he loved his dogs.
- 23 Q. That's good. All right. Now, when they took Mr.
- 24 Clayton off after they arrested him, did you ever have the
- 25 occasion to talk to Mr. Clayton again?

1 A. Yes, sir, I did.

2 Q. Tell me about that?

3 A. Well, he called me on my cell phone and it was probably
4 maybe the evening he got arrested, maybe the next day, I'm
5 not for sure, but when he got a phone call he called me and
6 asked me if I could get up to see him.

7 Q. Did he say what he wanted to talk about?

8 A. Not on the phone he didn't, no, sir.

9 Q. Did you get up to see him?

10 A. Well, it was maybe a day or two later. I called the
11 Detective Fowler and got with him, told him that Mr. Clayton
12 had contacted me and he wanted me to come up to see him.

13 And I asked Detective Fowler if there was anyway I could
14 come up to see him and when I did I wanted to be wired.

15 Q. Wanted to be wired?

16 A. Yes, sir.

17 Q. Why would you want to be wired?

18 A. Well, it was kind of a selfish reason and for -- to try
19 to get evidence against him and protect myself.

20 Q. Why were you trying to protect yourself?

21 A. Well, the main fact is I knew once Mr. Clayton found
22 out that I had wrote a statement on him and he knew I had
23 his property, that I would be subject to be arrested.

24 Q. Okay. Why did you want to get evidence on him?

25 A. It's a crime that shouldn't be -- shouldn't go on. And

1 he tried to get me involved in it.

2 Q. Is there anything in your personal life that caused you
3 to feel that way?

4 A. Yes, sir, there is.

5 Q. What?

6 A. Back in -- when my niece was five and a half, six years
7 old, she was with my sister and her boyfriend in Amarillo,
8 Texas, and she was molested by my sister's boyfriend and
9 she's been dealing with that all her life.

10 MR. DEJONG: Your Honor, I'm going to object to
11 that.

12 THE COURT: What's your objection?

13 MR. DEJONG: My objection is this -- and perhaps
14 we should take this up outside the presence of the jury,
15 Your Honor.

16 THE COURT: All right. Ladies and gentlemen,
17 we've got a matter of the law we've got to take care of. If
18 you'll go back to your jury room, I'll call you back in just
19 a few minutes. Don't discuss the case.

20 (WHEREUPON, the jury exited the open court at
21 approximately 2:37 p.m.)

22 THE COURT: Yes, sir.

23 MR. DEJONG: Thank you, Your Honor. My objection
24 is this. I think where Mr. Them is headed with this is to
25 get into this man's record.

1 MR. THEM: I understand. I'm not gonna get into
2 his record about some crime that he says he committed that I
3 have no proof of. I am not going there.

4 MR. DEJONG: I'm not saying that. I'm saying
5 you're getting ready to go into this man's record. Now, he
6 can go -- if that's where he's going, he can ask him about
7 those convictions, but he doesn't have anymore right beyond
8 going into those convictions than I do of talking about
9 those convictions. And all he is trying to do is before he
10 puts on what he is convicted of, is trying to prejudice this
11 jury that it was really nothing at all and that he was
12 convicted anyway. And I think that's wrong. I don't know
13 if that's what he gonna do or where he is headed. I don't
14 think he can go behind that conviction and retry those
15 cases. I don't want to retry them. He was convicted or he
16 wasn't convicted and what he was convicted of carried more
17 than in excess of one year. I don't think he has a right to
18 go into the facts of the conviction, why he pled guilty or
19 didn't plead guilty or how he got convicted or whatever. I
20 don't have that right on cross examination, I don't believe.
21 And I don't think he has the right bring it in on his
22 record. That's why I would object to it.

23 THE COURT: Yes, sir.

24 MR. THEM: That's not what I'm doing right now,
25 Your Honor. What I'm doing right now is trying to explain

1 why this witness took some rather extraordinary steps. I
2 asked him if there's anything personal involved and he's
3 trying to tell you that a relative of his was sexually
4 molested. Had he not been interrupted by the objection, he
5 might have had another six, eight words or maybe one more
6 sentence and he was finished with that. Now, and I propose
7 to re-ask that question and let him answer it when the jury
8 gets back, if the court will allow.

9 MR. DEJONG: And if that wasn't where he was
10 going, then what is the relevance of him having this niece
11 or whoever that was sexually assaulted ---

12 MR. THEM: The relevance is ---

13 MR. DEJONG: Excuse me, Mr. Them, I was not
14 through.

15 MR. THEM: I'm sorry. When you paused I thought
16 you were.

17 MR. DEJONG: There is no relevance to it other
18 than to try to bolster this man's testimony through his own
19 testimony and because he had some relative that was sexually
20 molested. There is no relevance to that at all, Your Honor.
21 I don't -- it is not relevant. It is merely prejudicial.
22 They're trying to bring in extraneous matters that have
23 nothing to do with this case, and I object to it. I'm
24 through.

25 MR. THEM: Part of the reason he did what he did.

1 THE COURT: Let me hear the rest of his answer.

2 MR. THEM: All right, sir. Can you read us the
3 last two lines or so? You listen carefully and finish.

4 OFF THE RECORD

5 (WHEREUPON, the testimony was played back in open
6 court.)

7 MR. THEM: The question I propose to ask him, was
8 a moment ago he was telling us about he had had a niece that
9 had been molested in Texas, would he finish that sentence?
10 That's what I'm gonna ask him a question about.

11 THE COURT: Is there more of the question or more
12 of the answer? Did you complete your answer?

13 WITNESS: Just that me and my dad, my mom, took my
14 niece and my nephew in after it happened and I seen what it
15 did to her personally.

16 MR. DEJONG: I'm sorry. I didn't hear that, Your
17 Honor.

18 THE COURT: He said he took him in -- took her ---

19 WITNESS: We took my niece and nephew back from
20 Amarillo, me and my mom and dad, and we took care of them
21 for several years after that, and we seen what it did to her
22 personally. That was the end of the answer.

23 THE COURT: You still have an objection?

24 MR. DEJONG: I still object, Your Honor. There's
25 no relevance. What does the State have to prove by showing

1 -- saying his motivation ---

2 MR. THEM: Your Honor.

3 MR. DEJONG: The State has no -- it's not an
4 element of the crime or anything else. He talking about his
5 motivation, not somebody else's motivation.

6 THE COURT: All night, Mr. Them.

7 MR. THEM: At some point in time in these
8 proceedings, someone is going to attack this man's
9 motivation, either by questions, by testimony or by closing
10 argument. I think since this is his only opportunity to
11 testify as to why he did what he did, that I'm entitled to
12 get that from him. Unless they want to be bound by an order
13 not to attack his motivation, not to comment on his
14 motivation. I'm just preparing for the common storm, Your
15 Honor.

16 THE COURT: All right. Well, obviously on cross
17 examination I'll -- and certainly allow it on redirect if I
18 sustain your objection now, Mr. Dejong. It depends on what
19 you're wanting to get into later. I'm either going to let
20 it in now or I'm going to allow him, based on your cross
21 examination, and I don't know what your cross examination is
22 going to be, but I agree with Mr. Them on the motivation
23 issue. I'll sustain your objection if you still stand by
24 your objection that it's irrelevant.

25 MR. DEJONG: I appreciate you sustaining my

1 objection, but in doing so, I am not agreeing to be bound by
2 any ---

3 THE COURT: No. You're not bound.

4 MR. DEJONG: Yes, sir. And I understand it might
5 come back to bite me.

6 THE COURT: I'm letting Mr. Them know he'll have
7 an opportunity, based upon the cross examination, to at
8 least attempt to get the information in on redirect.

9 MR. DEJONG: But nothing to -- wherever I go on
10 cross examination, nothing to keep us from revisiting this
11 objection?

12 THE COURT: That's correct.

13 MR. THEM: In response to what Mr. Dejong said,
14 very shortly I'm going to get into this gentleman's criminal
15 record. He has a charge on there for unlawful restraint.
16 We don't have such a crime in South Carolina, Your Honor.
17 He also has a possession of cocaine, which we have. He also
18 has a DUI more than first, which we have. I think he should
19 be allowed ten or fifteen words to explain what unlawful
20 restraint is so they don't think it's something a whole lot
21 worse than it is or something like that. Because it's an
22 unusually named crime.

23 MR. DEJONG: Since the jury is not here, then I
24 would simply request an in-camera on what he's gonna say on
25 that.

1 MR. THEM: Happy to do it.

2 THE COURT: Make your proffer.

3 IN-CAMERA EXAMINATION

4 OF STEVE YOUNG

5 BY MR. THEM:

6 Q. You were charged with unlawful restraint. What was
7 that, briefly?

8 A. I found out that my girlfriend's boyfriend -- or my ex-
9 wife's boyfriend was beating on my kids. I went, beat him
10 up. She went to call the police. I snatched the phone out
11 of her hand, hung it up, finished beating on him, walked out
12 the door and I was arrested by the police.

13 Q. Okay.

14 MR. DEJONG: May I have one moment, please?

15 THE COURT: Yeah.

16 MR. DEJONG: May I ask a couple of questions, Your
17 Honor?

18 THE COURT: Yes, sir.

19 IN-CAMERA EXAMINATION

20 BY MR. DEJONG:

21 Q. You were charged with unlawful restraint; right?

22 A. Yes, sir.

23 Q. And that's what you were convicted of; right?

24 A. Yes, sir.

25 Q. So did you hold your wife or ex-wife or whatever she is

1 for ---

2 A. No, sir.

3 Q. -- some period of time?

4 A. No, sir.

5 Q. Anybody else?

6 A. No, sir. I just -- well, I beat her boyfriend up. I

7 just snatched the phone -- in Illinois if you snatch a phone

8 or prevent somebody from free movement or free action, you

9 can be charged with unlawful restraint. And with my history

10 with the State's attorney, me and him didn't get along, he

11 was trying to get me for everything he could. He even tried

12 to get me for home invasion.

13 MR. THEM: Objection, relevancy.

14 WITNESS: Sorry.

15 THE COURT: Rather than getting into the facts of

16 this charge and not the other charge, do you think the two

17 of you could in the next five minutes just agree to some

18 language about that to explain it?

19 MR. DEJONG: I believe, Your Honor, if we had five

20 minutes we could work that out.

21 THE COURT: I'd rather them not hear about one and

22 then not worry about the cocaine and all the others. We'll

23 have another five minute break. We'll be able to start this

24 case soon, I hope.

25 (WHEREUPON, the court stood at recess for a short

1 break.)

2 THE COURT: Are we ready to proceed? Are there
3 any other issues that we need to take care of outside the
4 presence of the jury?

5 MR. THEM: Not now, Your Honor, if I could write
6 out the question.

7 THE COURT: We'll wait for Mr. Ball before we get
8 started with the jury back. I wanted to make sure there was
9 nothing else we could cover at this time.

10 MR. THEM: Your Honor, for the record, the
11 accommodation that I've worked out with opposing counsel was
12 when we talk about the crime of unlawful restraint, the
13 question I will ask, and I have written it out and they have
14 seen the text of it, the question will be, quote, were you
15 convicted in the State of Illinois in 1997 for unlawful
16 restraint involving a charge you held your girlfriend
17 against her will?

18 MR. DEJONG: That is agreed upon, Your Honor.

19 THE COURT: All right. I sustain the objection as
20 to the last question for now. We'll be ready to ask another
21 question. All right.

22 WITNESS: Your Honor, he needs to amend that to my
23 ex-wife.

24 THE COURT: It should be to his ex-wife, he said,
25 instead of something on the question.

1 WITNESS: Girlfriend. It wasn't my girlfriend, it
2 was my ex-wife.

3 THE COURT: It was his ex-wife instead of his
4 girlfriend.

5 MR. THEM: Does it make any difference if it's ex-
6 wife or girlfriend?

7 MR. DEJONG: That doesn't make any difference to
8 me. We get so many issues going here at a time. I would
9 simply ask at this point in time with regard -- he started
10 answering the question that really took the jury out, and
11 that was his personal motivation, which you've sustained. I
12 would ask you to instruct the jury to disregard any portion
13 -- any statement he made in regards to that question at this
14 time.

15 THE COURT: I'll grant that. Again, with the
16 right to revisit it on ---

17 MR. DEJONG: Yes, Your Honor, I understand that.

18 MR. THEM: Excuse me, Your Honor. We're putting
19 the cart way ahead of the horse. What happens if that
20 problem arises in a closing argument? I mean, all I can do
21 is stand up and reject. I don't know if I have much of a
22 remedy other than sustained.

23 THE COURT: Well, let's see how they cross
24 examine. If he doesn't get into that ---

25 MR. THEM: Okay.

1 THE COURT: -- then we don't need to hear about
2 motive.

3 THE COURT: Are we ready to get the jury back? We
4 ready to roll?

5 MR. THEM: Yes, sir.

6 MR. DEJONG: Your Honor, I can't do it now, but
7 there may be an additional argument on this whole CD issue.
8 I'll just make the court aware of that at this point in
9 time.

10 THE COURT: What would the ---

11 MR. DEJONG: Which one he's gonna play. If he
12 plays the original, you've already ruled on that, over my
13 objection. But if he plays the noise reduction, then I
14 think there's another whole issue involved in that.

15 THE COURT: All right. Your objection on the
16 original one based upon the issue we talked about yesterday?

17 MR. DEJONG: I'm going -- if it's the original
18 we're talking about, my objection, which you have already
19 ruled on, but I would have to object to that just to
20 preserve my record. But if he's playing the noise
21 reduction, then I think I have another objection over and
22 above ---

23 THE COURT: I presume he's going to play the noise
24 reduction based upon the witness who testified. I'll be
25 glad to hear from you now so that we don't have to take the

1 jury out again.

2 MR. DEJONG: Your Honor, I would simply state
3 this, that obviously this engineer has testified, but I
4 think, number one, under the best evidence rule, that the
5 original is the one that would be required to be played and
6 introduced into evidence. I don't believe there is a
7 provision under Rule 1002 to prove the content of a writing,
8 recording or photograph, the original writing, recording or
9 photograph is required except as otherwise provided in these
10 rules by statute. A duplicate is admissible to the same
11 extent as an original unless the genuine question is raised
12 as to the authenticity of the original or in the
13 circumstance it would be unfair to admit the duplicate in
14 lieu of the original. And I think in this case, number one,
15 I think when you're -- we start talking about duplicates,
16 we're talking when the original is not available. I don't
17 think it's to say, okay, we have the original, but we don't
18 want to play the original, we want to play something else.
19 I don't think that comes in under Rule 1003. I don't think
20 that's what that rule is talking about as far as duplicates
21 go. Additionally, Your Honor, they did the wire, they did
22 the recording. Your Honor ruled on that and I'm not arguing
23 that. But nonetheless still my position when I say they,
24 law enforcement, this man, they did it, they got what they
25 got. I think that is the original. And under the best

1 evidence rule, and even looking at the Rules of Evidence, I
2 think that -- if they want to introduce something they can
3 introduce it under Your Honor's ruling, but I don't think
4 they're entitled to bring something else in and play it as a
5 duplicate when the original is available.

6 THE COURT: All right. I understand from the
7 solicitor that both are going to be introduced into evidence
8 and the jury will certainly have an opportunity to listen to
9 both of them and if they have any questions about the
10 enhanced one or the one that is better to listen to. I'm
11 gonna overrule your objection. I believe that helps the
12 jury in making the decision, maybe this is not a perfect
13 analogy, but with the original picture that is enlarged.
14 That will -- this is sort of enlarged so they can see the
15 picture better. This is enhanced so that you can hear the
16 language better. So I note your objection, but I'm gonna
17 allow him to -- I don't think we need to have the jury
18 listen to both of them here, the first one and the second
19 one. If they want to hear the first one in deliberations,
20 I'll certainly allow them to do that since they're both -- I
21 understand, is that right, Mr. Them, both of them are gonna
22 be in evidence?

23 MR. THEM: Yes, sir, both of them are on this one
24 disc.

25 MR. DEJONG: Your Honor, I mean no disrespect, but

1 if he's gonna introduce them I'm gonna ask that both of them
2 be played in the courtroom on the record. I think he has a
3 duty, and Your Honor says he's going to introduce both of
4 them, okay, I understand Your Honor's ruling on it. But if
5 that is going to happen, then I think we need for the
6 Defendant -- they need -- we need to make sure on the
7 record that they are exposed to both of them. They may go
8 back in the jury room and say, we don't want to listen to
9 the original. And I think, even under Your Honor's ruling,
10 that would be inappropriate. I think they need to sit here
11 and listen to both of them.

12 THE COURT: Mr. Them, what about that?

13 MR. THEM: Your Honor, all they would hear is just
14 gibberish and noise and screeching and -- I mean, I sounds
15 like the Halloween haunted house tape with all the
16 background noise. You can't hear hardly anything. I don't
17 know that the jury needs to listen to fifteen minutes of
18 that when they can listen to fifteen minutes of something
19 that is much more intelligible, but not a whole lot better,
20 just a little bit better intelligible. It was a very
21 difficult tape to clean up.

22 MR. DEJONG: The Solicitor's rendition and
23 interpretation is not important. It's ---

24 THE COURT: All right. I'll tell you what we'll
25 do. I'll let the solicitor play them both and I'm going to

1 instruct the jury that on the original tape that when they
2 feel like they've heard enough they can raise their hands
3 and let me know and they can -- I don't want them to have to
4 -- it's a fifteen minute tape?

5 MR. THEM: Fifteen minute tape. I have another
6 possible alternative. Let me play my enhanced version and I
7 will tell the court now on the record that if he wants to
8 play the original I will not object to it. Let him subject
9 the jury to that fifteen minutes.

10 THE COURT: I'm not gonna do it that way. I'm
11 gonna have both sides come from the State rather than him
12 having to do that on cross examination. But I don't know
13 that there's any -- you want the jury to hear the whole
14 thing?

15 MR. DEJONG: Yes, Your Honor.

16 THE COURT: All right. I'll let them play both
17 then. I'll tell them that's my ruling.

18 MR. DEJONG: Just so -- and I feel like I'm late
19 afternoon. I'm appearing to be overly litigious and I don't
20 mean to be. I'm trying to represent my client.

21 THE COURT: You're representing your client.

22 MR. DEJONG: But to prevent that being overly
23 litigious in front of the jury, when I object to the
24 introduction of that, the objection, so the record, is clear
25 is going to be on both bases, I guess is the word, that is

1 as to the enhanced version and also my objection will go to
2 my original objection on *Miranda* and the Sixth Amendment,
3 Your Honor.

4 THE COURT: And I'll leave it up to Mr. Them as to
5 which one he wishes to play first.

6 MR. DEJONG: Thank you, Your Honor.

7 THE COURT: Okay. Your objection is noted and
8 your objection, when you state it to the jury, will be on
9 both grounds.

10 MR. DEJONG: Thank you, Your Honor.

11 MR. THEM: Your Honor, would you consider giving
12 me some sort of instruction to the jury that I'm required to
13 play the first one to have it in evidence before I can put
14 the second one ---

15 THE COURT: I'll cover that with the jury.

16 MR. THEM: That'll be wonderful. Thank you.

17 THE COURT: I don't want the jury to be prejudiced
18 toward either one of you. We'll gonna have all the evidence
19 in based upon the Defendant's request.

20 Any other legal matters we need to take care of before
21 the jury comes back?

22 MR. THEM: No, Your Honor.

23 MR. DEJONG: I can't think of any at this point in
24 time.

25 MR. BALL: You haven't told the jury yet to

1 disregard his initial testimony.

2 THE COURT: I'll do that.

3 (WHEREUPON, the jury entered the open court at
4 approximately 3:20 p.m.)

5 THE COURT: Thank you for your patience with us,
6 ladies and gentlemen. We've had our legal discussion about
7 the evidentiary matters and I'll sustain the objection to
8 the last question. You should just disregard the question
9 and the answer to that question at this time. At this
10 occasion I'll let the Solicitor ask his next question.

11 MR. THEM: Thank you.

12 DIRECT EXAMINATION CONTINUED

13 BY MR. THEM:

14 Q. Mr. Young, were you convicted in the State of Illinois
15 in 1997 for unlawful restraint involving a charge you held
16 your ex-wife against her will?

17 A. Yes, sir, I was.

18 Q. Were you convicted in Indiana in 2006 for DUI more than
19 first?

20 A. Yes, sir.

21 Q. Were you convicted in April of this year in Florida for
22 possession of cocaine?

23 A. Yes, sir.

24 Q. All right. Now, let's move to another area. Did you
25 ever have anymore contact with Mr. Clayton after he went to

1 jail?

2 A. Other than to visit, no.

3 Q. Did you have any telephone contact with him prior to
4 the visit?

5 A. Prior to the visit, yes.

6 Q. When you had the telephone contact about the visit, did
7 you arrange to get in to see him?

8 A. The contact I had prior to the visit, yes.

9 Q. Okay. And prior to actually visiting with Mr. Clayton
10 did you have a meeting with Detective Fowler?

11 A. Yes, sir, I did.

12 Q. And tell me about that meeting?

13 A. When I first -- well, Detective Fowler come and picked
14 me up because I didn't have enough gas in the car, so he
15 come and picked me up. I went down to the police station.
16 We met with another officer and he wired me for the visit
17 and then I went and visited Mr. Clayton.

18 Q. All right. Would you describe the area as best you can
19 in terms of size and building materials, et cetera, where
20 you visited with Mr. Clayton?

21 A. Well, I think it was brick walls, foundation brick
22 walls. There's a little hallway as you walk into the
23 visiting room just wide enough for you to walk through. I
24 don't remember how many cubicles there was, but there was
25 visiting cubicles that you sat down in a chair, had maybe a

1 little ledge like this, not much bigger that you can lay
2 your arms on or whatever. And then there was a phone on the
3 left hand side, I think, that you talked to the inmate
4 through.

5 Q. Okay. And ---

6 A. And there's also a glass partition between you and the
7 inmate.

8 Q. Could you hear people talking through the glass?

9 A. No, sir, you could not.

10 Q. Okay. What was the only way you could hear people
11 talking?

12 A. Through the phone.

13 Q. Okay. When they put the microphone on you, where did
14 they put the microphone?

15 A. If I remember, it was right up inside my collar here.

16 Q. All right. Now, when you got there what did Mr.
17 Clayton -- well, when you got there did Mr. Clayton come out
18 to visit with you?

19 A. Yeah. After I was wired and I went to the visiting
20 room, yes.

21 Q. What did he want to talk about?

22 A. Well, we started off talking about his bond.

23 MR. DEJONG: Your Honor, I'm going to object.

24 THE COURT: All right. Your objection is noted.

25 Overruled.

1 Q. What did he want to talk about?

2 A. We started off talking about his bond. And then we
3 moved into talking about, let me think, his bond, and then
4 we started talking about his case.

5 Q. Okay. What did he tell you about his case?

6 A. Oh, we started out talking -- I told him to the best of
7 my recollection all they had was a witness that identified
8 him. And he said that was pretty much all he knew that they
9 had and that it was his word against hers. That I should go
10 ahead and give the alibi that me and him was together the
11 whole night except for maybe ---

12 Q. And was that true?

13 A. -- except for maybe ten minutes. And no, it was not
14 true.

15 Q. Okay. What else did he talk about?

16 A. We talked about his animals and his dogs -- or his
17 animals and his property, what I should do with them. I
18 agreed to take care of his animals and take care of his
19 property and park his van down in winter quarters.

20 Q. What is winter quarters?

21 A. That is where we take our rides when our season's done
22 so they can be worked on. And basically our base of
23 operations.

24 Q. And where is that?

25 A. That's in Princeton, Florida.

- 1 Q. Okay. What else did y'all talk about in that
2 conversation?
- 3 A. What to do with his property if he got bond. What he
4 should sale.
- 5 Q. Was there ever any ---
- 6 A. We talked about ---
- 7 Q. Excuse me.
- 8 A. Oh, I'm sorry. We talked about a cell phone, cell
9 phone battery and knife.
- 10 Q. How did that come up? Tell us about that?
- 11 A. I asked him if -- if I recollect right, I asked him if
12 there was anything that the police could get him for that I
13 should take care of for him. And he said as far as he knew
14 that there was nothing, that he disposed of everything. And
15 then he asked me if cell phones had -- if all cell phones
16 had batteries. And I told him yes. And he told me, well,
17 the cell phone battery may be in the van, for me to look for
18 it and dispose of it.
- 19 Q. Okay. Was there ever any discussion about a weapon?
- 20 A. Yes, there was.
- 21 Q. Tell me about that?
- 22 A. I just asked him if there was anything in there and --
23 which on the tape you'll hear me make reference to a weapon.
24 And if you'll listen close you'll hear him make reference to
25 a weapon, the cell phone. And I asked him if there was any

1 weapon in there that he could be -- that was involved in it.

2 And he said, no, he disposed of it, but the police took a
3 picture of all his knives.

4 Q. Okay. Did y'all have any other discussions about the
5 events we're here for today?

6 A. Not to my recollection.

7 Q. Now, have you had a chance to listen to the information
8 contained on the compact disc, State's Exhibit Number 6 for
9 identification?

10 A. Yes, sir. Yes, sir.

11 Q. Have you listened to both tracks on there?

12 A. Yes, sir, I have.

13 Q. What's on the first track?

14 A. My voice and a bunch of noise.

15 Q. Are you able to identify your voice?

16 A. Mine, yes, you can. But when I listened to it the
17 first time you couldn't listen -- understand anything he
18 said.

19 Q. Is that a true and correct copy of your conversation
20 with Mr. Clayton at the jail you're talking about?

21 A. Yes, sir.

22 Q. What's on track two?

23 A. A same version of the original, but it's been cleaned
24 up through technology.

25 Q. Okay. Are you able to hear it any better and

1 understand it?

2 A. Oh, yes, you can hear it a lot better. You can hear my
3 voice better and you can pick out his voice a lot clearer on
4 some places.

5 Q. With the exception of noise being removed, does track
6 two appear to be a duplicate of track one?

7 A. Yes, it's the exact same.

8 Q. Do you recognize your voice?

9 A. Yes, sir.

10 Q. The little bits that you can hear of Mr. Clayton, do
11 you recognize his voice?

12 A. Yes, sir.

13 MR. THEM: Your Honor, we would move to admit this
14 CD into evidence at this time.

15 MR. DEJONG: And I object, Your Honor.

16 THE COURT: All right. Your objection is noted.
17 It's overruled.

18 MR. DEJONG: Thank you, Your Honor.

19 (WHEREUPON, State's Exhibit Number 6 was entered into
20 evidence.)

21 THE COURT: You intend to play it?

22 MR. THEM: Yes, sir.

23 THE COURT: All right. Ladies and gentlemen, as
24 you've heard the testimony there's two different tracks
25 there being introduced into evidence, the original and the

1 other. Both are going to be played. Based upon my ruling
2 as to the evidence it is admissible. Just listen as
3 carefully as you can as you would any other testimony that's
4 being played, as the CDs are played, both on track one and
5 track two. Mr. Them is going to identify which one is being
6 played at the time.

7 Q. How long does each track take?

8 A. Pretty close to fifteen, twenty minutes each.

9 Q. Okay. Does that refresh your memory as to how long
10 each track takes?

11 A. Let me get my glasses on. Yes, sir, each track is
12 thirty-two minutes and thirty-one seconds.

13 Q. Okay. Now, when we play the first track and the second
14 track, at any point in time if you hear any discussion with
15 Mr. Clayton about batteries, cell phones, weapons or alibis,
16 would you raise your hand high?

17 A. Yes, sir, I would.

18 Q. So everyone can pay attention.

19 MR. DEJONG: I'm going to object to him doing
20 that. Now he's interpreting the evidence. That is not
21 proper. You have ruled he can play them. He can play them.
22 That is up for the jury to decide what they are hearing.

23 THE COURT: I'll allow him to testify after
24 hearing the tapes as to what was said. And if you need to
25 go back to those tapes at any place to have him testify to

1 it, we'll be glad for you to do that.

2 MR. THEM: Okay, sir.

3 MR. DEJONG: Your Honor, with the court's
4 permission may I go sit in the bailiff's chair while he's
5 playing that?

6 THE COURT: Yes, sir.

7 MR. DEJONG: Thank you, Your Honor.

8 THE COURT: Ladies and gentlemen, let me remind
9 you too, if you can't hear because of volume, please let us
10 know. We can certainly raise the volume. We can't change
11 the CDs out.

12 MR. THEM: Can I at least have the Defendant raise
13 his hand when he speaks so they'll know who's speaking, the
14 first time?

15 MR. DEJONG: I object to asking the Defendant to
16 raise his hand.

17 MR. THEM: I'm sorry, the witness?

18 THE COURT: Yes, sir. Any objection?

19 MR. DEJONG: Still the same thing. My objection
20 remains the same, Your Honor, if the Solicitor is asking him
21 to interpret the tape for the jury and I believe that is
22 improper.

23 THE COURT: I overrule your objection on that.
24 The first time that his voice appears he's gonna let the
25 jury know that that one is him, that voice is the witness,

1 and he can certainly raise his hand on the first time his
2 voice appears so the jury will know when it's him talking
3 the first time.

4 Q. When we listen to the tape, whose voice is the clearer
5 of the voices on there?

6 A. You can hear mine very clear.

7 Q. And are there any other voices on there that you know
8 of other than yours and Mr. Clayton's?

9 A. Yes, sir. There's Detective Fowler's and the other
10 officer that was there that was hooking me up. And that
11 would be at the first of the tape.

12 Q. Now, from the time you started talking to Detective
13 Fowler when you first went there, you were hooked up?

14 A. When I first got to the police department?

15 Q. Yeah?

16 A. No. I didn't get hooked up till I was there. The
17 officer was there and they hooked me up when I arrived at
18 the police station.

19 Q. Okay. Thank you very much.

20 (WHEREUPON, State's Exhibit was 6 played in open
21 court.)

22 MR. THEM: Your Honor, this will be track two.

23 (WHEREPON, State's Exhibit 6 resumed playing in open
24 court.)

25 MR. DEJONG: Your Honor, could we hit pause for

1 just a moment?

2 THE COURT: Yes, sir.

3 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
4 approached the bar.)

5 THE COURT: Ladies and gentlemen, I'm going to ask
6 you to go out to your jury room just for a minute. We're
7 gonna discuss this legal matter. I'll call you back. Don't
8 discuss the case. We'll take a short break.

9 All right. We'll be at ease for about ten minutes.
10 Y'all can try to work out if you need to listen to the tapes
11 to determine -- from the bench conference there was some
12 question from the Defendant respective as to whether or not
13 the tape now being played is the original tape or not.
14 Y'all can listen to it. I just don't want to -- let me know
15 if you can't make it in ten minutes. We need to get the
16 jury back and listen to this. We'll be at ease for ten
17 minutes.

18 (WHEREUPON, the court stood at recess for a short
19 break.)

20 MR. DEJONG: You ready to go back on the record,
21 Mr. Them?

22 MR. THEM: Yes, sir.

23 MR. DEJONG: I think where my confusion was, Your
24 Honor, and I apologize, but I was under the impression he
25 was going to play the enhanced first. Apparently that was

1 the original he played first. Now, and what Your Honor said
2 at the bench conference a few minutes ago, the original has
3 been played. I don't care if he plays the enhanced or not.
4 That's up to him.

5 THE COURT: Okay.

6 MR. THEM: We're ready to play the enhanced, Your
7 Honor.

8 THE COURT: All right. This will probably be our
9 last witness today, won't it?

10 MR. THEM: Oh, yes, sir.

11 MR. DEJONG: You planning on finishing this
12 witness today, Your Honor?

13 THE COURT: You got anymore direct?

14 MR. THEM: Maybe three questions at the most.

15 MR. DEJONG: I expect cross ---

16 THE COURT: Your cross won't be more than two
17 hours; will it?

18 MR. DEJONG: I wouldn't anticipate it would be,
19 Your Honor. Maybe a shade one way or the other.

20 THE COURT: Well, we'll try to get the cross in
21 today.

22 MR. DEJONG: All right, sir. Very well.

23 THE COURT: Finish this witness. Bring the jury
24 back.

25 (WHEREUPON, the jury entered the open court at

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Steve Young - Direct Examination Continued by Mr. Them

253

1 approximately 4:30 p.m.)

2 WITNESS: Your Honor, there's another witness

3 waiting outside.

4 THE COURT: Yeah. I saw him.

5 MR. DEJONG: May we approach briefly on another

6 legal matter, Your Honor?

7 THE COURT: Yes, sir.

8 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball

9 approached the bar.)

10 MR. THEM: If we could have one minute, Your

11 Honor.

12 THE COURT: Yes, sir.

13 MR. THEM: Thank your, Your Honor.

14 THE COURT: All right. Mr. Them, you may continue

15 your case.

16 (WHEREUPON, State's Exhibit 6 continued to be played in

17 open court.)

18 MR. THEM: Can we cut the machine off a second,

19 Your Honor?

20 THE COURT: Yes, sir. Put it on pause.

21 MR. THEM: Mr. Dejong and I have agreed by

22 stipulation that the jury doesn't need to hear the rest of

23 it since they heard it on the first one.

24 MR. DEJONG: So stipulated, Your Honor.

25 MR. THEM: I have a couple of brief questions,

1 Your Honor.

2 THE COURT: Continue your examination of the
3 witness.

4 Q. Did he say anything to you about what he would do when
5 and if he made bond?

6 A. If I remember ---

7 MR. DEJONG: Your Honor, I object to that. That's
8 not relevant.

9 THE COURT: What's your relevancy?

10 MR. THEM: May I approach?

11 THE COURT: Yes, sir.

12 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
13 approached the bar.)

14 THE COURT: Objection sustained.

15 Q. Is the Defendant's physical appearance when you look at
16 him today any different than it was some thirteen or
17 fourteen months ago when you saw him in the jail?

18 A. Yes, sir, it's changed quite a bit.

19 Q. How?

20 A. He's cut his hair all off. He used to sport a goatee
21 and a mustache and he's lost considerable weight.

22 Q. How much is considerable?

23 A. I'd say a good twenty, thirty pounds.

24 Q. Okay.

25 A. His face is thinner.

1 Q. My final question. There was something on that paper
2 about going to the bath -- going in the bathroom or going to
3 the bathroom and in the same kind of sentence walking the
4 dog. What was that?

5 A. That was getting his alibi together. We was supposed
6 to be walking the dogs together.

7 MR. DEJONG: Your Honor, I'm going to object to
8 that interpretation.

9 THE COURT: I'll overrule your objection. I'll
10 allow him to testify to the conversation he had.

11 MR. DEJONG: I'm not trying to be argumentative.
12 I'm not objecting to the conversation he had. I'm objecting
13 to the interpretation that's speculative on his part of how
14 this man may have interpreted the same conversation.

15 THE COURT: I understand. I thought the question
16 was tell me about the conversation about the dogs ...

17 MR. THEM: About walking the dogs and going to the
18 bathroom.

19 MR. DEJONG: But then he asked what it means, Your
20 Honor. And it was on the tape. The tape speaks for itself.

21 THE COURT: Well, I'll allow him to testify as to
22 his interpretation of what the -- or how he took it, not any
23 interpretation of anybody else.

24 Q. What did you understand that to mean in your mind?

25 A. His alibi. He was setting up his -- wanting to set up

1 his alibi, what he did -- if you listen closely you'll hear
2 that he was talking about walking the dogs, I was walking
3 Coco with him, which Coco is the Doberman. And then talking
4 about when he went to the bathroom, actually the only time
5 he left was about ten minutes to go take a shower. That was
6 the only time he was supposed to be out of my sight.

7 MR. THEM: Thank you very much. I have no further
8 questions of this witness, Your Honor.

9 THE COURT: You may cross examine the witness.

10 MR. DEJONG: May it please the court.

11 THE COURT: Yes, sir.

12 CROSS EXAMINATION

13 BY MR. DEJONG:

14 Q. You have a conviction for driving under the influence
15 second degree?

16 A. Yes, sir.

17 Q. Conviction of unlawful restraint; right?

18 A. Yes, sir.

19 Q. And a conviction for possession of cocaine?

20 A. Yes, sir.

21 Q. The possession of cocaine was in 2008?

22 A. Yes, sir.

23 Q. When -- you said when Mr. Clayton was arrested he gave
24 you the keys to his van; right?

25 A. Yes, sir.

- 1 Q. Pardon?
- 2 A. Yes, sir.
- 3 Q. Didn't he also own a car?
- 4 A. Yes, sir, he did.
- 5 Q. And you and he traveled in the car and the van
- 6 together; right?
- 7 A. Yes, sir.
- 8 Q. And indeed at this point in time you didn't have a car;
- 9 did you?
- 10 A. No, sir, I did not.
- 11 Q. Okay. And in the van there was quite a few personal
- 12 items; were there not?
- 13 A. Mine and his both, yes, sir.
- 14 Q. And he had some musical instruments in the van?
- 15 A. Yes, sir, we talked about that on the tape.
- 16 Q. Yes, sir. Well, after this visit you made, you made on
- 17 the tape where you wore the wire, did you ever go to the
- 18 jail to see him again?
- 19 A. No, sir, I did not.
- 20 Q. Had no further contact with him; did you?
- 21 A. No, sir, I did not.
- 22 Q. By mail or any other means?
- 23 A. No, sir.
- 24 Q. Well, did he share with you, as I understood on the
- 25 tape, that some of those items in the vehicle were maybe

- 1 antique items?
- 2 A. Yes, sir.
- 3 Q. Where are they?
- 4 A. They are still in the van.
- 5 Q. And where is the van?
- 6 A. The van is in Walterboro, South Carolina.
- 7 Q. Walterboro, South Carolina. Who has the van in
- 8 Walterboro, South Carolina?
- 9 A. It's at a Ford dealership locked in storage.
- 10 Q. Who's paying the storage bill?
- 11 A. Nobody, sir.
- 12 Q. How long has it been in storage?
- 13 A. I think it was around November. It was right at the
- 14 end of our season.
- 15 Q. So a year ago it's been in storage?
- 16 A. Yes, sir.
- 17 Q. Nobody's paid the storage bill?
- 18 A. No, sir.
- 19 Q. And that was you taking care of his items?
- 20 A. His van broke down, sir, and I wasn't able to fix it
- 21 with -- it was over twenty-one hundred dollars with repairs.
- 22 Q. But you assured Mr. Clayton in the conversations you
- 23 were gonna take care of his property?
- 24 A. Yes, sir, I did.
- 25 Q. How about the four hundred dollars he told you was in

1 the van, is that still locked up in the van at the Ford
2 dealership?

3 A. No, sir, I found it, I found his license, I returned it
4 to the sheriff's department, so I left, I did not find the
5 four hundred until I got to Florence, South Carolina.

6 Q. How about the coins in there, where are they?

7 A. They're still there.

8 Q. I see. Okay. Now, in this conversation you were
9 asking him to prepare a paper, I gather, to turn his
10 property over to you or whatever?

11 A. No, sir, just to give me legal access to take care of
12 it to where if I get pulled over I'd have something in
13 writing from him.

14 Q. And that you never did and he never did?

15 A. No, sir, he never ---

16 Q. You never got it?

17 A. No, sir. I was asked to get my ride ready to leave and
18 we had to leave. I never did get a chance to get back up.

19 Q. Where are the dogs?

20 A. I left for Puerto Rico, I left them in care of a friend
21 of mine down there and he didn't take good care of them. He
22 let the Dobie run loose. He almost bit one of my
23 supervisors and they put her down. And they put Tuffy, the
24 little one, in the Humane Society, the SPC, the people that
25 don't kill the dogs, they just take care of them, put them

1 in a new home. They wouldn't do that with the Dobie because
2 she was aggressive.

3 Q. Well, you shared with him, I think is what you said,
4 that you were gonna take the van to winter quarters; did you
5 not?

6 A. Yes, sir.

7 Q. Never did that; did you?

8 A. I was on my way when the van broke down. We left
9 Charleston and I was on my way to south Florida when the van
10 broke down outside of Walterboro.

11 Q. And this was your friend?

12 A. He was up till he made the statement about raping that
13 girl. About attempting to rape that girl.

14 Q. Well, let's talk about that for a minute. We'll jump
15 around here a little bit. On August the 30th, 2007, the
16 fair -- was that the night the fair opened or the second
17 night of the fair?

18 A. That would have been Thursday and that was the night --
19 the day we opened.

20 Q. Okay.

21 A. And if I remember right, we opened up here at five
22 o'clock.

23 Q. All right. And how long did the fair go?

24 A. Usually the fair runs -- they have a set time, but if
25 there's more people on the midway and they'll let it run a

1 little longer so the people can use their tickets up.

2 Q. What time do they close on -- either on the 30th or the
3 morning of the 31st?

4 A. That would have been the 31st, sir, or the morning of
5 the 1st, if I remember right. Yes. Thursday was the 31st,
6 then it would have been the morning of the 1st, and I can't
7 recollect exactly what time we closed. But it was a Friday
8 night, so it would have been twelve o'clock or shortly
9 after.

10 Q. Well, when do you say that Mr. Clayton came to you and
11 made this statement, early hour morning of what day now?

12 A. That would have been Friday morning on the 1st. That
13 was -- if I remember right by looking at my statement, it
14 was -- Thursday was our first day, that was our opening day,
15 and then that night, I didn't see him until the next
16 morning, which would have been Friday morning. That would
17 have been the 1st.

18 Q. All right. We won't argue that point. Nonetheless, at
19 one point in time you said, whatever day it was, you had not
20 seen Mr. Clayton after like twelve thirty at night; right?

21 A. Yes, sir. It was approximately around that time. I
22 couldn't pinpoint it exactly.

23 Q. Where did you see him?

24 A. It would have been when we was closing and I had to
25 take my tickets and my shirts and my ride to the office and

- 1 he would have been probably going to get his draw, whatever
2 he had been doing that night, closing his joint.
- 3 Q. Do you recall telling the police officer that you saw
4 him at the Hot Spot around one o'clock in the morning?
- 5 A. No, I do not remember that.
- 6 Q. Y'all were buying beer there?
- 7 A. I do not remember that.
- 8 Q. All right, sir. Well, did you go to the Hot Spot that
9 night and buy beer?
- 10 A. I probably did because I usually bought beer every
11 night if I didn't have none at the lot. But I usually
12 carried a cooler that had beers.
- 13 Q. How much beer did you buy?
- 14 A. We sat -- me and my foreman, it was kind of a breaking
15 in period, bonding period between me and my foreman, since I
16 was his second in command. And we had drank quite a bit of
17 beer because I put him to bed around four thirty, me and his
18 wife put him to bed because he passed out around four thirty
19 that morning.
- 20 Q. Both of y'all had been drinking heavily, not Mr.
21 Clayton, but you and your foreman had been drinking heavily
22 before Mr. Clayton ever came to you?
- 23 A. I hadn't been. I hadn't been drinking a whole lot.
- 24 Q. So you don't drink as much as your foreman?
- 25 A. No, I don't.

1 Q. Well, when you talked to law enforcement -- actually at
2 one point in time on September the 1st you gave a statement;
3 didn't you?

4 A. Yes. I don't remember if it was a verbal or written.

5 Q. All right. And do you remember what you put in that
6 statement?

7 A. No, I don't.

8 Q. Would you like to see a copy of it?

9 A. Yes, I would.

10 Q. Okay. In that statement it says you talked to Mr.
11 Clayton about four thirty; right?

12 A. Right here it says at approximately four thirty-five
13 a.m. I was talking to a co-worker name Danny on my friend's
14 car when he showed up on his mountain bike and said he
15 needed to talk to me, and Danny left, and Kent Clayton, my
16 friend, said that he wanted to tell -- wanted me to tell the
17 police that he was with me all night, he didn't leave the
18 lot. I asked him -- that was the answer to your question,
19 sir.

20 Q. Nope, you didn't answer my question. It's the next
21 part I want you to read.

22 A. You asked me if -- could you repeat the question,
23 please.

24 Q. The question was -- you started reading that. I don't
25 know that I had it ---

- 1 A. Well, I read what you had underlined here, sir.
- 2 Q. Don't pay any attention to the underlining. What did
3 you tell the cops he said?
- 4 A. I told the cops -- okay, I'll go ahead -- let's see
5 here. That he was with me all -- let's see. He wanted me
6 to tell the police that he was with me all night and didn't
7 leave the lot. I asked him why and he said that he may have
8 half-heartedly tried to rape somebody.
- 9 Q. That he may have? He doesn't say he did; did he?
10 Correct?
- 11 A. That's what I wrote down, sir.
- 12 Q. Yes, sir. And you had been drinking when you talked to
13 them?
- 14 A. I hadn't went to sleep when I talked to the police
15 officer and I was still sober as I was when I was talking to
16 him.
- 17 Q. When he come up to you there at four thirty, now
18 whatever time, day, whatever you say it is, did he have any
19 bruises on him?
- 20 A. I didn't notice, sir.
- 21 Q. Well, he was your friend; right?
- 22 A. Yes, sir.
- 23 Q. You would notice that about a friend; wouldn't you?
- 24 A. Not really. I mean, I don't, I don't inspect men, sir.
- 25 Q. Have any scratches on him that you saw?

- 1 A. I didn't notice any. I didn't look for any.
- 2 Q. See anything out of the ordinary about him?
- 3 A. No. He just wanted me to verify that he was with me
- 4 all night.
- 5 Q. Okay.
- 6 A. If the police asked me.
- 7 Q. Did he appear intoxicated, not intoxicated? How did he
- 8 appear? Drunk or sober?
- 9 A. Riding his bike pretty good. So I'd say he was fairly
- 10 sober. He wasn't too drunk.
- 11 Q. Where is his car at now?
- 12 A. His car is in Florence.
- 13 Q. In Florence?
- 14 A. Yes, sir.
- 15 Q. How did it get to Florence?
- 16 A. Well, I had a friend of mine drive it. I drove his van
- 17 with the dogs in it with me because Coco couldn't ride with
- 18 nobody else. When we left our last spot, which would have
- 19 been Sumter, he drove the van -- the car down. When we got
- 20 to Florence, while we was at Florence we had mechanical
- 21 difficulty with it. We couldn't get fuel to the carburetor,
- 22 so I had to leave it. I took the van. Because we left two
- 23 days early cause I had to set my ride up.
- 24 Q. Without any authority or permission from Mr. Clayton,
- 25 you just took over his property; right?

1 A. He wanted me to take care of his stuff while he was
2 incarcerated until things come to a head or he was bonded
3 out.

4 Q. Yes, sir. But if I recall, when you were talking about
5 -- to the Solicitor, you said one of the reasons you went to
6 the police was a selfish reason, because you had his
7 property; right?

8 A. I didn't want -- once he found out I wrote a statement
9 on him, I didn't want him to file charges on me for stealing
10 his property because I didn't steal his property. He give
11 me permission to use -- to take care of it till he got out.

12 Q. Well, let's talk a little bit about -- going back to
13 this tape again for a minute. You said you wouldn't give
14 him an alibi; right?

15 A. I wouldn't give him no alibi, yeah.

16 Q. But then you ask him on the tape if there's anything in
17 his car that you need -- he needs you to take care of?

18 A. Well, I asked him if there was anything -- basically
19 what I was doing at the time, I wanted him to know that --
20 not to think that I was the one that was writing a
21 statement. I didn't want to put it out like, well, I'm just
22 here to get information on you. I'm sorry. That I wasn't
23 there to get information on him, that I was just there to
24 talk to him about taking care of his business while he was
25 incarcerated.

1 Q. Right. But you were willing to do something with that
2 if he needed it done; right?

3 A. No, I wasn't. As far as that was ---

4 MR. THEM: Excuse me, Your Honor, I believe that
5 mike went off.

6 A. What was the question again? Interrupted me. Where
7 was I at?

8 Q. I believe the question was that you were willing to do
9 away with anything you thought he might want you to do away
10 with; right?

11 A. I told him that I would help him take care of, take
12 care, sell, whatever he needed sold to help him get out.

13 Q. All right. Let's jump back to the early morning of
14 August the 31st, which I believe is the date around -- you
15 say around four thirty, could have -- you said four thirty,
16 five o'clock; right?

17 A. I was talking to my friend approximately four thirty or
18 five o'clock.

19 Q. Could have been a little earlier, could have been a
20 little later?

21 A. I said approximately, so it could have been.

22 Q. Yes, sir.

23 A. But it wouldn't have been much later -- earlier. I
24 know it wasn't any earlier because it was day -- close to
25 day break.

- 1 Q. All right, sir. Now, ---
- 2 A. And approximately nine o'clock is when I called the
3 police.
- 4 Q. Nine o'clock what time?
- 5 A. A.m.
- 6 Q. A.m. Okay. So you met Mr. Clayton in where?
- 7 A. Evansville, Indiana under the Ohio Bridge.
- 8 Q. To your knowledge is that his hometown?
- 9 A. He told me his mom lived there, his brother lived
10 there, so as far as I knew, yes.
- 11 Q. Okay. And then y'all stayed there through the end of
12 August?
- 13 A. No, sir.
- 14 Q. Stayed there when then?
- 15 A. Through July. It was around the end of July when we
16 left.
- 17 Q. Okay. Now, you indicated that he had slept in his van.
18 You don't know that as a fact, do you, Mr. Young?
- 19 A. Yes, I do because he slept in his van at the apartment
20 where we worked at, where we was remodeling.
- 21 Q. Where you were working?
- 22 A. He told me he slept in his van on the street and he was
23 asked to move several times by the police in Evansville.
- 24 Q. And you said one time you went to Madison, Kentucky;
25 right?

- 1 A. Madisonville, yes, sir.
- 2 Q. Madisonville. Then you say you went back home. Did
3 you go to Florida?
- 4 A. No, back to Evansville. I was still working on the job
5 to finish it up.
- 6 Q. When did you finish that up?
- 7 A. I think it was like a week or two later. It was just
8 before they shut down in Lebanon, because we left two days
9 before they shut down in Lebanon.
- 10 Q. Well, when y'all weren't working, when y'all weren't
11 working did you hang out together?
- 12 A. Yeah.
- 13 Q. Okay. Drank together?
- 14 A. Yes, sir.
- 15 Q. Do all the things I guess men do together; right?
- 16 A. Pretty much.
- 17 Q. Okay.
- 18 A. There was a few times he wasn't around, but yeah, we
19 hung out quite a bit.
- 20 Q. Okay. So from Evansville, then you go to Lebanon,
21 Tennessee?
- 22 A. Yes, sir.
- 23 Q. During any of this time did Mr. Clayton have any
24 problems that you were aware of?
- 25 A. Not that I know of.

1 MR. THEM: Objection, Your Honor.

2 MR. DEJONG: I'm not going any further.

3 THE COURT: All right. I'll sustain the
4 objection.

5 Q. And from Lebanon you went to where?

6 A. Like I said, I thought it was either Lawrenceville or
7 Greenville. I'd have to check the schedule to be sure.

8 Q. Would that have been Greenville, North Carolina?

9 A. South Carolina, sir.

10 Q. I see. Okay. When you came to Greenville, Easley, did
11 you have a job and did Mr. Clayton have a job at that point
12 in time?

13 A. Yes, we did, on the Rock 'n Roll.

14 Q. Okay. So did you get that job while you were in
15 Lebanon?

16 A. Yes, sir, we did.

17 Q. When you say you have a job on the Rock 'n Roll, was
18 that to tear it down?

19 A. We tore it down in Lebanon and I was offered the job in
20 Lebanon before we left.

21 Q. Okay.

22 A. And Mr. Clayton was offered the same job by my foreman.

23 Q. But that would have been just to tear it down and set
24 it back up when you got to the next point?

25 A. That was for me to work the whole spot because he asked

1 me how much it would take for me to stay with them the rest
2 of the year. And I told him -- I set the price and told him
3 I'd have to be second in command.

4 Q. Well, then I understand, though, when you got to
5 Greenville you were the one that suggested that he go be a
6 jointer?

7 A. Yes, sir.

8 Q. Well, why would he do that if he had a job with you on
9 the Rock 'n Roll?

10 A. Well, just like I said in my earlier testimony, he has
11 the gift of gab and that's what a jointie -- that's how a
12 jointie makes money if they can draw people in with their
13 mouth.

14 Q. Well, when he left you on the Rock 'n Roll, that put
15 you in a bind on the Rock 'n Roll; didn't it?

16 A. No, sir, it did not because he's a good worker and he's
17 strong, but at his age I didn't think he could handle it.
18 That's why I put it up to him going to work in a joint.

19 Q. If I understood you correctly when you were testifying
20 sometime ago, you said that Detective Fowler and Captain
21 Sargent and a lady came up to the fairgrounds; is that true?

22 A. I think so, but I'm not for sure. I know a lady was
23 there and I'm thinking Captain was there and I'm thinking
24 Detective Fowler was there the first time.

25 Q. Okay. Was the lady with the police officers?

1 A. I don't know, sir.

2 Q. Did you ever talk with the lady?

3 A. No. I talked to the detectives themselves.

4 Q. When you talked to the detective, was the lady with the
5 detectives?

6 A. Yes, but this was a brown haired lady. I took it that
7 she was with the detective's office.

8 MR. DEJONG: Move to strike, Your Honor, as not
9 responsive.

10 THE COURT: Overrule that. I believe he can
11 explain his answer.

12 MR. DEJONG: May I have just a moment?

13 THE COURT: Yes, sir.

14 MR. DEJONG: Thank you, Mr. Young.

15 THE COURT: Any redirect?

16 MR. THEM: Yes, sir.

17 **REDIRECT EXAMINATION**

18 **BY MR. THEM:**

19 Q. The beer that you were drinking early that morning when
20 that fellow -- that car where you slept when Mr. Clayton
21 came up, where did you get that beer?

22 A. Danny had it.

23 Q. Did you go up there after work to the Hot Spot to buy
24 any beer?

25 A. That's so far long ago -- after work I usually did, but

1 I couldn't tell you whether I did that night or not.

2 Q. Did you ever bump into Mr. Clayton at the Hot Spot that
3 night buying beer?

4 A. No, I did not.

5 Q. Okay. Did you ever tell anybody that you did?

6 A. No, sir, I did not.

7 MR. THEM: May I approach, Your Honor?

8 THE COURT: Yes, sir.

9 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
10 approached the bar.)

11 THE COURT: Any other questions?

12 MR. THEM: Nothing further, Your Honor.

13 THE COURT: All right. Thank you, sir, you may
14 step down, Mr. Young.

15 Ladies and gentlemen, I'm gonna dismiss you for the
16 rest of the day. We'll be ready to start some more
17 testimony tomorrow. Let's again start at nine o'clock in
18 the morning. I trust that we will be able to finish this
19 case tomorrow. I believe we will. If you'll be in your
20 jury room at nine o'clock we'll be ready hopefully to start
21 right then at nine o'clock. Let me remind you again, this
22 evening you're gonna go home to loved ones, they're going to
23 be inquisitive about your service today and tell me what
24 happened and how did it go, interesting case, and all those
25 questions that obviously your loved ones and business

1 associates or folks you see out and about tonight might want
2 to know those things. But if you would, just tell them
3 you'll be glad to share that with them after this case is
4 over and done with. But while the case is going on is not
5 the time to do that. Again, don't discuss it with anyone,
6 even your fellow jurors as you get back in your jury room in
7 the morning. You've committed to these parties that you've
8 gonna decide it totally on what the evidence is, the law.
9 You haven't heard all the evidence yet, so it would be
10 improper for you to talk about the case to anyone. Have a
11 good evening, ladies and gentlemen. I'll see you back in
12 the morning at nine o'clock.

13 (WHEREUPON, the jury existed the open court at
14 approximately 5:21 p.m.)

15 THE COURT: The juror inquiry that we discussed
16 off the record and on the record about the juror who perhaps
17 had a professional relationship with one of the witnesses as
18 well as perhaps the investigator for the Public Defender's
19 Office, we'll make that Court Exhibit Number 1 just for the
20 record.

21 (WHEREUPON, Court Exhibit Number 2 was marked for
22 identification.)

23 MR. DEJONG: Your Honor, may I inquire. I noticed
24 laying on the bench here is this appointment sheet we had
25 some argument over.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Steve Young - Redirect Examination by Mr. Them

275

1 THE COURT: That was not made a court exhibit.

2 MR. DEJONG: Thank you, Your Honor, I just don't
3 want it to get mismatched.

4 THE COURT: It was offered by Mr. Them, but I
5 didn't ---

6 MR. DEJONG: Yes, sir, I just didn't want it to
7 get convoluted with what was admitted. Thank you.

8 THE COURT: He had the testimony of Ms. Watson.

9 All right. We'll be back at nine o'clock in the
10 morning.

11 MR. DEJONG: Thank you, Your Honor.

12 (WHEREUPON, court was adjourned for the day at
13 approximately 5:24 p.m.)

14 (WHEREUPON, court resumed at approximately 9:07 a.m.)

15 THE COURT: We ready to proceed, gentlemen?

16 MR. THEM: Yes, sir.

17 MR. DEJONG: Your Honor, I think we are. I spoke
18 to your clerk earlier. My mother's doctor's appointment is
19 situated. I'm not involved in that anymore. The only
20 thing, I'm now hearing there were twenty-eight people
21 arrested ---

22 THE COURT: I talked to Mark about that. He's
23 gonna see what he can do. But you need to be there early;
24 right?

25 MR. DEJONG: Yes, sir.

1 THE COURT: Doug Childs is coming up, I think, so
2 we'll try to accommodate you today. He's gonna check to see
3 how many you've got.

4 MR. DEJONG: Okay.

5 THE COURT: We'll sort of see how it is and see if
6 you can do them at twelve o'clock or postpone them till next
7 week.

8 MR. DEJONG: Very good. Thank you, Your Honor.

9 THE COURT: He's gonna be checking on that today.

10 MR. DEJONG: Thank you. So I am permitted to go
11 directly to the LEC in the morning?

12 THE COURT: Right. We'll do that, then that'll
13 give you a chance to talk to them.

14 All right. Let's have our jury come in.

15 (WHEREUPON, the jury entered the open court at
16 approximately 9:08 a.m.)

17 MR. THEM: May we approach, Your Honor?

18 THE COURT: Yes, sir.

19 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
20 approached the bar.)

21 THE COURT: Good morning, ladies and gentlemen. I
22 hope you had a good evening. I understand from the bailiff
23 that some of you, or at least one of you, has asked about
24 taking notes. It's certainly permissible for you to take
25 notes and we can provide pads and pencils for you. They

1 have those arranged for you now if you want to. Let me give
2 you a word of caution. While it's okay to take notes,
3 remember, your notes are not evidence. And what someone
4 remembers could very well be more accurate than your notes.
5 Notes can be wrong. Another thing about taking notes is you
6 sometimes miss the trial. You get busy taking notes and you
7 miss the demeanor of the witness and activities in the
8 courtroom. But if anybody would like to take notes, I'll be
9 happy for you to. The bailiffs can get you the pads and
10 pens. If you'll just raise your hand they can pass those
11 out. If you would get those for them, Mr. Evans.

12 Also, I've given you the precaution so much, I feel
13 like I need to emphasize about not talking to anyone. I
14 know in the bygone days when I was a lawyer, we almost felt
15 like we were high hating the jury because we wanted to make
16 sure that there was no allegation made that we were talking
17 to the jury. Good morning was about all we would want to
18 say. So as you see -- of course the bailiffs are there to
19 help you. But as you see attorneys and others around and
20 they seem to be unfriendly to you, of course, there's a
21 reason for that. Their training says that they don't in
22 anyway talk with you other than a good morning, how you
23 doing, sort of thing. So even though you're talking about
24 the weather or sports teams or something else, it can
25 certainly be perceived that an individual is trying to curry

1 favor with a juror. So everybody that's affiliated, of
2 course, wouldn't be talking. I hope you understand that.

3 All right, Solicitor, you may call your next witness.

4 MR. THEM: Call Detective Kett Fowler.

5 KETT FOWLER,

6 being duly sworn, testified as follows:

7 DIRECT EXAMINATION

8 BY MR. THEM:

9 Q. Would you give us your full name so we can test the
10 mike?

11 A. Detective Kett Fowler.

12 Q. Where are you employed?

13 A. Pickens County Sheriff's Office.

14 Q. In what capacity?

15 A. I'm an investigator.

16 Q. And how long have you been involved with the Pickens
17 County Sheriff's Department working there?

18 A. I've been employed almost eight years.

19 Q. Do you have any prior law enforcement training or
20 experience prior to the sheriff's office?

21 A. Military police.

22 Q. And have you attended the Criminal Justice Academy and
23 successfully completed your certification process?

24 A. I have.

25 Q. Okay. Now, let me call your attention to the end of

1 August of last year. Were you employed at the sheriff's
2 department then?

3 A. I was.

4 Q. On August 31st, which we believe was a Friday, were you
5 working that day?

6 A. I was.

7 Q. Okay. And did you also have weekend duty that would
8 cause you to work Saturday and Sunday?

9 A. I did.

10 Q. Let me just talk to you generally a second. When a
11 road deputy, a deputy that's out riding around, is sent to a
12 scene and interviews people, do they write reports?

13 A. They do.

14 Q. And what happens to those reports?

15 A. The reports are filed. And as an investigation, if
16 there's any further investigation to be done, then it's
17 assigned out to different investigators.

18 Q. Did you get involved in the investigation of this case?

19 A. I did.

20 Q. What was your first involvement?

21 A. My first involvement was when I received the report, I
22 review it, and if there's anything further that I can do,
23 then I would do that. Otherwise, it's assigned to whichever
24 investigator that would work it. And so I would just assign
25 the case.

- 1 Q. Did you see a report that a deputy that had interviewed
2 Steven Young, the gentleman that testified yesterday
3 afternoon?
- 4 A. I did.
- 5 Q. What was that deputy's name?
- 6 A. Anthony Raines.
- 7 Q. Okay. When did you see that report?
- 8 A. It would have been that Saturday morning after I came
9 in to work.
- 10 Q. Okay. And at that point in time, to your knowledge at
11 least, had any victim sort of person reported a crime or an
12 incident that might have tied in with what Mr. Young had
13 said on Saturday morning?
- 14 A. Not at that time.
- 15 Q. At some later point in the day did you receive a phone
16 call from Deputy Raines?
- 17 A. I did.
- 18 Q. A radio call?
- 19 A. I did.
- 20 Q. What did you do as a result of that?
- 21 A. Deputy Raines contacted me because he was aware of the
22 report that had been filed.
- 23 Q. He filed that report?
- 24 A. He responded to the initial call. And the next day he
25 was also working and received another call to respond where

- 1 the same type incident was being reported by the victim.
- 2 Q. Okay. And did you meet Deputy Raines at the victim's
- 3 home?
- 4 A. I did.
- 5 Q. Was anybody with you?
- 6 A. Captain Sargent responded with me and I had my sister
- 7 riding with me that day.
- 8 Q. It's been kind of confusing. Captain is his rank and
- 9 Sargent is his last name?
- 10 A. That's correct.
- 11 Q. Okay. Why would a captain go out on a call like that?
- 12 A. He -- Captain Sargent, we have an officer in charge,
- 13 which he was for that weekend, and I'm the investigator.
- 14 Q. All right. And did you interview the victim?
- 15 A. I did.
- 16 Q. Did you take a statement from her?
- 17 A. I'm not sure if I did or if ---
- 18 Q. Was a statement taken from her?
- 19 A. A statement was taken, yes.
- 20 Q. As a result of what she told you, what did you do?
- 21 A. From what she told me and from what had already been
- 22 reported, I went to the fairgrounds to meet with Mr. Young.
- 23 Q. Why did you go to the fairgrounds?
- 24 A. Because based on the report that had been filed, from
- 25 what Mr. Young had reported, we knew that a possible suspect

1 would be employed at the fair.

2 Q. Okay. So when you went to the fairgrounds, what did
3 you do?

4 A. I met with Mr. Young. I met with his supervisor. I
5 got a statement from Mr. Young, a written statement, because
6 he had not provided one at that time. Got basically
7 information to positively ID the alleged suspect.

8 Q. Did Mr. Young point out the suspect to you?

9 A. He did at some point.

10 Q. Did the pointing out of the suspect happen before or
11 after the victim took the big tour around the circle?

12 A. I'm not, I'm not sure if they actually pointed out. I
13 remember that the supervisor -- we explained to the
14 supervisor what was going on and that we needed to know if
15 Mr. Clayton was still working at the fair and if so where
16 at.

17 Q. When you interviewed Mr. Young at the fairgrounds that
18 day, did he give you a name of the person that had had a
19 conversation with him?

20 A. He actually named it to Deputy Raines. It was listed
21 in the report.

22 Q. Okay. Now, what -- were you able to confirm that Mr.
23 Clayton was at work that day?

24 A. Yes.

25 Q. What did you then do?

1 A. From that point we went back to the victim and asked
2 her if she could come to the fairgrounds and walk around and
3 see if she recognized the person that assaulted her.

4 Q. And did she do that?

5 A. Yes.

6 Q. At what time and on what day did that happen?

7 A. That was on Saturday.

8 Q. Okay. What time of day?

9 A. Late afternoon, early evening.

10 Q. Okay. And was the fair open?

11 A. It was.

12 Q. When you got there where did y'all go?

13 A. When we got there we just parked. We went in the main
14 gate and proceeded to walk around the entire perimeter of
15 the -- or the interior of the fair where the attractions
16 were.

17 Q. Okay. How many times did y'all make that loop around
18 the area that I think Mr. Young calls the midway?

19 A. Three times.

20 Q. Okay. Did anything -- excuse me. Did Ms. Jones alert
21 to anything on the first walk-around?

22 A. I don't recall her responding with any one particular
23 person that she thought might be the suspect on the first
24 time.

25 Q. On the second time?

1 A. On the second time it appeared to me as though she made
2 eye contact with Mr. Clayton. And then I really just waited
3 on her response.

4 Q. Was there ever any discussion with you and Ms. Jones
5 about another individual that she looked at?

6 A. The only other person that she responded to was one
7 other person that was at the fair that was an employee. And
8 it was not in the same area as Mr. Clayton. But she said he
9 had the same hair color.

10 Q. How do you know they're employees just looking at them?

11 A. Well, she made reference that the suspect was wearing a
12 fair T-shirt.

13 Q. Well, when you were making that tour and she looked at
14 somebody else, I believe you just said that person was a
15 fair employee?

16 A. I believe it was, yes.

17 Q. How do you know he was a fair employee?

18 A. Because they wore shirts.

19 Q. Would you describe these shirts somewhat?

20 A. Just different colors with the insignia that identified
21 them as being there with the carnival.

22 Q. What colors were they, bright colors, dark colors?

23 A. I don't recall.

24 Q. Okay. Now, on the third trip around, what if anything,
25 did Ms. Jones do?

- 1 A. On the second trip around, she stated that she believed
2 Mr. Clayton -- or she identified him as possibly being the
3 suspect.
- 4 Q. On the second or the third?
- 5 A. On the second.
- 6 Q. Okay.
- 7 A. We made another trip around, and on the third time
8 around, she again said she thought that he might be the
9 suspect.
- 10 Q. She said she thought what?
- 11 A. That he might be the -- that he looked similar.
- 12 Q. At that point in time did you ask her any questions
13 about how sure she was?
- 14 A. I did.
- 15 Q. What was her response?
- 16 A. She said she wasn't a hundred percent positive. I
17 asked her if she could scale it on her certainty and she
18 said she was about fifty percent sure.
- 19 Q. Okay. Then what happened?
- 20 A. From that point I made arrangements for her to go back
21 home, because at that point I no longer needed her there. I
22 contacted Mr. Young and asked him ---
- 23 Q. The gentleman that testified yesterday?
- 24 A. Yes, sir.
- 25 Q. Okay.

1 A. Because I had been talking with him. I made contact
2 with him, asked him to come to where I was, and I pointed
3 out the gentleman that the victim identified. I asked him
4 if that was the same person that he had had a conversation
5 with, and he said yes.

6 Q. Okay. And then what did you do?

7 A. From there we made contact with Mr. Clayton, made
8 arrangements for another employee to assume his attraction
9 there. I simply asked him if he would be willing to come
10 speak with me about a report that had been filed.

11 Q. Was he under arrest at this time?

12 A. No, sir.

13 Q. Had you already focused on him as a lead suspect?

14 A. Yes.

15 Q. I'm gonna show you a document that's been marked
16 State's Exhibit Number 1 for identification only, at this
17 point in time, and ask if you've ever seen that document and
18 if you have, what is it?

19 A. Yes. This is a *Miranda* rights form that I wrote
20 information on and read to Mr. Clayton.

21 Q. How do you use that when you're interviewing someone?
22 Tell me the process you go through if you will?

23 A. I explain that I need to speak with whoever it is about
24 a report that's been filed or whatever, and maybe if they've
25 been accused of something, that they're entitled to their

1 rights and all, and I explain what their rights are. I ask
2 if they're willing -- if they understand and if they're
3 willing to speak with ---

4 Q. Do you tell them what their rights are?

5 A. Yes, I do.

6 Q. Do you read them out?

7 A. I read every line.

8 Q. Where do you read it from?

9 A. From the form.

10 Q. Read it to me, please, what you read to him that day?

11 A. Okay. Before we ask you any questions you must
12 understand your rights. You have the right to remain
13 silent. Anything you say can be used against you in court.
14 You have the right to talk to a lawyer for advice before we
15 ask you any questions and to have him or her with you during
16 questioning. If you have no money to pay a lawyer's fee,
17 the court will appoint one to represent you without cost, if
18 you wish. If you decide to answer questions without a
19 lawyer present, you will still have the right to stop
20 answering at any time. You also have the right to stop
21 answering at any time until you talk to a lawyer.

22 Q. Okay. And did he appear to understand that?

23 A. Yes.

24 Q. What do these initials on the left hand side of the
25 paper just across from what you read mean?

- 1 A. I explain to them that if they understand I ask them to
2 initial beside each line.
- 3 Q. Each line?
- 4 A. Yes.
- 5 Q. And did he do so?
- 6 A. Yes.
- 7 Q. All right. And did -- after he told you he understood
8 those rights, did you go through a procedure whereby you
9 asked him if he was willing to waive those rights?
- 10 A. Yes.
- 11 Q. How did you do that?
- 12 A. I always ask the person -- at first I ask if they can
13 read and write and I ask about their education.
- 14 Q. Did you have any problems with Mr. Clayton's education
15 or his ability to read and write?
- 16 A. No. I made note that he was a high school graduate
17 with four years of college with a music degree.
- 18 Q. Okay.
- 19 A. At that point ---
- 20 Q. Sir?
- 21 A. Go ahead.
- 22 Q. Tell me what procedure you went through to have him
23 waive his rights if he was willing to do so?
- 24 A. Okay. I ask them to read out loud the waiver of
25 rights. It's a paragraph on the form. I ask ---

- 1 Q. You wanted him to read it?
- 2 A. Yes.
- 3 Q. Did he?
- 4 A. Yes.
- 5 Q. Would you read what he read to you?
- 6 A. Okay. I have read this statement of my rights and I
- 7 understand what my rights are. I am willing to make a
- 8 statement and answer questions. I do not want a lawyer at
- 9 this time. I understand and know what I am doing. No
- 10 promises or threats have been made to me and no pressure or
- 11 coercion of any kind has been used against me.
- 12 Q. Okay. And did he sign that?
- 13 A. Yes.
- 14 Q. Are there any witnesses indicated on there?
- 15 A. Yes.
- 16 Q. Who?
- 17 A. Captain Sargent.
- 18 Q. Did you watch -- are you on there as a witness?
- 19 A. Yes.
- 20 Q. Okay. Did you actually see him sign it?
- 21 A. Yes.
- 22 Q. Who is the person that signed that?
- 23 A. He did.
- 24 Q. Is he in this courtroom?
- 25 A. Mr. Clayton.

- 1 Q. Point him out?
- 2 A. I believe it's the Defendant between the two attorneys.
- 3 Q. Let the record reflect the witness is pointing at the
- 4 Defendant. Now, did he give you a written statement?
- 5 A. He did.
- 6 Q. Let me show you State's Exhibit Number 2 for
- 7 identification ---
- 8 A. Okay.
- 9 Q. -- and ask you if you've ever seen that before?
- 10 A. I have.
- 11 Q. What is that?
- 12 A. It's a voluntary statement.
- 13 Q. In whose handwriting, the body of it?
- 14 A. The body of the statement is Mr. Clayton's.
- 15 Q. Okay. And is it signed by Mr. Clayton?
- 16 A. It is.
- 17 Q. Is that signature witnessed by anyone?
- 18 A. Yes.
- 19 Q. Who?
- 20 A. Myself and Captain Sargent.
- 21 Q. The person that signed that statement that you have in
- 22 your hand, is he in the courtroom today?
- 23 A. Yes.
- 24 Q. Would you point him out, please?
- 25 A. Mr. Clayton.

1 Q. Let the record reflect that the witness is pointing at
2 the Defendant.

3 MR. THEM: Your Honor, I would move to admit
4 State's Exhibit Number 1 and State's Exhibit Number 2 into
5 evidence.

6 THE COURT: Any objection?

7 MR. DEJONG: May I see them, Your Honor, please?

8 THE COURT: Let them be reviewed by Defense
9 counsel, please.

10 MR. DEJONG: No objection to State's Exhibit
11 Number 2, Your Honor. I do have an objection to State's
12 Exhibit Number 1.

13 THE COURT: What's your ---

14 MR. DEJONG: May we approach?

15 THE COURT: Yes, sir.

16 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
17 approached the bar.)

18 (WHEREUPON, Court Exhibit Number 3 was marked for
19 identification.)

20 MR. DEJONG: As redacted, no objection, Your
21 Honor.

22 THE COURT: All right. Exhibits 1 and 2 are into
23 evidence.

24 (WHEREUPON, State's Exhibit Numbers 1 and 2 were
25 entered into evidence.)

1 Q. Would you read for me what the Defendant wrote on

2 State's Exhibit Number 2 into evidence?

3 A. It says on the night in question I was having beer with

4 an acquaintance, Steve Young, in parenthesis. I'm assuming

5 that we drank till approximately two a.m. Thereupon I

6 walked my dogs so that they could relieve themselves. Came

7 back to the van and went to sleep. Woke the next morning at

8 approximately ten till eleven a.m. I went back to work.

9 Occurred on Thursday, August 31st.

10 Q. Okay. Now, is that signed by the Defendant?

11 A. Yes.

12 Q. In your presence?

13 A. Yes.

14 Q. Was the 31st of August a Thursday or was it a Friday?

15 A. I believe the 31st was Friday.

16 Q. But the Defendant wrote Thursday?

17 A. Correct.

18 Q. Okay. Now, after you had this did you get a warrant?

19 A. After I obtained his statement, we explained, you know,

20 what had been reported and all and we asked if he would

21 consent to a search of his van.

22 Q. Okay. Did y'all look in his van?

23 A. We did.

24 Q. And what, if anything, did you find?

25 A. The only thing we found that had been mentioned as far

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Kett Fowler - Direct Examination by Mr. Them

293

1 as the report and all, there was a footlocker that had
2 numerous knives ---

3 MR. DEJONG: Your Honor, I'm gonna object to that.

4 THE COURT: Your objection?

5 MR. DEJONG: Unless they can show some nexus
6 between what they are now talking about and this crime it is
7 not relevant.

8 MR. THEM: May we approach, Your Honor?

9 THE COURT: Yes, sir.

10 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
11 approached the bar.)

12 Q. When you searched the car -- I'm sorry. When you
13 searched the vehicle did you find anything in that
14 footlocker?

15 MR. DEJONG: And Your Honor, I don't mean to
16 interrupt. Just for the record, I don't think you ruled on
17 the objection on the record after a bench conference, so if
18 you would rule, please, sir.

19 THE COURT: I overrule your objection, Mr. Dejong.
20 I'll let him answer.

21 Q. What did you find in the footlocker?

22 A. We found a footlocker that had numerous knives and also
23 there was a box of ---

24 Q. That's not important. The knives that you found, were
25 they -- can you tell me what kind of knives they were?

1 A. It was different types. I don't recall if there were
2 any -- pocket knives most likely, I would guess.

3 Q. When you say pocket knives, tell me what you mean?

4 A. Folding type.

5 Q. Folding knives. Okay.

6 A. I do know there were some fixed blade knives.

7 Q. Fixed blade, that's a solid blade?

8 A. Yes.

9 Q. Were you able to tie any of those knives that you found
10 there to this crime?

11 A. No.

12 Q. Okay. Now, after that what did you do?

13 A. We basically just photographed the van and the
14 footlocker and whatnot. And from there I had contacted the
15 magistrate and explained, you know, what the facts were at
16 that time, with what I had going on. And at that point the
17 magistrate issued a warrant for Mr. Clayton.

18 Q. And did you go back and arrest the Defendant?

19 A. We stayed there until the road supervisor contacted us
20 when they did have an arrest warrant and at that point he
21 was arrested.

22 Q. When you took him into custody, was it at the
23 fairgrounds?

24 A. Yes.

25 Q. At his booth?

- 1 A. I guess it was at his van.
- 2 Q. Did you handcuff him?
- 3 A. Yes.
- 4 Q. Did anything happen as he was walking out of there that
- 5 involved Mr. Young that testified yesterday afternoon?
- 6 A. He asked if we could go by where his friend was so that
- 7 he could give him his keys to his van and so that he could
- 8 take care of his property.
- 9 Q. All right. Then what happened?
- 10 A. From there we came back to the sheriff's office and he
- 11 was booked in.
- 12 Q. Okay. At some later point in time did you have any
- 13 contact with Mr. Young, the witness who testified yesterday
- 14 afternoon?
- 15 A. Yes.
- 16 Q. What was Mr. Young talking to you about?
- 17 A. On September the 5th, about four days later, Mr. Young
- 18 contacted me and he told me that Mr. Clayton had contacted
- 19 him asking if he could come visit with him.
- 20 Q. At some point in time did you set that up?
- 21 A. I did.
- 22 Q. When was that visit to take place?
- 23 A. I told Mr. Young that I would contact him later. You
- 24 know, he just explained to me what -- kept me up to date on
- 25 what was going on, I guess. But on the 7th I made

1 arrangements for Mr. Young to visit.

2 Q. Now, when Mr. Young came to visit Mr. Clayton, did he
3 go straight in to see Mr. Clayton or did he go some place
4 first?

5 A. He went somewhere else first.

6 Q. Where?

7 A. To the sheriff's office conference room.

8 Q. For what reason?

9 A. To be wired up for audio surveillance.

10 Q. When you say wired up, tell us what you mean?

11 A. Place a microphone and a recorder on his person for
12 audio recording.

13 Q. Okay. And is that what we heard on the tape at the
14 beginning of -- the CD, I'm sorry, I'm an old timer?

15 A. Yes, it is.

16 Q. Is that right?

17 A. Yes, sir.

18 Q. All right. So then how far away is this conference
19 room from this visitation area?

20 A. It's in the same building. It's on the ground floor
21 level and you have to walk up the steps and basically across
22 the upstairs of the building.

23 Q. Now, can you describe this visitation area for us?

24 A. It's a small area that has like -- I'll describe it
25 somewhat like phone booths, but larger. It's kind of like

- 1 this booth here except it has walls that go completely to
2 the ceiling. It has a glass front with telephone, probably
3 four, five or six booths.
- 4 Q. Are those booths wired for secret recording?
- 5 A. Not necessarily.
- 6 Q. Okay. Are those booths wired in such a way that
7 someone can go to a control panel and watch what's going on?
- 8 A. The area is monitored by camera.
- 9 Q. Okay. Now, was Mr. Young able to visit with Mr.
10 Clayton?
- 11 A. Yes.
- 12 Q. Was there anything between them while they were
13 visiting?
- 14 A. Only the glass partition.
- 15 Q. Based on your experience, could you and I have a
16 conversation through that glass?
- 17 A. I've not personally used those booths, but I would -- I
18 believe you could probably hear out and back without use of
19 the phone, but it might be very loud. You'd had to talk
20 loud.
- 21 Q. Okay. Now, did you observe the entire visit?
- 22 A. I did monitor the visit.
- 23 Q. Was the recording device running from the time Mr.
24 Young had it put on him in the conference room and during
25 his walk from the conference room to the visitation area and

1 during the visitation, as well as his walk back to some
2 place else?

3 A. Yes.

4 Q. Okay. After the visitation where did he go, Mr. Young?

5 A. Mr. Young came back to the control room where I was
6 just right around the corner. I met with him and we went
7 back downstairs to the conference room and stopped the
8 recording and took the wire off.

9 Q. So all of that was recorded on that CD?

10 A. Yes.

11 Q. Okay. Just one second, please. The -- I'm switching
12 subjects entirely now, sir. The description that's on the
13 warrant about height and weight, size and all that, where do
14 you get that information?

15 A. The description that's on the warrant?

16 Q. Yeah, the description -- the physical description of
17 the Defendant, where do you get that information?

18 A. I primarily use his driver's license information.

19 Q. What did you use in this case?

20 A. Let me find the warrant. I'm not sure what it says.
21 The warrant says white male, six two ---

22 Q. I want to know where you got that information in this
23 case, first?

24 A. I can't say for sure. I most likely relayed my
25 estimates from seeing him.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Kett Fowler - Direct Examination by Mr. Them

299

1 Q. Okay. And what does it indicate as your estimates?

2 A. Six two, two twenty, with a ---

3 Q. Does the Defendant -- I'm sorry. Does the Defendant
4 look any different to you today than he did on the date you
5 interviewed him and arrested him?

6 A. He does.

7 Q. How does he look different?

8 A. It appears that he may have lost some weight and his
9 hair is shorter and it's not the same color really.

10 Q. What color was it on the day you arrested him?

11 A. More of a blonde.

12 Q. Do you remember how it was styled or how it was combed?

13 A. It was -- I don't know, it was like parted in the
14 middle and it was longer. The bangs were longer.

15 Q. Okay. And you say he's lost weight. How much weight
16 does it appear to you he's lost from that day until today?

17 MR. DEJONG: Your Honor, I'm going to have to
18 object to this.

19 THE COURT: I sustain the objection.

20 MR. THEM: May I approach, Your Honor?

21 THE COURT: Yes, sir.

22 (WHEREUPON, Mr. Them, Mr. Dejong and Mr. Ball
23 approached the bar.)

24 Q. You indicated on the warrant you thought he weighed two
25 hundred and twenty pounds. What do you think he weighs

1 today?

2 A. I would estimate between one eighty-five and one
3 ninety-five.

4 Q. Okay.

5 MR. THEM: I have no further questions of this
6 witness, Your Honor.

7 THE COURT: You may cross examine.

8 MR. DEJONG: Thank you, Your Honor, may it please
9 the court.

10 **CROSS EXAMINATION**

11 BY MR. DEJONG:

12 Q. So that I'm clear, the alleged assault purported took
13 place on September the 31st; right?

14 A. No, sir, August.

15 Q. August the 31st, that's right.

16 A. Well, night of -- early morning hours of the 31st.

17 Q. Early morning hours of August the 31st; right?

18 A. Correct.

19 Q. Now, what time did you have contact with Mr. Clayton on
20 September the 1st?

21 A. Mr. Clayton? I think on the exhibit it's around six
22 o'clock.

23 Q. I notice you have notes with you on the witness stand.
24 Are you using those to refresh your memory?

25 A. Just the report, my supplemental report.

1 MR. DEJONG: Your Honor, I would request I be
2 allowed to see the notes he's using to refresh his memory.

3 (WHEREUPON, Mr. Dejong reviewed Detective Fowler's
4 notes.)

5 MR. THEM: Your Honor, I wonder if we could just
6 have him pull his notes out of that file so that the
7 information Mr. Dejong is looking at is what he asked for.

8 MR. DEJONG: He had the whole file up there. I've
9 scanned it. I know basically what we're talking about.

10 MR. THEM: Okay.

11 Q. So you met with Mr. Clayton at what time?

12 A. It was around six o'clock, whatever time is on the
13 exhibit from earlier.

14 Q. Okay. That would have to be on that evening, six
15 o'clock in the evening?

16 A. Correct.

17 Q. On the 1st?

18 A. Correct.

19 Q. Well, when you went to the fairground the first time, I
20 believe it was the first time, that's when you met with
21 Young; right?

22 A. Correct.

23 Q. Now, when you met with Young, did he point out to you
24 Clayton at that point in time?

25 A. I don't believe he did. From what I remember I think

- 1 the supervisor went and found where he was located.
- 2 Q. And that was shared with you?
- 3 A. Correct.
- 4 Q. And then did you go by there?
- 5 A. I can't say for sure. I may have.
- 6 Q. Well, here's the question. Before you took the alleged
- 7 victim to the fairground to do this traipse around the
- 8 fairground, you knew who Kent Clayton was; didn't you?
- 9 A. I did.
- 10 Q. You knew what he looked like?
- 11 A. I believe so, yes.
- 12 Q. And you knew where he worked?
- 13 A. Yes, I knew what station he was at.
- 14 Q. Now, jumping back up to September the 1st around six
- 15 o'clock sometime in the evening, when you saw Mr. Clayton
- 16 did he have any scratches on him?
- 17 A. I don't recall seeing any.
- 18 Q. You take any pictures of him?
- 19 A. We have a booking photo, yes.
- 20 Q. Other than the booking photo, did you take any pictures
- 21 of him?
- 22 A. I don't believe we did.
- 23 Q. Have any bruises on him?
- 24 A. I don't recall seeing any.
- 25 Q. There was nothing remarkable about his appearance when

1 you talked to him at six o'clock on September the 1st; was
2 there?

3 A. No, sir.

4 Q. Now, you received the report from Officer Raines;
5 right?

6 A. Not directly, but it's filed at the sheriff's office
7 and I received it.

8 Q. Well, his report comes into your possession; does it
9 not?

10 A. Yes, sir, it does.

11 Q. And in part you base your investigation on his report;
12 correct?

13 A. Correct.

14 Q. Now, in this report was there a description of the
15 alleged assailant by the alleged victim?

16 A. Not in the report that he filed that morning. The
17 report I got that morning was not ---

18 Q. Okay.

19 A. -- he had not spoke with the victim.

20 Q. Well, all of the reports come into your possession,
21 whether you generate it or some other law enforcement
22 officer generates it; right?

23 A. Yes.

24 Q. And in those reports there is a description that was
25 given by the alleged victim; was there not?

1 A. The description in the initial report was not provided
2 by the victim.

3 Q. Who was that provided by?

4 A. Mr. Young.

5 Q. Well, I believe you have the whole file up there.

6 Could you refer to -- would you refer to, added by A.

7 Raines, 9/1/2007, 16:25. Correction, that's the top of page

8 ---

9 MR. THEM: Objection, Your Honor, I think he's
10 getting into hearsay asking this officer to say what some
11 other witness might say.

12 MR. DEJONG: I don't think it's hearsay, Your
13 Honor. He's the detective. He had the reports and he's
14 already testified he based his investigation on these
15 reports. I think I'm entitled.

16 THE COURT: Objection is overruled.

17 MR. DEJONG: Thank you, Your Honor.

18 A. Yes, sir, I have that page.

19 Q. Well, who is Lisa?

20 A. That would be the victim.

21 Q. And in that report is it not stated she did not notice
22 any unusual markings or facial hair on the subject?

23 A. Yes, it does.

24 Q. Well, when you went around the fairground the first
25 time she indicated that there was somebody there that she

1 thought might be the person; right?

2 A. I don't know if she identified anybody on the first
3 time around. It's possible.

4 Q. First second or third, there was another individual
5 that she basically hesitated on or pointed out; right?

6 A. Yes, sir.

7 Q. Did you ever talk to that individual?

8 A. No, sir.

9 Q. Did that individual have facial hair?

10 A. I don't recall.

11 Q. Did he have blonde hair?

12 A. I believe he did.

13 Q. Was he about six two, six four?

14 A. I'm not sure.

15 Q. Weight about two hundred twenty or two hundred forty
16 pounds?

17 A. I can't recall.

18 Q. What time, if you know or the investigation reflects,
19 what time did the alleged victim call on this case?

20 A. I believe the call came in at around one p.m. I
21 believe it was one oh nine, to be exact.

22 Q. One p.m. on what day?

23 A. On Saturday the 1st.

24 Q. Okay. So that would have been in excess of twenty-four
25 hours of when this alleged assault occurred; would it have

1 not?

2 A. Yes.

3 Q. Now, there have been certain pictures introduced into
4 evidence by the State, Mr. Fowler. Do you know when those
5 pictures were taken?

6 A. Which pictures are you referring to?

7 Q. I apologize, sir. That was an unfair question to ask
8 you. I am referring to what has been marked as State's
9 Exhibit 3, State's Exhibit 4 and State's Exhibit 5.

10 A. These are photographs taken of the victim by Deputy
11 Raines while we were at her residence.

12 Q. Which time?

13 A. When we responded at around one p.m.

14 Q. Okay. So those are pictures of the alleged victim that
15 were taken in excess of twenty-four hours after the alleged
16 assault?

17 A. Yes, sir.

18 Q. To your knowledge, Mr. Fowler, did the alleged victim
19 in this case ever seek any kind of medical treatment?

20 A. To my knowledge she did not.

21 Q. So after you take these pictures of the alleged victim,
22 then you go back to the fairground; right?

23 A. Myself and Captain Sargent went.

24 Q. And that's when you met with Young?

25 A. Yes, sir.

1 Q. Now, how long were you there with Young?

2 A. Maybe an hour.

3 Q. Okay. Well, let me back up just a little bit. You say
4 the alleged victim called sometime around one or after one
5 on September the 1st?

6 A. Yes.

7 Q. Correct? What time did you respond to that call, if
8 you recall?

9 A. I responded as soon as Deputy Raines contacted me.

10 Q. Okay. Well, would that have been around one, one
11 thirty, two o'clock?

12 A. One forty-five or so.

13 Q. And then how long were you there with the alleged
14 victim?

15 A. Again, probably an hour maybe, hour and a half, long
16 enough to get a statement and photograph things.

17 Q. Okay. Then you go to the fairground?

18 A. Yes, sir.

19 Q. And you're there with Young for approximately an hour?

20 A. Estimation, yes. Long enough to get a statement, get a
21 positive ID on Mr. Clayton and information that we would
22 need.

23 Q. So at that point in time then that I understand, you
24 are now telling me you got a positive identification from
25 ---

- 1 A. Employee records.
- 2 Q. From Young; right?
- 3 A. From the supervisor.
- 4 Q. As to who Clayton was?
- 5 A. Yes.
- 6 Q. Then you leave the fairground and go back to where the
7 alleged victim is; right?
- 8 A. Yes.
- 9 Q. Now, who goes with you when you go back to the alleged
10 victim? Is Captain Sargent still with you?
- 11 A. Yes.
- 12 Q. What discussions did you and Captain Sargent and the
13 alleged victim have when you got back to her house?
- 14 A. We mainly just wanted to know if she felt like she
15 could identify the suspect if she saw him, and asked if the
16 person would be working at the fair if she would be able to
17 identify him, and if so, would she be willing to go down
18 there and see him.
- 19 Q. So you then took her to the fairground?
- 20 A. Yes, sir.
- 21 Q. Did you drive, did you walk? How did you get there?
- 22 A. We drove.
- 23 Q. Were there further discussions about this while you
24 were driving from wherever you picked up the alleged victim
25 to the fairground?

- 1 A. Just -- not really. We explained what we wanted her to
2 do if she was willing and able to do that.
- 3 Q. Okay. So you go in the front gate and you start
4 walking?
- 5 A. Yes.
- 6 Q. Did Captain Sargent walk with you?
- 7 A. I believe so, yes.
- 8 Q. So in terms of the walking, was it -- she was in the
9 middle between y'all?
- 10 A. I don't recall. It was just a small group that walked.
- 11 Q. Okay. So now the first time you walk around she
12 identifies no one?
- 13 A. I don't recall her responding with anyone.
- 14 Q. Or certainly didn't even think she maybe kind of
15 halfway was sure of Mr. Clayton -- she didn't point out Mr.
16 Clayton on the first walk-around?
- 17 A. No, sir.
- 18 Q. Now, on that first walk-around, though, you knew where
19 Clayton was; didn't you?
- 20 A. I did.
- 21 Q. And you knew what he looked like; didn't you?
- 22 A. Yes.
- 23 Q. And then nothing, so you walk her around again; right?
- 24 A. Yes, sir.
- 25 Q. Well, on the first walk-around, how many people there

1 at the fair did it appear to you that she made eye contact
2 with?

3 A. I couldn't say for sure. I mean, the purpose for being
4 there was for her to look at people.

5 Q. Yes, sir. But you were pretty sure on the second time
6 around she made eye contact with Mr. Clayton; weren't you?

7 A. It appeared to me as though she made eye contact with
8 him.

9 Q. But it didn't appear to you that she ever made eye
10 contact with anybody else?

11 A. There was one other person.

12 Q. Right.

13 A. I basically let her walk and let her respond if she saw
14 someone that she thought looked like the suspect.

15 Q. And as you were walking you say there was no
16 conversation?

17 A. Not really.

18 Q. Well, not really. Does that mean there was or there
19 wasn't?

20 A. There may have been general conversation, but the
21 purpose for me being there was for her to walk around and
22 respond to me if she saw someone that looked like the
23 suspect.

24 Q. So you made a complete -- well, actually you made three
25 complete loops around the midway; right?

- 1 A. Yes.
- 2 Q. And you went in the front gate?
- 3 A. Yes.
- 4 Q. Where's the back gate in relationship to the front
- 5 gate?
- 6 A. I'm not familiar with the back gate at the fairgrounds.
- 7 There's the main entry gate. There are some gates along
- 8 that side that parallels the parking area.
- 9 Q. Well, during all these walks did the alleged victim
- 10 ever -- did you ever ask, point out where this alleged
- 11 assault took place?
- 12 A. I believe she just said the rear parking lot, the
- 13 parking area.
- 14 Q. That is outside the midway area or would be outside the
- 15 back gate; would it not?
- 16 A. It would be outside the fenced area of the fairgrounds.
- 17 Q. Okay. Coming back to your walk around the fairground.
- 18 I believe you said the fair was open?
- 19 A. Yes, sir.
- 20 Q. This was on Saturday?
- 21 A. Yes, sir.
- 22 Q. It would have been Saturday late afternoon, I presume?
- 23 A. Yes.
- 24 Q. Quite a few people there?
- 25 A. Yes, sir.

- 1 Q. People moving about, milling about?
- 2 A. Yes, sir.
- 3 Q. Well, when you took her there initially, did you ask
4 her to look at everybody or did you ask her to zero in on
5 fair personnel? What did you ask her to do?
- 6 A. I asked her to just look around. But she had mentioned
7 that she somewhat recalled a fair T-shirt. So obviously it
8 was look at the people with fair T-shirt or shirts.
- 9 Q. Okay. So finally on the third trip she says, that
10 might be the person?
- 11 A. She said she believed it could be the suspect.
- 12 Q. Fifty percent sure?
- 13 A. Yes, sir.
- 14 Q. Fifty percent unsure; right?
- 15 A. Yes, sir.
- 16 Q. Not much difference than the first person she talked
17 about; was there?
- 18 A. She -- the reason I didn't speak with the other person
19 that she made reference to was she watched him long enough
20 to decide that he was not the suspect, that he only had a
21 similar hair color.
- 22 Q. So there were times that you stopped walking and then
23 would start walking again; right?
- 24 A. Yes, sir.
- 25 Q. And you didn't -- you set the pace; right?

- 1 A. She set the pace.
- 2 Q. She set the pace. I see. You didn't wire her ---
- 3 A. No, sir.
- 4 Q. You didn't wire yourself?
- 5 A. No, sir.
- 6 Q. We have no recordings; do we?
- 7 A. No, sir.
- 8 Q. Not even a video; do we?
- 9 A. No, sir.
- 10 Q. So based on how fast you walked or when you stopped or
- 11 whatever else, we don't know other than based on your
- 12 memory; right?
- 13 A. And hers, I guess.
- 14 Q. So after that, did you, did you talk to Young again?
- 15 A. I did.
- 16 Q. While she was there with you?
- 17 A. No, sir.
- 18 Q. Where was she?
- 19 A. I had her -- I made arrangements for her to go back
- 20 home.
- 21 Q. So at that point in time -- and you said you made
- 22 arrangements for the alleged victim to go home and you
- 23 stayed at the fairgrounds?
- 24 A. Correct.
- 25 Q. And that's when you talked to Mr. Clayton?

- 1 A. After I spoke with Mr. Young, I approached Mr. Clayton.
- 2 Q. Now, when you talked to Mr. Clayton, he was not under
- 3 arrest; was he?
- 4 A. No, sir.
- 5 Q. Did you tell him he wasn't under arrest?
- 6 A. Probably. I don't recall exactly.
- 7 Q. Was he free to go?
- 8 A. Yes, he was.
- 9 Q. Was he in any kind of custody?
- 10 A. No, sir.
- 11 Q. And when he was free to go, not under arrest and not in
- 12 any kind of custody, that's when you Mirandize him?
- 13 A. Yes, sir.
- 14 Q. Now, after that you took him, I gather, to the Pickens
- 15 County Law Enforcement Center?
- 16 A. Later on.
- 17 Q. Yes, sir.
- 18 A. I basically, when I approached him, I asked him if he
- 19 would be willing to speak with me regarding a report that
- 20 had been filed. He agreed, walked freely with me and
- 21 Captain Sargent out of the area of the public and all and we
- 22 talked with him.
- 23 Q. Yes, sir. Then after that walk, that's when you
- 24 decided to take him in and arrest him; right?
- 25 A. Well, after we looked in his van, after I spoke with

1 the magistrate, told him what the situation was, and the
2 magistrate issued a warrant.

3 Q. At what point after he was arrested did you give him
4 his *Miranda* warnings?

5 A. After he was arrested?

6 Q. Yes, sir?

7 A. I did not.

8 Q. So after he was arrested you never gave him his *Miranda*
9 warnings?

10 A. No, sir.

11 Q. I see. Okay. Now, on September the 5th -- yeah,
12 September the 5th. The months get a little confusing there
13 sometimes. On September the 5th, that's when Young
14 contacted you about the visitation; right?

15 A. Yes.

16 Q. Now, you didn't hear any -- well, you asked him if he
17 got contacted again to call you; right?

18 A. I did.

19 Q. Now, you didn't hear anything from him, so you
20 contacted him two days later on September the 7th?

21 A. I did.

22 Q. And actually at that point in time you asked him to
23 come in and set up a visitation with Mr. Clayton?

24 A. I asked him if he still wanted to come visit with Mr.
25 Clayton.

1 Q. Yes, sir. But that was at your request?

2 A. It was -- well, it was a follow-up to his contacting
3 me.

4 Q. Yes, sir. But nonetheless, it was your contact on the
5 7th?

6 A. Correct.

7 Q. All right, sir. Now, so Young comes in and he agrees
8 to be wired?

9 A. Yes.

10 Q. He was wired with Pickens County Sheriff's Office
11 equipment?

12 A. Yes.

13 Q. He is wired by Pickens County Sheriff's Office
14 deputies?

15 A. Yes.

16 Q. And I gather Mr. Clayton never knew he was being
17 recorded; did he?

18 A. I assume he did not, no.

19 Q. And the point of wiring him was that law enforcement
20 wanted a copy of the conversation; didn't they?

21 A. That was my purpose. Yes.

22 Q. Certainly. And the microphone that was put on Mr.
23 Clayton was not visible to anybody -- I'm sorry. The
24 microphone that was put on Mr. Young was not visible to
25 anyone that would have been looking at Mr. Young?

- 1 A. No.
- 2 Q. And then you proceed to arrange the visit?
- 3 A. Yes.
- 4 Q. Do you recall what day of the week this -- the 7th was
- 5 on?
- 6 A. I believe it was a Friday.
- 7 Q. Okay. Are you familiar with the rules of the jail, Mr.
- 8 Fowler? As to visitation?
- 9 A. Vaguely, yes.
- 10 Q. Pardon?
- 11 A. I'm vaguely familiar, yes.
- 12 Q. Is it not true that there is not normally visitation on
- 13 Friday afternoons with inmates?
- 14 A. It's my understanding that visitations are arranged on
- 15 Sundays.
- 16 Q. Right. So that being the case, then you certainly had
- 17 to arrange the visitation for him to get -- for Young to get
- 18 in the jail to see Clayton?
- 19 A. I did.
- 20 Q. So that was out of the norm of the jail policy; right?
- 21 A. Out of the normal procedure, yes.
- 22 Q. Yes, sir. So the wire was put on Young in the
- 23 conference room?
- 24 A. Yes.
- 25 Q. Is that upstairs or downstairs, by the way?

- 1 A. Downstairs.
- 2 Q. Thank you, sir. And then what happened after that we
3 have listened to in the courtroom; right?
- 4 A. Yes.
- 5 Q. This wire, did -- when someone is wired, do they wear
6 like a little Walkman recorder and it's recorded on that?
7 Or how does that wire work?
- 8 A. Yes. It's a recorder that's worn on them and records.
- 9 Q. And then law enforcement will -- let me back up here.
10 So as soon as the visit was over, Young goes back down to
11 the conference room or some place in the jail; right?
- 12 A. He met with me at the control room.
- 13 Q. And you immediately take possession of that tape?
- 14 A. I didn't.
- 15 Q. Law enforcement?
- 16 A. Law enforcement did, yes.
- 17 Q. Yes. Now, when you were out there at the fairground
18 and Mr. Clayton was not under arrest, he was not in custody,
19 he was free to go and you gave him his *Miranda* warnings, did
20 you ever give him a copy of those *Miranda* warnings?
- 21 A. Not the *Miranda* warnings, no.
- 22 Q. All right, sir. So you read them to him, you say he
23 signed them, boom, that was it?
- 24 A. Yes, sir.
- 25 Q. Well, how about the statement you say that he gave, was

- 1 he ever given a copy of that?
- 2 A. I believe he was. That's normal procedure.
- 3 Q. Well, I'm really not asking you -- I'm not trying to be
4 flippant here, Mr. Fowler. I'm not asking you what is
5 normal procedure. Do you know what was done in this case?
- 6 A. Yes, it was.
- 7 Q. Did you ever take his van, speaking of Mr. Clayton's
8 van, and go put it in property and evidence?
- 9 A. No, sir.
- 10 Q. You never took possession of that van?
- 11 A. No, sir.
- 12 Q. And were you aware that he had another vehicle there?
- 13 A. I don't recall having knowledge of that.
- 14 Q. I guess without that knowledge then certainly you would
15 have never taken that into ---
- 16 A. No, sir.
- 17 Q. -- property and evidence either; would you?
- 18 A. No, sir.
- 19 Q. You say that Mr. Clayton gave you consent to search?
- 20 A. Yes.
- 21 Q. Was that in writing?
- 22 A. Yes.
- 23 Q. And you searched the van?
- 24 A. Yes.
- 25 Q. Did you make an inventory?

- 1 A. No, sir. We didn't take anything from the van.
- 2 Q. So there was nothing in there worth -- evidentiarily
- 3 worth preserving as evidence; was there?
- 4 A. We never found anything that we could directly link to
- 5 what was reported.
- 6 Q. And these knives you say you found in the truck, that
- 7 was an assortment of knives; wasn't it?
- 8 A. Yes, it was.
- 9 Q. And none of those knives you can say had anything to do
- 10 with the allegations of this case; can you?
- 11 A. I cannot say that, no.
- 12 Q. And certainly you didn't take any of them into property
- 13 and evidence; did you?
- 14 A. No, sir.
- 15 Q. When you searched his van was it secured? Was it
- 16 locked?
- 17 A. I believe it was.
- 18 Q. Did you find any of Mr. Young's property in there?
- 19 A. Not specifically. I can't say there was anything of
- 20 his or not. I don't know whose was whose.
- 21 Q. Well, you can't say even that the knives then belonged
- 22 to Mr. Clayton or Mr. Young; can you?
- 23 A. I can't, no, sir.
- 24 Q. After September the 7th, until within the last day or
- 25 so, did you ever have any contact more -- anymore contact

- 1 with Young?
- 2 A. I've maintained contact with him since September.
- 3 Q. But nothing specifically, just maintaining contact?
- 4 A. Correct.
- 5 Q. Well, did he ever bring any money to the law
- 6 enforcement center?
- 7 A. No, sir.
- 8 Q. Did he ever bring any items to the law enforcement
- 9 center?
- 10 A. He brought Mr. Clayton's out-of-state driver's license.
- 11 Q. That was sometime after the 7th; right?
- 12 A. I believe so, yes.
- 13 Q. That was after this recording y'all had done in the
- 14 visitation room?
- 15 A. That's correct. I believe it was on the 7th when he
- 16 brought the license.
- 17 MR. DEJONG: If I may have one moment, please,
- 18 Your Honor.
- 19 THE COURT: Yes, sir.
- 20 MR. DEJONG: Thank you, Mr. Fowler.
- 21 THE COURT: Anything on redirect?
- 22 MR. BALL: Judge, we've got a juror, I believe,
- 23 that's holding up his hand.
- 24 THE COURT: Yes, sir, let's take a short break.
- 25 We'll take a break before the redirect. We'll take about a

1 five minute break.

2 (WHEREUPON, the jury exited the open court at

3 approximately 10:15 a.m.)

4 (WHEREUPON, the court stood at recess for a short
5 break.)

6 MR. THEM: Your Honor, before the jury comes back
7 in, I have a matter to bring before the court.

8 THE COURT: All right. Be glad to hear from you.

9 MR. THEM: Mr. Dejong in his cross examination of
10 the witness asked the witness about did the victim talk
11 about the Defendant having a mustache. I've looked at the
12 booking photograph of the Defendant when he was taken into
13 custody on September the 1st, and he does have a mustache,
14 but it's blonde and, remember, this crime is alleged to have
15 occurred at about one or two o'clock in the morning. I
16 would like to put that photograph -- the booking photograph
17 in evidence to show the light color of the mustache so that
18 I can argue that it wouldn't -- it possibly very easily
19 could not have been seen at night in a dark area because of
20 its color and it would be different if it had been a black
21 mustache or something like that. And I'm assuming that this
22 victim will authenticate the photograph that way. So rather
23 than do that when the jury's out here, I might as well tell
24 you I'm planning to do it right now, so Mr. Dejong can do
25 what he needs to do.

1 THE COURT: Any objection to the photograph?

2 MR. DEJONG: I do, Your Honor, in this regard.

3 She's already testified he had a mustache. My examination
4 of Detective Fowler was basically because of what she said,
5 a prior inconsistent statement. That was my purpose, that
6 was my sole purpose, and as far as the Solicitor's argument
7 goes on light colored mustache or dark color mustache, I
8 also said his hair was blonde. So I don't imagine blonde
9 hair would be any easier to see than a mustache or a lack of
10 a mustache. At this point in time I don't particularly see
11 the relevance of entering -- of introducing that booking
12 sheet.

13 MR. THEM: Might I ask Mr. Dejong a question?

14 THE COURT: Yes, sir.

15 MR. THEM: Are you taking the position that she
16 testified when she was on the stand that he had a mustache?

17 MR. DEJONG: Yes.

18 MR. THEM: Thank you very much. I'll withdraw.

19 THE COURT: Problem resolved. Let's bring our
20 jury back.

21 (WHEREUPON, the jury entered the open court at
22 approximately 10:27 a.m.)

23 THE COURT: Mr. Them, you may redirect anything
24 you have of this witness.

25 MR. THEM: Thank you, Your Honor.

1

REDIRECT EXAMINATION

2 BY MR. THEM:

3 Q. Detective Fowler, when you went to the fairgrounds with
4 Ms. Jones to do the walk-around, did you in any way, shape
5 or form, attempt to point her in the right direction either
6 by word or by actions?

7 MR. DEJONG: Objection, Your Honor, he's leading.

8 THE COURT: I'll overrule the objection on that
9 question.

10 A. No, I did not.

11 MR. THEM: Thank you very much. I have no further
12 questions.

13 MR. DEJONG: Nothing on recross, Your Honor.

14 MR. THEM: That's the State's case, Your Honor.
15 We rest.

16 THE COURT: Ladies and gentlemen, we've come to a
17 point in the trial where we need to take care of some legal
18 matters. I'm gonna again ask that you go back to your jury
19 room. Those of you who might be taking notes, of course,
20 you just need to leave the notes -- if you'll write your
21 name on the note pad so that we know they belong to you,
22 just leave the note pads in your chair and they'll be there
23 for you when you come back. We'll call you back in just a
24 few minutes. We'll take care of these legal matters, then
25 we'll be ready to hear from you. Don't discuss the case

1 while you're out.

2 (WHEREUPON, the jury exited the open court at
3 approximately 10:32 a.m.)

4 THE COURT: All right. Any legal matters we need
5 to take care of at this time?

6 MR. DEJONG: Yes, Your Honor, may it please the
7 court. At this point in time I would move for a directed
8 verdict on behalf of the Defendant with regard to the
9 indictment which alleges assault with intent to commit
10 criminal sexual conduct in the first degree. Taking that in
11 the light most favorable to the State, Your Honor, I submit
12 that there is no testimony presented by the State from which
13 a jury could find a verdict of guilty on that particular
14 charge.

15 The code section with regard to assault with intent to
16 commit is 16-3-656, which really doesn't shed a lot of light
17 on anything other than sentencing, with the -- well, let me
18 just read the code section. Assault with intent to commit
19 criminal sexual conduct described in the above sections
20 shall be punishable as if the criminal sexual conduct was
21 committed. There is no particular definition of assault
22 with intent to commit other than it says conduct described
23 in the above sections. And then it simply goes on to talk
24 about the punishment.

25 Now, the State -- the only thing that I submit that the

1 State has with regard to an assault with intent to commit
2 criminal sexual conduct in the first degree would be the
3 Defendant's statement, alleged statement, to the alleged
4 victim, that he was going to rape her. We don't concede
5 that he said that, but for purposes of this argument we
6 would concede that.

7 However, Your Honor, beyond that there is nothing to
8 indicate that there was ever an intent to sexually assault
9 the alleged victim in this case. Now, granted the State
10 does not have to prove criminal sexual conduct in the first
11 degree. Obviously if they could we wouldn't be talking
12 about assault with intent. However, Your Honor, I believe,
13 looking at it from two different angles, number one, on the
14 assault with intent to commit, I think the State must prove
15 something more than simply what the Defendant allegedly said
16 to the alleged victim. And I say that for this reason, Your
17 Honor. With -- if we took the Defendant's statement out of
18 here that the State alleges he made, we would be looking at
19 assault and battery of a high and aggravated nature at best.
20 And again, I do not concede my client is guilty of assault
21 and battery of a high and aggravated nature. But for
22 purposes of this argument, what the State has shown, if
23 anything, taking the testimony and evidence in a light most
24 favorable to the State, I submit that is all they have shown
25 if you take the Defendant's alleged statement out of all

1 that testimony.

2 Now, the other point that I would argue on that, Your
3 Honor, is this. Accepting for the moment that the State
4 does have an assault and battery of a high and aggravated
5 nature that can go to the jury, to send it to the jury
6 without any other circumstances on the, on the assault with
7 intent, would put the Defendant in a position of being
8 convicted on that charge solely on his own statement. That
9 I would submit is not proper because there has to be more
10 than the Defendant's statement to convict him on. There
11 must be a corpus delicti of the crime. And I simply submit,
12 Your Honor, that in this case there is no corpus delicti of
13 the crime because if you take his statement away, at best
14 you have assault and battery of a high and aggravated
15 nature. The allegation that a weapon was used, again I
16 don't concede that, but nonetheless for purposes of this
17 argument, difference in sexes, perhaps difference in sizes,
18 there are all of the -- basically all of the class elements
19 of assault and battery of a high and aggravated nature.

20 Other than his statement, taking the testimony and
21 evidence in a light most favorable to the State, Your Honor,
22 ---

23 THE COURT: Which statement are you referring to
24 when you -- when he was wired?

25 MR. DEJONG: The statement -- I'm sorry, Your

1 Honor. I need to be a little more specific. I apologize.
2 The statement that the State says -- or has introduced
3 alleging my client said, I'm going to rape you. I think
4 there has to be some other circumstance in there. And if
5 you recall the testimony, Your Honor, of the alleged victim,
6 she said he said that, then she said he held a knife to her.
7 There was never anything after that done that the State has
8 presented by way of evidence that there was any move on the
9 Defendant's part to carry through on a sexual assault..
10 There was no ripping of clothes. There was no groping of
11 her body, no groping of breasts, genitalia, buttocks or
12 anything else. Indeed, as I recall her testimony, she said
13 she threw him -- that Mr. Clayton threw her to the ground,
14 bend over and held the knife to her. And the second time I
15 believe her testimony was after he had thrown her down, at
16 best, he straddled her. But there is no indication, there
17 is no testimony whatsoever that he ever tried to assault
18 her. I think the crowning part of all of that is, by her
19 own testimony, she says he said, I'm gonna let you go. And
20 she went off and he went off and that was that.

21 So I think, Your Honor, my argument is that there is no
22 evidence whatsoever to send this case to the jury on assault
23 with intent to commit criminal sexual conduct in the second
24 -- in the first degree. I would submit that there is
25 sufficient evidence to send it on assault and battery of a

1 high and aggravated nature. I would not argue that, Your
2 Honor. And certainly assault and battery of a high and
3 aggravated nature is a lesser included offense and I think
4 that could be appropriate, certainly for Your Honor to rule.
5 Thank you, sir.

6 THE COURT: Mr. Them, be glad to hear from you.

7 MR. THEM: If we could accept Mr. Dejong's basic
8 premise and ignore the existence of that statement that I'm
9 going to rape you, he might have an argument. But I don't
10 know how we ignore the absolutely clearest possible
11 indication of what his intentions were. He didn't say, I'm
12 going to assault and battery of a high and aggravated
13 nature. He said, I'm going to rape you. The name of the
14 statute is assault with intent to commit criminal sexual
15 conduct. I think when you tell somebody you're going to
16 rape them and you grab them and you throw them to the ground
17 and you hold a knife at their throat, you have certainly
18 begun an assault.

19 The fact that you were unsuccessful because this lady
20 fought probably like a banshie the way she described it, and
21 when you look at the injuries to her body that she got in
22 that, he was just an unsuccessful rapist. He's not a rapist
23 that changed his mind and had some spiritual awakening.
24 He's somebody that was hell bent on raping this woman and
25 she just fought him to a standstill and he felt like, with

1 her noise and screaming and hollering, that he was going to
2 get caught so he abandoned his attempt. But he clearly, out
3 of the words of his own mouth committed the crime.

4 THE COURT: All right, Mr. Dejong, I believe there
5 is -- I certainly can appreciate your argument on the corpus
6 delicti and the fact that the statement was made, and I
7 appreciate the clarification on which statement you were
8 talking about, but I think this is a -- there is sufficient
9 evidence. I've got to consider everything in the light most
10 favorable to the State for this particular motion and even
11 without the statement I believe there is enough evidence by
12 the nature of the attack, the time of the attack, use of the
13 weapon. I think there is sufficient direct evidence and
14 substantial circumstantial evidence that reasonably could
15 tend to prove guilt. So I'll let the jury make that
16 determination. I deny your motion. Any other motions?

17 MR. DEJONG: Your Honor, I have no other motions.
18 I have discussed with my client, our client -- excuse me,
19 Mr. Ball. I'm not familiar -- I'm not used to having co-
20 counsel. I have discussed with our client his right to
21 testify, his right not to testify, but I always share with
22 my client, we will never make that decision until the State
23 has rested. I would simply ask, Your Honor, that we have
24 about fifteen minutes to confer with our client, not
25 necessarily to go over his rights, those have been explained

1 to him, but at this point in time just to get his decision
2 of whether he wishes to testify or not testify. I realize
3 that it's his decision to make, not ours, but I think he is
4 certainly entitled to advice of counsel before making that
5 decision now that the State has rested, Your Honor.

6 THE COURT: Is there any issue between the Defense
7 and State as far as prior criminal record?

8 MR. THEM: None, Your Honor. I don't have
9 anything I could impeach him with.

10 THE COURT: All right, Mr. Clayton, is there
11 anything you need to ask me about your right? I'm sure Mr.
12 Dejong and Mr. Ball have explained to you your rights under
13 the Fifth Amendment that you can remain silent and if you
14 remain silent I'll certainly tell the jury they can't hold
15 that against you because you will be presumed innocent. But
16 if you testify you'll be subject to cross examination of the
17 State and you'll be treated like any other witness as far as
18 the testimony you give. Certainly you can -- we'll take a
19 short break and you can confer with your attorneys now about
20 that. And if you have any questions of me after that
21 conference with the attorneys, I'll be glad to answer
22 anything you have. I just want to make sure that you
23 understand that you can't be forced to testify. It's your
24 decision as to whether or not you wish to. All right.
25 We'll take about a fifteen minute break.

1 MR. DEJONG: Your Honor, could we withdraw to the
2 small jury room that's not being used. Is that okay with
3 you?

4 (WHEREUPON, the court stood at recess for a short
5 break.)

6 MR. THEM: Your Honor, this morning Mr. Ball
7 informed me that he wanted to know whether or not the victim
8 was going to be here. As you recall, as each witness
9 testified I asked the court to release them from my
10 subpoena. I told Mr. Ball she was released. But as luck
11 would have it, she was up here in the event we got a verdict
12 this morning so she could speak to the court. She was just
13 served by the Defense with a subpoena. It is my
14 understanding, or at least my belief, that they plan to call
15 her as a witness in the Defense. At that point in time I
16 would probably interpose some sort of objection. I thought
17 maybe I could do that right now to find out exactly what
18 rules the court was gonna use.

19 I take the position that he cannot recall her for
20 additional cross. At the point in time that he calls her,
21 she becomes his witness and he cannot lead her.

22 MR. BALL: I think that's accurate.

23 THE COURT: Okay. I don't think there's any doubt
24 about that.

25 MR. THEM: Good. We don't have a problem.

1 THE COURT: He won't be leading the witness if
2 he's calling her as his witness.

3 MR. THEM: Just wanted to be sure we're all on the
4 same sheet of music. Thank you.

5 THE COURT: All right. Defense ready to proceed?

6 MR. BALL: Yes, sir.

7 THE COURT: Just by way of scheduling, do you have
8 any idea how long your defense may be as far as numbers of
9 witnesses or ... Would you foresee we'd charge the jury
10 before lunch or just get our testimony in and then ---

11 MR. DEJONG: Your Honor, very candidly at this
12 point in time, I think we only plan on offering one witness.
13 How long that witness will be, I don't know. Mr. Ball is
14 gonna handle the examination of that witness. I would ask
15 if we're close to the lunch hour that we go ahead and let
16 them go to lunch so -- that's for selfish reasons -- so we
17 would have the lunch hour to prepare our closing arguments,
18 Your Honor. But I would ask you to consider that.

19 MR. THEM: I would agree with Mr. Dejong, Your
20 Honor.

21 THE COURT: All right. We'll just get our charge
22 and verdict form and all those things together too.

23 MR. DEJONG: There may be -- since Your Honor said
24 that, I apologize, but if we could discuss the charge.

25 THE COURT: Yeah, we'll do that.

1 MR. DEJONG: Before we break for lunch?

2 THE COURT: Yeah, we'll do that so everybody knows
3 what to prepare.

4 All right. Ready for the jury?

5 MR. DEJONG: Yes, sir.

6 MR. THEM: Yes, sir.

7 THE COURT: Bring the jury in, please, sir.

8 (WHEREUPON, the jury entered the open court at
9 approximately 11:14 a.m.)

10 THE COURT: All right, ladies and gentlemen, thank
11 you very much for your patience with us. Mr. Ball, you may
12 call your first witness.

13 MR. BALL: Keith Cochran.

14 KEITH COCHRAN,

15 being duly sworn, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. BALL:

18 Q. Mr. Cochran, if you'll speak loud enough that I can
19 hear you, then I think all the jurors will hear you. I
20 don't know, you may want to get up a little closer to the
21 mike.

22 A. Yes, sir.

23 Q. For the record, state your full name, please?

24 A. Keith Allen Cochran.

25 Q. And where do you live?

1 A. I live in Easley on Croswell School Road.

2 Q. Now I believe you are actually here today under a State
3 subpoena; is that correct?

4 A. That's correct.

5 MR. THEM: Objection, Your Honor. I released this
6 gentleman from the subpoena long ago.

7 THE COURT: All right. I sustain the objection.
8 We don't need to get into that.

9 Q. And where do you work?

10 A. I work for the Greenville Pickens Speedway and the
11 Upper South Carolina State Fair.

12 Q. And what is your role there for those folks?

13 A. I am the marketing director.

14 Q. And do you also do anything else?

15 A. I'm the announcer at the speedway and do the marketing
16 and advertising for the race track and for the fair. I've
17 done it for twelve years.

18 Q. All right, sir. I was gonna ask you how long you've
19 been doing that. But thank you. Do you recall during the
20 2007 Upper State fair an event that took place at the gate
21 up there?

22 A. Yes, I do.

23 Q. Would you tell the jury what you observed and what you
24 did?

25 A. Well, one morning, it was early in the fair, I had to

1 take my dog out to walk my dog because I absolutely can't
2 let him loose like I usually do when the fair's there
3 because we have so much activity on the fairground and the
4 elephants and the tigers and everything, so I took him out
5 to walk him every morning of the fair around six o'clock.
6 And this particular morning I encountered a couple at the
7 gate one area of the fairground.

8 Q. Let me just interrupt you for a second. Do you see
9 half of that couple here?

10 A. Yes, the lady with the maroon sweater.

11 Q. Okay. Go ahead?

12 A. They were having a spirited discussion, I would say.
13 It kind of scared me at first because the fairground is
14 usually real quiet at that time and most of the people are
15 down for the night, you know, they've finished their duties
16 and whatever they were doing and it's kind of quiet. So
17 it's unusual to see somebody, so I saw this couple. And the
18 gentleman addressed me as -- told me about that he had had
19 his car sitting on the fairgrounds, his van sitting on the
20 ---

21 MR. THEM: Objection.

22 THE COURT: I sustain the objection.

23 Q. Don't tell what he said, just ...

24 A. Okay. Well, I saw the couple and they were having a
25 spirited discussion at the time.

1 Q. Did you observe their condition?

2 A. Well, I took them that they had been up partying all
3 night, that they were -- probably had been drinking and they
4 looked like they -- I mean, at that hour of the morning it's
5 unusual to see anybody and I thought they had been out
6 partying all night. I thought they were carnies.

7 Q. What was your opinion as to the amount of drinking, if
8 it ---

9 MR. THEM: Objection, Your Honor. I don't think
10 he can talk about the amount of liquor they drank.

11 THE COURT: I sustain the objection as the
12 question is asked. If you lay a foundation I'll be glad to
13 hear from you.

14 MR. BALL: All right.

15 Q. Tell the jury exactly what you observed and anything
16 that you heard being said there?

17 A. Well, I had ---

18 MR. THEM: Objection, Your Honor, he's asking for
19 hearsay. Tell us what you heard said.

20 THE COURT: I sustain the objection.

21 Q. Did the victim, so-called victim, what was her
22 condition?

23 A. She was in a distressed state. She was looking for a
24 place to lay her head down, is what she was looking for.

25 MR. THEM: Objection, Your Honor.

1 THE COURT: I overrule the objection.

2 A. She was not happy that she didn't have a place to lay
3 down and rest. She had asked me if I knew a place where she
4 could do that.

5 MR. THEM: Objection. Hearsay.

6 THE COURT: Overruled.

7 A. And she asked specifically if I knew a neighbor of mine
8 by the name of Scott Fulbright who lives up the road. I do
9 know Scott Fulbright. And she said, well, maybe I could go
10 to his house and get some rest. I had a discussion with the
11 gentleman about the car on the fairground, the van on the
12 fairground.

13 Q. And I believe that he moved the van off of it?

14 A. He had said he was upset that the ---

15 MR. THEM: Objection, hearsay.

16 THE COURT: I sustain the objection.

17 Q. You can't say what he said. But he -- was the
18 automobile moved?

19 A. The automobile had been moved that day. He said the
20 grand poobah had made him move his car.

21 MR. THEM: Objection.

22 THE COURT: I sustain the objection.

23 A. Okay.

24 Q. Did you see them leave?

25 A. I left them.

1 Q. Oh, you left them and they were still there?

2 A. Yes.

3 Q. Let me ask you a little bit about the set-up there
4 where the fair is. Do you have any law enforcement on the
5 scene there?

6 A. Yes, sir, we do during the fair.

7 Q. And tell the jury about that?

8 A. We have a Pickens County deputy on the fairground at
9 those hours at all times. Joey Duncan was there in the fair
10 office. And then, of course, once the fair opens we have
11 deputies on the fairgrounds throughout the eleven days of
12 the fair. And a pretty good staff of deputies. But at that
13 hour Joey Duncan was there in the fair office.

14 Q. Were you there -- what time did you get down there?

15 A. Well, I walk my dog about six and I get ready, I go out
16 to eat every day of the fair, and I'm usually in the fair
17 office about eight o'clock each morning.

18 Q. But did you hear any screaming or anything like that
19 prior to them showing up?

20 A. No.

21 Q. Did you have an opportunity to observe the lady?

22 A. I did.

23 Q. And did you see any beat marks or anything like that?

24 A. I didn't notice any.

25 Q. I'll show you a picture there and ask you, were you

1 able to see anything like that?

2 A. I did not notice anything like that.

3 Q. How about this one?

4 A. I did not.

5 Q. And if she had had those at that time, would you have
6 noticed them?

7 A. Most likely. And if she had asked for help, I knew
8 that I had a deputy right there, I could have helped her.

9 Q. And did she?

10 A. She did not ask for help. She wanted a place to lay
11 down. It gave me the opinion that the party was over ---

12 MR. THEM: Objection, opinion.

13 THE COURT: I sustain the objection.

14 Q. Don't say what your opinion was. But she had been
15 drinking?

16 A. I believe so.

17 MR. THEM: Objection. Leading.

18 THE COURT: Sustained.

19 Q. Tell us again what her condition was when you saw her
20 the first time?

21 A. She was upset. She was looking for a place to call the
22 party off, to lay down.

23 Q. Okay.

24 A. And she mentioned Scott Fulbright, specifically we
25 talked about Scott Fulbright, my neighbor, said, does he

1 still live on this street? And I told her, yes, he still
2 lives on the street.

3 MR. THEM: Objection. Non-responsive.

4 THE COURT: I sustain the objection.

5 Q. You can't say what somebody said. But are you quite
6 certain about the time?

7 A. I'm absolutely certain about the time, because when the
8 fair comes I have to be very methodical about my times. I
9 can't let my dog out, so I have to walk him in the morning
10 about six to six thirty, get ready to go to the fair and be
11 at the fair office about eight.

12 Q. In your observation did she appear to be afraid of the
13 man she was with?

14 A. He was consoling to her actually. He was telling her,
15 everything's gonna be okay, keep your chin up. He was more
16 consoling is the opinion that I got. I didn't detect any
17 friction between them.

18 Q. Prior to this appearance there at about six in the
19 morning, did you know either one of these folks?

20 A. No, I did not.

21 Q. Answer any questions the Solicitor may ask you.

22 CROSS EXAMINATION

23 BY MR. THEM:

24 Q. Had you and I ever talked before yesterday?

25 A. No.

1 Q. Had we ever had any dealings before yesterday?

2 A. Not to my knowledge. Kett came and served me and he
3 talked to somebody on the phone. That could have been you.
4 But other than that ...

5 Q. Do you remember telling me yesterday in response to a
6 question I asked you, that you thought that this event
7 occurred in the middle of the fair?

8 A. Yes.

9 Q. Thank you very much. I have no further questions.

10 THE COURT: Any redirect?

11 MR. BALL: Yeah, just ...

12 REDIRECT EXAMINATION

13 BY MR. BALL:

14 Q. Well, the middle of the fair would be how long they're
15 gonna be staying there; is that correct?

16 A. When he first asked me the time I had to think back
17 because we've since had a fair since then. This has been
18 fourteen months ago. But my conversation with the gentleman
19 about moving the car sparked my memory specifically that it
20 was at the beginning of the fair because the Jaycees park
21 the cars on the fairground. And it's very important that we
22 don't have any vehicles on the fairground. So that sparked
23 my memory that it was at the beginning of the fair. Because
24 we could not let that gentleman park his van on the
25 fairground. It has to be in the area where the carnival

1 workers park. So it had to be like the first weekend of the
2 fair.

3 Q. And as far as the five thirty, six o'clock time, you're
4 absolutely certain?

5 A. I'm positive about it.

6 MR. THEM: Objection. It's not responsive to the
7 question I asked.

8 THE COURT: I sustain the objection.

9 MR. BALL: That's all.

10 THE COURT: All right. Thank you, sir. You may
11 step down.

12 MR. BALL: May we excuse this witness, Your Honor?

13 THE COURT: Any objection to this witness being
14 excused?

15 MR. THEM: No, Your Honor.

16 THE COURT: Without objection.

17 MR. BALL: Judge, we -- excuse me, go ahead. We
18 have a matter to take up outside the presence of the jury.

19 THE COURT: All right, ladies and gentlemen, we
20 have another matter of law. I'll ask you if you would go
21 back to your jury room, don't discuss the case and I'll call
22 you back just as soon as I can.

23 (WHEREUPON, the jury exited the open court at
24 approximately 11:26 a.m.)

25 THE COURT: Yes, sir.

1 MR. BALL: Your Honor, it's my understanding that
2 Mr. Clayton will not be taking the stand and we offer him up
3 for your voir dire.

4 THE COURT: Mr. Clayton, if you would, please,
5 come around with your attorneys.

6 (WHEREUPON, the Defendant was duly sworn.)

7 THE COURT: Let me reaffirm what I discussed with
8 you briefly before. You're now to the defense of your case
9 and you have a right to testify in this case. You have a
10 right to get on the witness stand and be sworn in and offer
11 testimony. Also, you have a right to remain silent. The
12 Constitution of our state, the Constitution of the United
13 States, gives every citizen the right to remain silent and
14 it states that no person can be compelled in any proceeding
15 to be a witness against himself. This means you can't be
16 required to testify. You have the right to testify in your
17 own behalf, but nobody can make you testify. It's a
18 personal right that you enjoy, Mr. Clayton, and nobody can
19 waive this right except you. If you decide you want to
20 testify, you'll be subject to the same rules that govern
21 other witnesses. You can be examined and cross examined on
22 any relevant issues in the case. I understand from the
23 conference we had earlier that there were no prior criminal
24 offenses that you committed for which the State would be
25 able to cross examine you on, but you would be subject to

1 all the other questions and be -- the Solicitor would be
2 allowed to question you about this particular incident. A
3 decision by you to testify must be freely made by you and
4 voluntarily made, and intelligently made by you, with the
5 knowledge of the protections that you have under the
6 Constitution of our state and the United States. You must
7 also understand the consequences of your decision to
8 testify. You may decide not to testify. And if you decide
9 not to testify, I'll give an instruction to the jury, they
10 can't give that fact any consideration whatsoever. It
11 should be absolutely no prejudice to you because you don't
12 testify. The decision, Mr. Clayton, of whether to testify
13 or not to testify is left entirely up to you. You have had
14 a chance already to talk with your attorneys. I'll
15 certainly give you a reasonable time to talk with them more.
16 You can talk with family or friends, whoever you wish, but
17 the decision is yours and yours alone to make. Do you
18 understand what I've discussed with you?

19 Mr. CLAYTON: Yes, sir, after advisement, I'm
20 going to decline.

21 THE COURT: Do you have any questions of me about
22 what I've explained to you?

23 Mr. CLAYTON: No, sir.

24 THE COURT: All right, sir. You wish not to
25 testify?

1 Mr. CLAYTON: Right, sir.

2 THE COURT: All right, sir. Return to your seat.

3 MR. DEJONG: Your Honor, the Defense rests.

4 THE COURT: Anything in reply?

5 MR. THEM: Yes, sir, one witness.

6 THE COURT: All right, gentlemen, what I propose
7 to do after we have the reply witness, I'll send them to
8 lunch and -- I wouldn't think the reply would take very
9 long; would it?

10 MR. THEM: Oh, no.

11 THE COURT: Okay. And we'll maybe -- one thirty,
12 would that be enough time for everybody to -- that'll give
13 us a little time to get the charge ready, verdict form, and
14 those kinds of things.

15 MR. THEM: I would think so.

16 THE COURT: And then we'll be ready to start back
17 about one thirty. Is that enough time? I'm assuming we're
18 gonna break at -- quarter till two suit you better? One
19 thirty gonna be all right?

20 MR. DEJONG: I think one thirty will be all right.

21 MR. THEM: One thirty will be fine.

22 THE COURT: All right. It'll depend on when we
23 break, how long we'll take on the charge.

24 MR. DEJONG: Your Honor, before you bring the jury
25 in, there is an issue. It's my understand the State is

1 going to now call the husband of the alleged victim in this
2 case. Witnesses were sequestered at the Defense's request
3 yesterday morning. We argued the issue whether the alleged
4 victim's husband was entitled to be in the courtroom or not
5 because he was her support. That issue came down that if he
6 was going to testify he had to remain outside the courtroom,
7 as I recall Your Honor's ruling. The Solicitor then said he
8 was not going to call him as a witness and he has sat
9 through this trial, most of the trial. I don't think the
10 alleged victim nor her husband were here earlier this
11 morning. But now he wants to call him as a rebuttal
12 witness. I have two problems with that. Probably more than
13 that, but two is all I can think of at the moment. Number
14 one, he said he wasn't going to testify. Now, now he sat
15 through here and listened to the testimony, listened to the
16 testimony of this witness, and now he wants to call him as a
17 rebuttal witness. I simply submit, Your Honor, that is
18 improper. He could have sequestered him, we would never
19 have had this issue. He chose not to. He said he wasn't
20 going to call him as a witness. And therefore I submit he
21 should not be allowed to call him as a witness at this time.

22 THE COURT: Yes, sir, Mr. Them.

23 MR. THEM: I think Mr. Dejong was absolutely
24 incorrect on the facts. This gentlemen, to my knowledge,
25 has not been in the courtroom after the sequestration order

1 was issued. I just -- when the previous witness finished, I
2 made the decision that I was going to call him as a rebuttal
3 witness as to where his wife was at that time in the
4 morning. I asked my victim witness coordinator to go
5 outside and get him. He came in after that. So to my
6 knowledge, I can't guarantee what goes on behind me while
7 I'm doing a trial, but I'll represent to the court that I
8 don't believe that this witness has been in the court for
9 any witness's testimony. And I know he wasn't in here for
10 the previous witness's testimony. And I think the court was
11 in a position to see whether he was here or not, or
12 whatever.

13 MR. DEJONG: He was certainly in here when his
14 wife testified, Your Honor.

15 MR. THEM: Your Honor, he is not testifying -- let
16 me double check that fact before I say anything. I stand
17 corrected. He was in here when his wife testified
18 yesterday. I am calling him in rebuttal on a completely new
19 matter which had nothing to do with any of the testimony. I
20 can represent that he was not in here for the testimony that
21 he's going to be called to rebut, the testimony of the last
22 witness. So I don't think I'm -- I haven't violated the
23 intent of the order. The intent of the order is to fix
24 where they don't get to hear what each other say so they can
25 make their stories better. He was not in here when that

1 witness testified and I'm prepared to call my victim witness
2 coordinator as a witness to when he came in the courtroom
3 this morning.

4 MR. DEJONG: I won't even get into that issue.
5 But the fact remains from what I understand, the Solicitor
6 wants to put him on the stand for him to rebut the Defense's
7 witness as to a time element. He was certainly in here,
8 listened to his wife's testimony when she testified as to
9 time elements. That's why we sequester witnesses, Your
10 Honor. Thank you.

11 THE COURT: Mr. Them is going to have restrictions
12 only to questions relating to the last testimony. I don't
13 know that I -- perhaps I wasn't listening. I don't know if
14 I even heard a date. I heard a time, but I don't know if I
15 heard a date. But I'm gonna allow him -- I don't believe
16 the witness has been here for most of the trial. I haven't
17 observed him. I think the critical point is that he wasn't
18 here during the last testimony. He's gonna have a limited
19 testimony of his -- asking him questions and him giving
20 responses to the defense witness, and that alone. So I
21 believe he would be entitled to testify. I don't believe
22 the spirit of the sequestration order -- it was a little
23 different sequestration, if you remember from our bench
24 conference, and maybe this wasn't on the record, that if he
25 was going to testify he was gonna have to testify on the

1 State's case immediately following the first witness's
2 testimony. So I think once the defense puts witnesses up, I
3 think that makes it a little different picture, particularly
4 with reply testimony, as far as what he can testify to as to
5 this particular incident if he knows anything about it.

6 I'll overrule your objection, Mr. Dejong.

7 All right. Let's bring our jury in.

8 (WHEREUPON, the jury entered the open court at
9 approximately 11:38 a.m.)

10 THE COURT: Any other witnesses from the Defense?

11 MR. DEJONG: The Defense rests, Your Honor.

12 THE COURT: Anything in reply?

13 MR. THEM: Yes, sir, one witness.

14 THE COURT: All right, sir, call your witness.

15 DAVID LEE JONES,

16 being duly sworn, testified as follows:

17 **REPLY DIRECT EXAMINATION**

18 **BY MR. THEM:**

19 Q. Mr. Jones, what, if any, relation are you to Aleatha
20 Jones?

21 A. That is my wife.

22 Q. Okay. And were y'all living together in the end of
23 August and the beginning of September of last year?

24 A. Yes, sir, and we're still living together now.

25 Q. Let me call your attention to the time when the Upstate

1 Fair was in town. Did anything happen in the early morning
2 hours of Friday, August 31st, involving your wife?

3 A. Yes, sir, they did.

4 Q. What time, what time did you go to bed the night
5 before?

6 A. It was probably about eleven o'clock.

7 Q. Okay. Were you awakened in the middle of the night?

8 A. It was about two or three ---

9 MR. DEJONG: Objection, Your Honor, he's leading.

10 THE COURT: I sustain the objection.

11 A. It was probably two or three o'clock I heard doors
12 rattle and her come in. Me and her had had an argument
13 earlier and I laid in the bed till the next morning and I
14 asked her why was she so late getting in? She said, well, I
15 walked ---

16 Q. Okay. I don't want you to tell me what she told you
17 now. What time was it you heard that rattling noise and
18 stuff like that?

19 A. It was probably between two and three o'clock in the
20 morning.

21 Q. Okay. Did you have a conversation with her the next
22 morning?

23 A. Yes, I did.

24 Q. At about what time?

25 A. It was probably five thirty, six o'clock, somewhere

1 around there.

2 Q. Okay. Was it daylight yet?

3 A. No. It wasn't quite daylight yet.

4 Q. When you went to bed the night before that, did your
5 wife have any bruises or abrasions or marks on her?

6 A. No, sir.

7 Q. Look at these photographs, State's Exhibit 3, 4 and 5.

8 Do you recognize the person in there?

9 A. Yes, sir, I do.

10 Q. Who is it?

11 A. It's my wife.

12 Q. When you woke up that Friday morning and talked to her
13 at about five or six o'clock just before sun-up, did she
14 have those marks on her?

15 A. Yes, sir.

16 Q. I have to ask you this. Did you put those marks on
17 her?

18 A. No, sir, I did not.

19 Q. Okay, sir. Thank you very much. I have no further
20 questions.

21 THE COURT: Cross examination.

22 REPLY CROSS EXAMINATION

23 BY MR. DEJONG:

24 Q. Mr. Jones, I'm not asking you to say anything she said.

25 Did you call the police?

1 A. I did not.

2 MR. THEM: Objection, Your Honor, that's not
3 responsive to reply testimony about whether or not he called
4 the police.

5 MR. DEJONG: I think he's an open witness, Your
6 Honor. I'm not limited ---

7 A. I asked and begged her ---

8 THE COURT: Hang on just a minute, Mr. Jones.
9 Yes, sir.

10 MR. DEJONG: I think he is a witness. I'm not
11 limited -- he is a witness. It's not like ---

12 THE COURT: Well, I'll then be able to let him ask
13 more questions if you want to expand beyond, I'll give him
14 redirect.

15 MR. THEM: Could I be heard on that, Your Honor?

16 THE COURT: Yes, sir.

17 MR. THEM: I believe in reply testimony he is
18 limited to cross examination to issues I raise on reply.
19 It's not an open witness. The witness is called
20 specifically to reply to a certain bit of testimony.
21 Otherwise, we just open it all up again.

22 THE COURT: Okay. I agree with you. I'll give
23 him some leeway in ...

24 MR. DEJONG: Thank you, Mr. Jones.

25 THE COURT: All right. Thank you, sir, you may

1 step down.

2 MR. THEM: The State rests. We have nothing
3 further.

4 THE COURT: Ladies and gentlemen, you've heard all
5 the testimony now. The next stage of the trial, of course,
6 will be the closing statements of the attorneys and I'll
7 have instructions for you. There's several matters that we
8 need to discuss, the lawyers and I, legally, about the
9 procedures from here on. It's gonna take a little while
10 longer while waiting to do those things and then it'll be
11 lunch time. So I'm gonna give you an early lunch so that we
12 can be working a while and then when you come back hopefully
13 we'll then be ready to start with closing statements of the
14 attorneys and I'll instruct you on the law. I'm gonna ask
15 if you'll be back at one thirty. I believe we'll have time
16 to get our work done and then also have a lunch break
17 ourselves. It's a quarter till twelve now. If you'll be
18 back at one thirty, we'll be ready to start then. Again,
19 let me remind you not to discuss the case. Have a good
20 lunch and we'll see you back at one thirty.

21 (WHEREUPON, the jury exited the open court at
22 approximately 11:45 a.m.)

23 THE COURT: Yes, sir, Mr. Dejong.

24 MR. DEJONG: The jury room door is not closed at
25 the moment. I think Mr. Evans is closing it. They may be

1 gone, but I didn't want to ...

2 THE COURT: Yes, sir, Mr. Dejong.

3 MR. DEJONG: Thank you, Your Honor. At this point
4 in time, Your Honor, I would renew my motion for a directed
5 verdict. I can reargue it if you want me to, Your Honor,
6 but it would be basically the same argument I made at the
7 end of the State's case, Your Honor.

8 THE COURT: I have the same opinion. I'll deny
9 your motion, respectfully, sir.

10 MR. DEJONG: Thank you, Your Honor.

11 THE COURT: All right. How about the -- any other
12 motions, anything about my charge to the jury that we need
13 to work out?

14 MR. THEM: Nothing remarkable from the State, Your
15 Honor.

16 MR. DEJONG: Your Honor, as far as from the
17 Defense, I would ask the court to charge the lesser
18 included. The State concurs that assault and battery of a
19 high and aggravated nature is the lesser included offense of
20 assault with intent to commit. I can hand up case law on
21 that if Your Honor desires. But the State agrees with that.
22 And I believe under the circumstances of this case, Your
23 Honor, that a charge on the lesser included would be
24 appropriate, Your Honor.

25 THE COURT: We are going to be charging assault

1 with intent to commit criminal sexual conduct first degree
2 and then ABHAN?

3 MR. THEM: No, sir, I'm not asking you to charge
4 ABHAN. I oppose you charging ABHAN.

5 THE COURT: Okay. Well, ---

6 MR. THEM: Mr. Dejong is correct that I do agree
7 that ABHAN is in the theoretical legal abstract sense a
8 lesser included offense of assault and battery with intent
9 to kill. I don't see any basis for arguing assault and
10 battery of a high and aggravated nature in this situation in
11 that there's been no evidence presented that would make it a
12 jury issue as to whether or not he committed ABHAN or
13 assault and battery with intent to commit criminal sexual
14 conduct. The only evidence you have before the court is
15 assault and battery with intent to commit criminal sexual
16 conduct, Your Honor. I don't hear -- I don't know any ABHAN
17 evidence. And I don't think he's entitled to an ABHAN
18 situation on the theory that if the jury doesn't believe he
19 said, I'm going to rape you, that reduces it to an ABHAN,
20 because that's not really an issue as to whether or not the
21 rapist said that. The only evidence in the record is that
22 the rapist said, I'm going to rape you. So I don't believe
23 he has a factual basis. While he does have a legal basis, I
24 don't believe he has a factual basis for ABHAN.

25 THE COURT: Mr. Dejong, do you have anything on

1 the record other than the absence of evidence? I heard you
2 arguing about taking out the statement. Is there anything
3 else in the record evidentiarily that would allow me to
4 charge them on ABHAN?

5 MR. DEJONG: Not based on what the alleged victim
6 said, Your Honor.

7 THE COURT: Well, any source of evidence from
8 anyone that would ---

9 MR. DEJONG: The source of -- the only other
10 source of evidence would be that when Young gave his
11 statement, simply that Clayton said, I might have or I may
12 have made a half-hearted attempt. I go back to my argument
13 on the directed verdict comment, Your Honor. And that's
14 kind of my same argument, if you will, to get the lesser
15 included.

16 THE COURT: Corpus delicti and so forth?

17 MR. DEJONG: And Your Honor, on that -- I'm sorry.
18 On that obviously the statements made by the Defendant are
19 up to the jury to accept or reject. And I would simply say,
20 if they reject it then I think that I would be entitled to
21 that lesser included of assault and battery of a high and
22 aggravated nature. I think we have all of the elements that
23 are -- I'm not trying to reargue -- all of the elements that
24 are of assault and battery of a high and aggravated nation
25 -- nature with the exception of the testimony we asked about

1 in that particular statement.

2 MR. THEM: Your Honor, the Defendant says he
3 wasn't even there. So he can't claim, you know, ABHAN
4 because it wasn't as serious as it says. He says he wasn't
5 even there. Somebody else must have done this, not me.

6 MR. DEJONG: That was evidence presented by the
7 State, Your Honor. The State did not put the witness on the
8 stand, and I think what the State is trying to do now is do
9 a burden shift on us and I think that's totally
10 inappropriate.

11 MR. THEM: Excuse me, Your Honor.

12 THE COURT: Yes, sir.

13 MR. THEM: I'm putting all these bright young
14 lawyers we've got to doing some research. If you'll give us
15 five minutes we may be able to find some case law for you.

16 THE COURT: Are there any other, any other charge
17 requests that anybody particularly has other than the
18 normal? I'll obviously charge his right not to testify,
19 that they can't hold that against him. I'll briefly hit on
20 expert witnesses since one testified. Credibility of
21 witnesses. Prior record of a witness. That would apply to
22 two of the witnesses. Direct evidence, circumstantial
23 evidence. And we'll have a verdict form. The verdict form
24 will just be guilty or not guilty on the charge depending on
25 the lesser included.

1 MR. DEJONG: Are you gonna charge on statements,
2 Your Honor?

3 THE COURT: Statements, right.

4 MR. DEJONG: Yes, sir.

5 THE COURT: You talking about statement of the
6 Defendant?

7 MR. DEJONG: Yes, sir.

8 THE COURT: I'll have that down about the *Miranda*
9 and so forth.

10 Mr. Dejong, I am not going to charge ABHAN. I
11 respectfully deny your motion. You're certainly protected
12 on the record on that. I just don't think factually -- I
13 think it's going to be one or the other based on the facts
14 that I've heard.

15 All right. We'll be back at one thirty.

16 MR. DEJONG: My objection to that is sufficiently
17 noted on the record, Your Honor?

18 THE COURT: Right now it is.

19 MR. DEJONG: Thank you.

20 THE COURT: We'll be at ease until one thirty.

21 (WHEREUPON, court stood at recess for a lunch break.)

22 THE COURT: All right. We ready to proceed,
23 gentlemen?

24 MR. THEM: Ready, Your Honor.

25 MR. DEJONG: Ready for the Defense, Your Honor.

1 THE COURT: We'll have our jury come in, please.

2 (WHEREUPON, the jury entered the open court at

3 approximately 1:36 p.m.)

4 THE COURT: All right, ladies and gentlemen, thank
5 you very much for waiting with us. We are now ready to
6 proceed. The attorneys will have an opportunity to address
7 you. I told you earlier, this is not evidence. You've
8 heard all the evidence. But I'm sure that each of these
9 attorneys can give you some insights to help you in your
10 closing deliberations. I urge you to listen carefully as
11 they address you. Afterwards I'll instruct you on the law.
12 Mr. Dejong.

13 CLOSING ARGUMENT

14 BY MR. DEJONG:

15 Thank you, Your Honor, may it please the court. Ladies
16 and gentlemen of the jury, as His Honor has shared with you,
17 you have now heard all the testimony and seen all the
18 evidence in this case. This is our opportunity to come back
19 before you and talk to you about what we believe the case to
20 be about. It also gives us an opportunity to again discuss
21 the law with you briefly. Indeed, I will try to be brief,
22 but there are some things that I feel like I certainly must
23 cover in representing my client.

24 We talked a little bit, or I talked a little bit
25 yesterday, about whether the Defendant would testify or not.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Argument of Mr. DeJong

361

1 Now, it is apparent to you at this point in time that he has
2 not testified. And His Honor is going to instruct you on
3 that. I would ask you to listen to that carefully. And
4 again, as I discuss the law or the facts, ladies and
5 gentlemen, I would never try to intentionally mislead you,
6 but please understand the law comes from His Honor and the
7 facts of this case came from the witness stand. I'm simply
8 here to talk to you about that, my take on that. But with
9 regard to the law of the Defendant not testifying in a case,
10 that in large part goes back to what we were talking about
11 yesterday, the presumption of innocence, the Fifth Amendment
12 of the Constitution of the United States, no one can ever be
13 held to testify, and the fact, ladies and gentlemen, also
14 goes -- or goes with that, is the burden of proof. As I
15 shared with you yesterday, the burden of proof is on the
16 State to prove their case beyond a reasonable doubt.
17 Hopefully a little later I'll come back and talk to you
18 about reasonable doubt. But those issues, the Fifth
19 Amendment, the presumption of innocence and the burden of
20 proof all go into the Defendant not testifying. And I
21 believe His Honor will charge you as a part of his law -- as
22 part of his charge that the fact that the Defendant did not
23 testify is not to be considered by you or talked about by
24 you during your deliberations on whether the Defendant is
25 innocent or guilty. And I would ask you to adhere to that,

1 because that is a great constitutional principal in this
2 country. It's part of the oath, I believe, that you took
3 when you swore to try this case and again that is very
4 important. So I would ask you just to erase from your mind
5 the fact that the Defendant did not testify in this case.

6 Now, again, as His Honor shared with you yesterday, you
7 are the triers of the facts in this case. He is the Judge
8 of the law. Now, as the triers of the facts, one thing that
9 you can certainly take into consideration back in the jury
10 room while you're deliberating, an issue that we call
11 credibility. That is the credibility of the witnesses, the
12 believability of the witnesses. That is for you to decide.
13 I think His Honor will share with you that you can believe
14 everything a witness told you, you can believe none of what
15 a witness told you. You can believe some of what a witness
16 told you and disregard other parts of what the witness told
17 you. You can believe one over many or many over one. It's
18 all in your part of being the jury and looking at the facts
19 in this case.

20 Now, another thing and something that makes juries so
21 phenomenally wonderful is that collectively you take a lot
22 of common sense back there into the jury box with you. You
23 don't leave it on this side when you walk around the corner
24 to sit in those seats. You take that common sense, you take
25 that life's experience back in there with you. And

1 certainly, as I said, that's what makes a jury so
2 phenomenally great, because you as a collective body have
3 all that common sense back there with you. Certainly the
4 law does not ask you to leave your common sense outside of
5 the jury room. You take it back in the jury room with you.
6 Now, what I would like to do is spend a little time
7 going over what you have heard and certainly our take on it.
8 When we talk about credibility, let's talk about the alleged
9 victim in this case first. We're doing that simply because
10 she was the first witness to testify. On the credibility
11 issue, she has been convicted of fraudulent checks. She has
12 -- she's a thief. She's a shoplifter. And that goes to her
13 believability. Now, aside from that, when you look at her
14 believability, time is an issue in this case. There is no
15 doubt about that. She says she left her house about eight
16 thirty in the evening, as I recall. She and her husband
17 were quarreling, arguing, whatever the exact word was I
18 don't know, but nonetheless there was certainly some strife
19 going on in the household of the alleged victim and her
20 husband. She walks to the Upper South Carolina State Fair
21 at the fairgrounds up on 123, according to her, to cool off.
22 Now, she's there from eight thirty, and now the time gets a
23 little fuzzy, a little gray in there. We've had several
24 different times from several different witnesses and that is
25 for you to decide.

1 According to her testimony, and again, the credibility
2 issue and common sense issue, she sits here and tells you
3 that she was assaulted, as I understand, on the fairgrounds
4 while the fair was still operating. The gentleman, Mr.
5 Cochran, had testified, who works for the fair, he said
6 there's always deputies there around the clock. As I
7 understood her, she said she was at the front gate, headed
8 to the back gate to go out, and she is assaulted. Now,
9 again, according to her testimony there are people there. I
10 believe she said the rides were still operating. She said
11 she is screaming and nothing happened in response to her
12 screams that she said she was making.

13 Then she says she was thrown down, a knife -- and I
14 would ask you also to remember, ladies and gentlemen, there
15 was never a knife found by law enforcement that they connect
16 to this crime. I would ask you -- there was an issue, there
17 was talk over knives being found in Mr. Clayton's truck, but
18 I ask you not to let that cloud your judgment and cloud your
19 thinking because law enforcement said they could make no
20 connection with that whatsoever. And indeed when Mr. Young
21 testified, as I recall, he said he had some property in that
22 van as well. So if those knife, as they were brought in, in
23 my opinion, ladies and gentlemen, are totally irrelevant to
24 this case. There was never a knife that law enforcement
25 could say, that was the knife that was used, if one was even

1 used, and I submit there was not. But again, I ask you just
2 to erase that from your mind.

3 Nonetheless, the victim says that some person grabbed
4 her, and remember the identification on this as well, after
5 three trips around the fairground, she was only fifty
6 percent sure and maybe there was another man and then she
7 said initially in her report twenty-four to thirty hours
8 later, that this person who assaulted her, by her
9 description to law enforcement, had no identifying marks,
10 had no facial hair, although she did testify on the witness
11 stand today or yesterday, excuse me, that he had facial
12 hair. Credibility.

13 Now, so she says then that this man put a knife to her
14 throat. I heard nothing other than that. She says he said
15 he was going to rape her. But what I would ask you to
16 consider is that there was no testimony whatsoever that the
17 Defendant in this case, Mr. Clayton, ever did anything of a
18 sexual nature. Now, he's a big man. He's been sitting at
19 counsel table. You've been watching him. He was described
20 by more than one person, six four, two hundred and something
21 pounds. He's a large man.

22 Then she says she got away and he -- she says he
23 grabbed her again, put her to the ground again, then he lets
24 her go. But I submit to you there was nothing sexual in
25 anything that he did by her testimony. So she then

1 testifies that he let her up, let her go away, and she went
2 about her business. Now, by going about her business she
3 went home. There was still people there on the fairground,
4 by her testimony. By Mr. Cochran's testimony, there are
5 deputies there on the fairground. She doesn't search out a
6 deputy. She doesn't search out another fair personnel
7 person and say I have been assaulted. She goes home. When
8 she gets home, what does she do? Apparently she talks to
9 her husband, according to his testimony. But I would ask
10 you to consider this, she left because they were having a
11 quarrel, she stayed out all night. What do you tell your
12 husband that you had a quarrel with before you left the
13 house and you stay out all night and come back dirty and
14 disheveled, what do you tell that man, your husband?

15 Now, I would also ask you to consider this. Again, she
16 didn't report it to a deputy, she didn't report it to fair
17 personnel. She goes home and indeed, ladies and gentlemen,
18 does not report what she claims as this assault until at one
19 or after one of the following day. My math is not real
20 good, and I'm really not good when it comes to times and
21 clock times, but I think that's in excess of twenty-four
22 hours in which she says this alleged offense occurred. Why?
23 Well, the law enforcement says they go out there and the
24 State has introduced these pictures here, and you will
25 certainly have those back in the jury room, but one thing I

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Argument of Mr. DeJong

367

1 would ask you to consider when you look at these exhibits,
2 to me there appears to be some blackening of the eyes, one
3 eye or two eyes. I never heard her say or testify that this
4 man ever struck her. Put her to the ground. But he never
5 struck her. She never says she took a hard blow to the
6 head, that I recall.

7 So again, I ask you to consider a woman having a
8 quarrel with her husband, stays out all night, goes home to
9 an angry husband and then twenty-four hours after this
10 alleged offense, the cops come and say -- take pictures and
11 say that's the injuries she sustained because of this
12 alleged assault. Again, I just ask you to apply your common
13 sense to that. Think about it. Think about it.

14 Then we move to Mr. Young. The drunk, the druggie and
15 the guy who likes to restrain his wife. The friend. The
16 good friend. I'll take care of your property for you. I
17 don't have a car. My gosh, maybe I can get me a couple of
18 vehicles here. Credibility. Where are the cars? This good
19 friend's gonna take care of his property, going to do all
20 these things, take care of all this stuff. Man tells him he
21 has four hundred dollars in the van. Where is the four
22 hundred dollars? Had coins in the van. Where are the
23 coins? They're still in the van in Walterboro or Florence
24 or some place like that. And not just one vehicle, ladies
25 and gentlemen, two vehicles. Where is this property? This

1 property is still in the van. Good friend. When's the last
2 time you paid a storage payment on those vehicles? Never.
3 I believe I asked him when the last time he even checked on
4 them was, and I think the response was he had not.
5 Credibility. And part of credibility is -- when you look at
6 credibility is what does a witness have to gain or
7 potentially lose by their testimony.

8 Now, interestingly enough, when Mr. Young is
9 testifying, if I heard his testimony correct, he really
10 didn't want Mr. Clayton to get out of jail because he was
11 afraid Mr. Clayton was gonna charge him with stealing his
12 property. Although they say Mr. Clayton gave him the keys
13 to at least one vehicle. The other vehicle, I don't know
14 whether he had the keys. But by his own testimony both of
15 those vehicles belonged to Mr. Clayton. And he wasn't
16 really fond of the idea of Mr. Clayton getting out of jail
17 to confront this friend, if you will, this friend who calls
18 law enforcement, reports this alleged incident, this friend
19 who says, yeah, I'll wear a wire, I'll try to get what you
20 want and give it to you. Credibility, ladies and gentlemen.
21 My goodness, credibility. Then he said, well, he says Mr.
22 Clayton came to him about four thirty in the morning, this
23 man who has been convicted of driving under the influence
24 second offense and possession of cocaine said, well, his
25 foreman had really been drinking and he was drunk, his wife

1 had to put him to bed, but I really hadn't been drinking
2 that much. I just remember exactly what happened that
3 night. Common sense, ladies and gentlemen. Common sense.
4 So then he says that Mr. Clayton came to him and said,
5 well, I need an alibi. And he says why? He says, well, I
6 may have made a half-hearted attempt to rape somebody. I'm
7 not saying that statement is true, that certainly is what he
8 testified to. And not that -- well, initially he said he
9 tried to rape somebody. Then on cross examination he said,
10 well, yeah, I may have tried to. But again, I just really
11 ask you to think about that credibility. What does Young
12 have to gain by his testimony in this case?

13 On direct examination when Mr. Them was asking
14 questions, as I recall, he was sharing with you his devout
15 love for these two dogs that Mr. Clayton had. Again, maybe
16 a small thing, but if it's a friend and you've got dogs and
17 you say you're gonna take care of those dogs, what does he
18 do? One of them ends up in a dog pound some place and gets
19 put to sleep. Another one ran away. Now there's a friend
20 for you. With friends like that I'm not sure anybody would
21 ever need an enemy.

22 Now, then we get to Detective Fowler, and obviously I'm
23 not going into a great deal of detail here on the testimony.
24 I'm not gonna do that. I'm not gonna ask you to sit here
25 while I go through it blow for blow. What I'm inclined to

1 do is hit some of the high points here. Then we have
2 Detective Fowler. Now, he is a police officer. However, I
3 would submit to you, ladies and gentlemen, he has no greater
4 credibility because he is a police officer. He is a witness
5 like everybody else. He is a police officer. So they get
6 this call at one o'clock on September the 1st, and I don't
7 exactly have my days straight, but I believe that was on
8 Saturday, and they go out to the alleged victim's house,
9 talk to her, they come back to the fairground and talk to
10 Young. And if I'm not mistaken, that's when Detective
11 Fowler actually finds out and identifies for himself who the
12 Defendant is. They then go back, pick up the alleged victim
13 and bring her back to the fairgrounds.

14 Now, they then take the three round tour of the midway,
15 so to speak, and Detective Fowler said, well, we didn't
16 really talk about anything. We told her just to go around
17 and see if she could try to see somebody that she might
18 recognize. You know, the fascinating thing I find about law
19 enforcement this day and time is they can wire somebody in a
20 skinny dadburn minute when they think they're going to get
21 something they can preserve. But when they do something do
22 they ever put the wire on, do they bring you a CD of what
23 they did, how they did it? No, they did not.

24 So they say they asked her to walk around. Now, part
25 of this I think, ladies and gentlemen, is simply human

1 psychology. And again, that's for you to decide and your
2 common sense. But you have at least one police officer and
3 perhaps two, walking with the alleged victim around the
4 fairground. I would submit, whether it is conscious or
5 unconscious, if I'm walking with somebody and asking them to
6 identify someone, again whether it is deliberate or not
7 deliberate, if I know where the person is that I think is
8 the perpetrator of this crime, I think it is only natural, I
9 think it is only human, you slow down. That is for you to
10 decide.

11 I also ask you to consider this. The first trip
12 around, as memory serves me, she spotted someone, and you
13 take Detective Fowler's testimony was basically that she
14 thought that might be the person. I asked Detective Fowler
15 about his appearance and all that good stuff, and then she
16 says, no, that's not him. But they never -- based on that
17 they never talked to the guy, they never stopped him, never
18 Mirandize him when he's not in custody and free to leave and
19 not under arrest and get a statement from him. They don't
20 do that.

21 Now, I don't know if they slowed down or not, but
22 here's where I'm going with this. The point is, they walk
23 around one time. They say Mr. Clayton was in the same
24 approximate place each of the three times that they walked
25 around. Now there were other people around. Whether those

1 other people were in the same approximate places, I don't
2 know. I don't know what they asked her to look at,
3 everybody at the fair, fair personnel, I don't know that.
4 But our mind, I submit, ladies and gentlemen, will play
5 tricks on us. If I walk across the street and see somebody,
6 then I walk away and I walk back across the street and see
7 somebody, they're going to look familiar to me. The third
8 time I walk back across the street and they are still there,
9 that is the person. Our minds, our human minds, play tricks
10 on us. But if you will recall, again, by her description
11 that she gave law enforcement, no distinguishing marks,
12 everybody says he has a mustache and then obviously the day
13 of trial she comes in and says he has a mustache.

14 So then law enforcement -- well, let me back up a
15 little bit. First time around, nobody. Second time around,
16 I think so. And that's why I propound my theory to you of
17 how the human mind will play tricks on us. By the third
18 time she walks around, she a little more sure and that's as
19 sure as she's gonna get. She's fifty percent sure that that
20 is the guy that assaulted her. Fifty percent. That's fifty
21 percent I'm right, fifty percent I'm wrong. Those aren't
22 real good gambling odds right there. I think the Solicitor
23 stood and told you in his opening comments, yes, they could
24 convict a guy on fifty percent identity. I might be wrong,
25 but I believe that's what he said. So now they go back to

1 good friend, drug user, drunk, Steve Young and they say, is
2 this the guy? Yeah, that's the guy.

3 Now we get into the area of statements. Ladies and
4 gentlemen, His Honor is going to charge you on statements
5 made by the Defendant. I'm going to ask you to listen to
6 that. I'm not going to try to share with you exactly what
7 the language of the law is, but there are certain factors in
8 there that you take into consideration whether you want to
9 accept the Defendant's statement or not accept the
10 Defendant's statement. Now, there are two statements in
11 this case. One of the statements, the first statement,
12 which is marked here as an exhibit and been introduced, as
13 memory serves me, you will have back in the jury room with
14 you. And that statement is a statement that I don't have a
15 great deal to say about. It was the second statement when
16 this good friend goes in and says, I will be wired to go
17 talk to him. That's the one I want to talk to you about.
18 They go out to the fairground, sometime I believe they said
19 around -- well, they had been there for a while, but
20 actually the contact is made with my client, I believe they
21 said around six o'clock. Now, he is not in custody, he is
22 free to go, he's not under arrest. They give him his
23 *Miranda* warnings. He gives a statement. Doesn't get a copy
24 of his *Miranda* warnings as I recall the testimony. He then
25 at some point in time after that, they haul him off to jail.

1 They arrest him, they serve an arrest warrant on him. When
2 did you Mirandize him again? Never. Then law enforcement
3 personally does not go to him, but they put a microphone on
4 this guy and send him in to talk. It is up to you what you
5 want to do with that statement. I simply submit to you,
6 chunk it. Credibility issues, law enforcement issues, and
7 again, His Honor is going to instruct you on the law.

8 Sorry, sometimes I get a little disjointed here. But
9 on these pictures of these injuries, again, I'm going to ask
10 you to look at those. Again, I don't know when they were
11 made. You look at them, you decide that.

12 But now we come to Mr. Cochran. Here's what I would
13 ask you to consider about Mr. Cochran on the -- Mr. Cochran
14 doesn't even know these people. He's never met either of
15 these people in his life. Mr. Cochran has nothing to lose
16 or gain by coming into this courtroom to share with you his
17 testimony. Credibility. Now, Mr. Cochran says he works
18 with the fair. You heard that. He was some integral part,
19 as I understood, of a management team that worked out there.
20 He comes in and he says, yeah, it was now, I think he said
21 five thirty or six, but you take what you heard, I was out
22 walking my dog. I saw this man and woman, kind of scared
23 him at first, because the fair was closed. Do you see the
24 woman in the courtroom? Without hesitation, ladies and
25 gentlemen, as I recall, he pointed to the alleged victim in

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Argument of Mr. DeJong

375

1 this case, with a man. I believe he made some remark about
2 intoxication, but you take that -- I'm really not a hundred
3 percent sure of that. But what he did say was this, as I
4 recall, there was no mention by this lady to Mr. Cochran
5 that she was in distress, other than the fact that she
6 needed a place to lay her head for the night. And again,
7 I've said it three or four times and I'll say it one more
8 time, she was fighting with her husband, she needed a place
9 for the night. As far as the man that was with her, I
10 believe the question was posed, did she appear to be afraid
11 of him, frightened, and the response was no, if anything he
12 was trying to console her, telling her everything would be
13 all right. And then I think Mr. Cochran says he basically
14 left them and she went about her business or they went about
15 their business. But again, I would ask you to recall that
16 was about five or six o'clock in the morning, according to
17 Mr. Cochran.

18 Now, the last witness was Mr. Jones, that is the
19 alleged victim's husband. He said, yeah, they had been
20 quarreling or arguing, whatever the words were.
21 Nonetheless, there was strife there. He went to bed. He
22 says she came home about two or three o'clock in the morning
23 but did not talk to her until about six o'clock the next
24 morning. Common sense. That is this, you can be laying in
25 bed asleep, you can hear something, you make an assumption

1 of what you heard, maybe somebody coming in the house, only
2 to go downstairs and realize the noise that you heard
3 thinking somebody came in the house was the icemaker. He
4 did not confirm at two or three o'clock in the morning that
5 she actually came in. What he said was, he heard her come
6 in. I simply submit to you, that was an assumption on his
7 part, nothing that he ever checked out. The first time he
8 saw his wife again, as memory serves me, he said was five
9 thirty or six o'clock the next morning.

10 Now, I'm about done, but let me shift gears here for
11 just a moment. I would ask you to take all of those
12 credibility issues, applying your common sense to what you
13 have seen and heard over the last day and a half and plug
14 all of that in, and what I'm going to ask you to plug that
15 into obviously is credibility and everything His Honor
16 charges you on the law. I'm not asking you to disregard the
17 charge of the law. What I do want you to remember, and what
18 I want to talk about a little bit is reasonable doubt.
19 Proof in this case is beyond a reasonable doubt. I think
20 there are about four, three -- three or four burdens of
21 proof. I'm not going to bore you with all those. I'm gonna
22 briefly -- if you've ever served on a civil jury, the burden
23 of proof in a civil jury or car wreck-type case is by a
24 preponderance of the evidence. That is the lowest burden of
25 proof, by preponderance of the evidence. If you had a

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Argument of Mr. Dejong

377

1 scale, if one scale tipped ever so slightly that's the
2 preponderance of the evidence. That is not the burden of
3 proof in a criminal case. The burden of proof in a criminal
4 case is the highest burden of proof there is in the law, and
5 that is beyond a reasonable doubt. His Honor will charge
6 you on reasonable doubt. I think he's gonna share with you
7 something along the lines of a reasonable doubt is such a
8 doubt that would make an honest, conscientious citizen in
9 managing their own affairs, or words to that effect, to
10 hesitate to act. That's a reasonable doubt. And he's also
11 going to share with you that if you are firmly convinced the
12 Defendant is guilty, then you must find him guilty.
13 However, please don't cut him off. If you believe there is
14 a real possibility or probability, you listen to that word,
15 I don't remember the exact word, possibility or probability
16 that the Defendant is not guilty, then you must, you must
17 resolve that doubt in favor of the Defendant and find him
18 not guilty. And again, that goes along with that
19 presumption of innocence.

20 I think, ladies and gentlemen, if you look at what
21 you've seen and heard, you apply this test of credibility
22 that His Honor is going to give you, and it probably will be
23 a little more than what I've talked about, but basically
24 I've hit the high points on that. But when you look at the,
25 when you look at the burden of proof, when you look at the

1 substantial constitutional right of presumption of
2 innocence, when you walk back in that jury room, you apply
3 the law, you apply your common sense, you look at the
4 credibility and you can say, State, you have not stripped
5 that cloak from Mr. Clayton's shoulders, that presumption of
6 innocence and return a verdict of not guilty. Thank you so
7 much for your time and your patience.

8 THE COURT: Mr. Them, you may address the jury.

9 CLOSING ARGUMENT

10 BY MR. THEM:

11 Thank you very much, Your Honor. Mr. Dejong, Mr. Ball,
12 ladies and gentlemen, this argument started out with two
13 fundamental questions you have to ask, but after listening
14 to Mr. Dejong, this argument isn't right anymore because
15 there's three fundamental questions you have to ask. The
16 new fundamental questions you have to ask are, what are the
17 odds that a lady is gonna dream up a story like this, beat
18 herself up or let herself get beat up by her husband, sign
19 up to come take the emotional problems she had to go over
20 walking into this court and that she could describe a six
21 foot four, two hundred and twenty-five -- two hundred and
22 twenty pound fair worker with blonde hair who quite
23 coincidentally has a friend who calls the police on the same
24 day to say, in effect, he didn't say it this way, but in
25 effect, my six foot four, two hundred and twenty pound fair

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Statement of Mr. Them

379

1 worker, shirt wearing friend, came to me and said he half-
2 heartedly tried to rape somebody last night and I need you
3 to lie for me and come up with an alibi so I can prove that
4 I wasn't there? And to carry the question even further, who
5 would call his friend to come to the jail to work on a phony
6 alibi that you can hear on tape with questions about, did
7 you get the cell phone battery, is there anything you think
8 -- no, I disposed of everything. Oh, come on, folks, let's
9 get to the real world and let's talk about the ethics of
10 this case.

11 The Defendant is charged with assault with intent to
12 commit criminal sexual conduct. I guess if we want to talk
13 about his intent, maybe the best evidence on what his intent
14 was, I'm gonna rape you. Is that a pretty good indication
15 of what his intent was, when he looks this woman in the face
16 with a knife at her throat after he's wrestled her to the
17 ground, saying, I'm gonna rape you? His Honor will go
18 through, unfortunately, a rather complicated law that we use
19 to replace the intent to rape law. We took something that
20 was relatively simple and, goodness, made it difficult. We
21 have exotic terms that are used in there and the law defines
22 what those terms are and then they have to define some of
23 those terms that they used to define these terms. I'm gonna
24 let the Judge try to explain that to you. Basically
25 somebody tried to rape somebody that used a weapon.

1 Now, back to my two fundamental questions, now that
2 we've, hopefully, resolved the first fundamental question of
3 what are the odds. Did an attempted rape occur? And if it
4 did, who did it? Did an attempted rape occur? You gotta
5 look at the witnesses and the evidence. When you look at
6 witnesses you gotta look at credibility. The fact that a
7 lady bounced approximately ten checks and got caught
8 shoplifting once, does that mean she's gonna come in here
9 and conjure up a story like this? The Defense would have
10 you believe, I think what they're saying, is that her
11 husband beat her up. There's no evidence of that. The
12 statements or the innuendo that that happened is not
13 evidence. What kind of evidence did they present to you
14 that the husband beat her up?

15 MR. DEJONG: Your Honor, I'm going to object to
16 that.

17 THE COURT: I sustain the objection.

18 MR. DEJONG: Move that it be stricken.

19 MR. THEM: The husband clearly said that he was
20 not responsible for any of those marks. And if you're
21 scuffling and fighting and clawing and scratching and biting
22 to try to stop somebody from raping you at knife point,
23 aren't you gonna get scuffed up in the process, particularly
24 when he weighs two hundred and twenty pounds and he pulls
25 you to the ground and he's on top of you and you're fighting

1 and you get loose and he grabs you again and pulls you to
2 the ground? Certainly you're gonna get scuffed up. That's
3 what those pictures show.

4 Now, unfortunately there is no book that tells us
5 exactly what a potential rape victim should do if they're
6 lucky enough to get away without getting raped. What would
7 the average person do? They would run to what they
8 considered a place of safety. Their home. Would they run
9 into the fairgrounds where he works? Would they run into
10 his house looking for safety? Or would they run home
11 looking for safety? Now, when you look at witnesses, they
12 never realize what a big deal us lawyers want to make out of
13 time, what time did that happen? Let me just ask y'all,
14 what time did Mr. Steve Young start testifying yesterday?
15 That was less than twenty-four hours ago. There's probably
16 not anybody here that could come within thirty minutes as to
17 when he testified. What time did Mr. Cochran testify this
18 morning? That was probably less than four or five hours
19 ago. Times aren't important when you're in issues like this
20 lady was required to deal with. People don't look at events
21 and immediately look at their watch and write down the
22 numbers. They talk in terms of about, around,
23 approximately, I guess, I think so, et cetera. But those
24 times are not important.

25 Now, when you look at the criminal record of Mr. Young,

1 there's one thing that you need to look at very carefully,
2 crimes for which he was convicted. Some sort of exotic
3 domestic abuse charge where it was unlawful restraint, an
4 argument with his ex-wife. The second thing was possession
5 of cocaine. And the third thing was driving under the
6 influence on more than one occasion. Do any of those things
7 involve dishonesty? Any stealing, any lying, any cheating?
8 No. His substance abuse problems, and unfortunately all too
9 common problem of domestic violence. But they're not
10 honesty issues. They're substance abuse issues and family
11 issues. Now, when we talk about Mr. Young, he's an odd sort
12 of fellow in a way. I guess what he is is a case study in
13 how far friendship goes and when does friendship end?
14 Friends are supposed to help each other, they're supposed to
15 offer each other support, they're supposed to try to help in
16 anyway they can. But at some point in time the events that
17 are being discussed or things that are getting ready to
18 happen cross the line of friendship. I can't ask my friend
19 to help cover up the murder of my wife. That's going too
20 far. I can ask my friend to loan me a hundred dollars or
21 two hundred or a thousand. I can ask him to take me to
22 Columbia. I can't ask him to lie when I physically abuse my
23 child and poke out his eye. It's a line that's drawn some
24 place that you can't cross over in friendship, because it's
25 just too serious a crime. He was in effect asking Mr. Young

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Statement of Mr. Them

383

1 to commit a crime to come in here and lie under oath that
2 was gonna put him in trouble for what he did. I want you to
3 put yourself in jeopardy of going to prison, commit perjury,
4 because I kinda half-hearted attempted to rape this lady
5 over there. He got angry about it. He contacted law
6 enforcement and told them that he had been contacted by the
7 Defendant about setting up a phony alibi. Later on, as luck
8 would have it, the same officer that went up to meet him to
9 take that report, got the call to go to Ms. Jones' house.
10 Well, it didn't take long for him to add two and two and
11 come up with a number real close to four, so he contacted
12 detectives and went out there and the two cases pretty well
13 fit together like gears in a watch. Maybe not exactly, but
14 there was some sort of obvious connection there.

15 Now, if you're looking to try to find out who the
16 suspect is and you've got these connections here, height,
17 weight, size, works at the fair, you've got Mr. Young's
18 story about trying to set up a phony alibi, you go to the
19 fair. I think the Defense would require that anytime law
20 enforcement does something like that they have cameramen and
21 sound men and I guess then they would start complaining that
22 we didn't do it in color. No. They're trying to quietly
23 walk around the place with the lady to let her see if she
24 sees the person that assaulted her.

25 All of these thoughts about what they think might have

1 happened, what's natural and all that, no. What happened is
2 what happened. The officer clearly told you he didn't in
3 any way, shape or form, point at, you see him over there,
4 ma'am, is that him over there, the guy in the red tie over
5 there? Nothing like that. They just walked around with
6 her. This is a lady that looked at this man's face across a
7 knife blade that was stuck to her throat. She saw someone
8 that she thought for a moment fit the man's description, but
9 then on further reflection she said, no, no, it's not him.
10 But then she saw Mr. Clayton. She was not proof positive to
11 be able to say, that's the man that assaulted me. She was
12 pretty sure it was him. She said she was fifty percent.
13 The height, the weight, the hair color, the mustache, the
14 fair worker, all that stuff fit.

15 If she was gonna come in here and lie to cover up -- I
16 don't know what she would have been covering up, but if she
17 was gonna come in here and lie just to try to get him in
18 trouble, wouldn't she have said, that's him a hundred
19 percent, I'm absolutely positive, don't have any doubt in my
20 mind. She said, I'm fifty percent sure. And when I told
21 you in opening argument that fifty percent sure is not
22 enough to convict, I was absolutely right. Fifty percent is
23 not enough to convict a man. But that's not the only
24 evidence we have as to the identity of this person. The
25 best evidence we have as to the identity of this person is

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Statement of Mr. Them

385

1 the Defendant himself when he goes to see Mr. Young and
2 tells him, I kinda halfway tried to rape somebody last night
3 and I need you to say I was with you, and all that.

4 Then we have the situation that strangely nobody has
5 talked about that much, this may look like a compact disc.
6 This is a smoking pistol. This is probably the most
7 important piece of evidence in the whole trial, because on
8 here, and you'll have this with you in the jury room so that
9 you can listen to it, are statements from the Defendant who
10 called Mr. Young to come up there to help work on this phony
11 alibi. There's statements on there, oh, no, I got rid of
12 the knife. What about the cell -- told him about the cell
13 phone battery, look and see if there's a cell phone battery.
14 Does that sound like he ain't the guy? How would he know
15 about the cell phone situation? How would he know about a
16 weapon being involved and all that sort of stuff? He was
17 trying to set up a phony alibi and he thought that his
18 friend would be with him lock, stock and barrel, right or
19 wrong. He misjudged the character of that man. That man
20 evidently, by way of background or whatever, just couldn't
21 go that far. And probably got angry that someone asked him
22 to go that far, not to mention got angry with what the
23 person did. Oh, I might be upset with you if you stole a
24 bicycle or a car, but not like I would be if you raped
25 somebody or murdered somebody. I mean, those are very

1 different crimes. He asked Mr. Young to go too far and Mr.

2 Young could not go that far.

3 Now, when we get to evidence we have the written
4 evidence of the phony alibi signed by the Defendant. We
5 have the photographic evidence of the victim and her
6 injuries. We have this audio evidence. And then we have
7 the verbal evidence. Sometimes witnesses come into this
8 courtroom and intentionally lie. Most of the time, though,
9 witnesses come into this court and they make mistakes or
10 their memory is faulty, but I don't believe that they
11 intentionally lie.

12 The last gentleman that testified, Mr. Cochran,
13 admitted that when I spoke to him yesterday, this incident
14 that he's talking about occurred in the middle of the fair.
15 They said it was a ten day fair, but this incident happened
16 on the, on the opening night. Middle of the fair would have
17 been next week -- would have been in the next week.
18 Obviously it couldn't have been Mr. Clayton then because he
19 was in jail on the 1st. But somehow overnight he -- I don't
20 know exactly what he did or what he said. I think he said
21 something about I checked the records. Didn't bring any
22 records with him. But he remembers clearly seeing one-half
23 of the man and woman team that he saw out there. He had no
24 doubt in his mind it was that lady right there that he saw
25 shortly before six o'clock in the morning on September the

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Closing Statement of Mr. Them

387

1 1st. Well, think about what kind of lighting conditions
2 there would be before six o'clock seven weeks ago. If
3 you've got children, you take them to school, you probably
4 know that all too well. The lighting conditions are that it
5 would still probably be dark or just dawn. And why would he
6 remember that person so clearly but what about the six foot
7 four, two hundred and twenty pound man they would have you
8 believe that was with her. How did he miss that guy? Did
9 you hear anything about that guy, any description of him or
10 anything? Nothing. But he remembered the woman. And with
11 all due respect to women, women have the ability to change
12 their appearance rather substantially with hairdo and
13 clothing and make-up and things of that nature. I submit to
14 you, with all due respect to Mr. Cochran, that he was wrong.
15 I'm not saying he intentionally lied. Don't get me wrong.
16 I think he made an honest mistake and he thought he saw
17 something that he didn't see, and that lady looked somewhat
18 like the lady he saw and in his mind he put two and two
19 together and I think he came up with five or three, not
20 four.

21 Now, a lot of what Mr. Dejong said I agree with
22 totally. You don't leave your common sense out here when
23 y'all go around there. You don't leave your common sense
24 out here when you go in there. The twelve of you as one
25 collective group having various and different life

1 experiences will come together, hopefully, and reach a just
2 verdict. And that verdict should be based on the evidence.
3 And let me tell you now, this is not a perfect case. I
4 don't think there's ever been a perfect case. Every case
5 has minor problems in it one way or the other, be it for the
6 Defense or be it for the prosecution. The evidence in this
7 case should leave you firmly convinced, just like Ms. Jones
8 said, that she was assaulted by a man at the fair at knife
9 point who said he was going to rape her, scuffled with her,
10 she got beat up in the process, she got away from him but he
11 took her cell phone, threatened to kill her, and she
12 probably stayed at home for a day or so after being
13 threatened to be killed at knife point wondering whether or
14 not she would be killed. She was probably too frightened to
15 call.

16 And again, in short form, back to my initial question,
17 what are the odds of all these things coming together and
18 pointing to Mr. Clayton? Is it not guilt beyond a
19 reasonable doubt? If it's not a hundred percent guilt, is
20 it very, very close to a hundred percent guilt? The tape is
21 the smoking -- I'm old fashioned, I still call it tapes.
22 The CD is the smoking gun. What he says on there about the
23 alibi, knowing that the alibi can't be right, and about the
24 destruction of evidence, those are the keys points that
25 erase every problem in this case. The Defendant is guilty,

1 out of his own mouth, on that tape. No question but he's on
2 that tape because the police officer watched the tape being
3 made. And you notice they taped it from the time they put
4 it on, him walking around the building, till the time they
5 took it off. So nobody could say they might have tampered
6 with anything. As I tell all jurors, my final point, if you
7 have a reasonable doubt as to the Defendant's innocence, do
8 your duty, vote not guilty. But on the other hand, if this
9 evidence has convinced you, firmly convinced you as to the
10 Defendant's guilt, vote him guilty, let him be held
11 accountable according to the law. Thank you very much.

12 THE COURT: Mr. Foreman, ladies and gentlemen,
13 it's now my responsibility to charge you on the law. And as
14 I stated to you at the beginning of the case, I have before
15 me an indictment and that indictment charges this Defendant
16 with assault with the intent to commit criminal sexual
17 conduct in violation of South Carolina law. Let me remind
18 you again that the fact that this Defendant has been
19 arrested and charges brought against him, indicted in this
20 case, that's not evidence in the case and cannot be
21 considered by you as evidence of guilt in this case. It
22 doesn't create any presumption or inference of guilt. The
23 indictment is simply the formal written instrument by which
24 the charges are made against the defendant and the formal
25 paper by which the case is brought before this court.

1 The Defendant in this case has pled not guilty to the
2 indictment and that plea puts the burden on the State to
3 prove the Defendant guilty. A person charged with
4 committing a criminal offense in South Carolina is never
5 required to prove himself innocent.

6 Now, ladies and gentlemen, that's an important rule of
7 law in our state that a Defendant in a criminal trial, no
8 matter how serious the charge may be, will always be
9 presumed innocent of that crime for which the indictment was
10 issued unless guilt has been proven by evidence that would
11 satisfy you of that guilt beyond a reasonable doubt.
12 Presumption of innocence doesn't end any phase of the trial.
13 It continues to exist and stay with the Defendant when you
14 begin your deliberations, stays until you are convinced
15 beyond a reasonable doubt and have reached a verdict of
16 guilt beyond a reasonable doubt by evidence satisfying you
17 of guilt beyond that reasonable doubt if you so find.
18 Presumption of innocence stays with the Defendant. There's
19 no burden on a Defendant in any case to present evidence,
20 and any reference or inference to such that is required, you
21 should certainly disregard that. The Defendant is presumed
22 innocent and this presumption is a substantial right to
23 which every defendant is entitled unless you the jury are
24 satisfied by the evidence of that guilt beyond a reasonable
25 doubt.

1 I've used reasonable doubt quite often and you may ask,
2 well, what is a reasonable doubt in the law? A reasonable
3 doubt is a doubt that would cause a reasonable person to
4 hesitate to act. As I've said, the State has the burden of
5 proving guilt beyond a reasonable doubt. If you've served
6 on a jury before, perhaps you've served in a case in which
7 it was a civil matter in which the judge instructed you that
8 there was a standard of proof by what was called the
9 preponderance or the greater weight of the evidence and that
10 a fact only had to be proven more likely true than not true.
11 In criminal cases the State's proof is more powerful than
12 that. It's proof beyond a reasonable doubt. And that proof
13 is such proof that leaves you firmly convinced of the
14 Defendant's guilt.

15 Now, ladies and gentlemen, there are very few things in
16 this world that we can know with absolute certainty, and in
17 criminal cases the law doesn't require proof that overcomes
18 every possible doubt. If, based upon your consideration of
19 the evidence, you're firmly convinced that the Defendant is
20 guilty of the crime charged, then you must find the
21 Defendant guilty. If on the other hand, you think there's a
22 real possibility that the Defendant is not guilty, then you
23 must give the Defendant the benefit of the doubt and find
24 him not guilty.

25 Now, let me remind you again, ladies and gentlemen,

1 that each of us have had certain duties to perform during
2 the course of this trial. As the trial judge, it's my
3 responsibility to preside over the case, to rule upon the
4 admissibility of evidence that's been offered during the
5 course of the trial. You're to consider only the competent
6 evidence that's before you and if there was any testimony or
7 statements which were objected to and the objection was
8 sustained, or any testimony that was ordered stricken from
9 the record in this case, you must disregard such testimony.
10 You're to consider only the testimony that's been presented
11 from the witness stand, the exhibits that have been made a
12 part of the record in this case, and that alone.

13 My job also is to instruct you on the law that's
14 applicable in this case. As the presiding judge, I'm the
15 sole judge of the law, and it's your duty as jurors to accept
16 the law and apply the law exactly as I state it to you now.
17 You may already have an idea about what the law is or even
18 an idea about what the law ought to be in cases such as
19 this. And if you have such an idea and it's in conflict
20 with what I now tell you the law is, then you must disregard
21 that notion, because you've sworn to accept the law and
22 apply the law exactly as I state it to you now.

23 Every case that's tried in this courtroom, the jury
24 becomes the sole and exclusive judges of the facts in the
25 case. A trial judge in our state under our Constitution and

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Charge

393

1 law, cannot comment on or make any statement to a trial jury
2 about the facts in the case. Since you are the sole judges
3 of the facts in the case, as the jury, you're not to infer
4 from what I've said during the progress of this trial and
5 ruling upon admissibility of evidence or other rulings I may
6 have made, anything I say to you now during the course of
7 these instructions to you, that I have an opinion about the
8 facts in the case. I do not have an opinion about the
9 facts. That's totally and exclusively up to you and you
10 alone to determine what the facts are. It's your duty to
11 make that determination as to the effect, the value, the
12 weight and the truth of the evidence that's been presented
13 to you during the course of the trial.

14 Ordinarily there's two types of evidence. There's
15 what's called direct evidence and circumstantial evidence.
16 Direct evidence simply means it's the testimony of a person
17 who claims to have actual knowledge of the facts, such as an
18 eye witness. It's evidence which would immediately
19 establish the main fact to be proved. On the other hand,
20 circumstantial evidence is evidence of proof of a chain of
21 facts and circumstances that would indicate the existence of
22 a fact. The law makes absolutely no distinction between the
23 weight or the value to be given either circumstantial
24 evidence or direct evidence. Nor is a greater degree of
25 certainty required for circumstantial evidence than for

1 direct evidence. You should weigh all the evidence in the
2 case, ladies and gentlemen, and after weighing all the
3 evidence if you're not convinced of the guilt of the
4 Defendant beyond a reasonable doubt, then you must of course
5 find the Defendant not guilty.

6 Necessarily, you must determine credibility of
7 witnesses who've testified in the case. Credibility simply
8 means believability. It's your duty as jurors to analyze
9 and evaluate the evidence and determine which evidence
10 convinces you of its truth. In determining the
11 believability of witnesses who've testified in this case,
12 you may believe one witness over several witnesses. You can
13 believe several witnesses over one witness. In your
14 discretion, you can believe part of the testimony of a
15 witness and reject the remaining part of the testimony of
16 that very same witness. If you choose, you may believe the
17 testimony of a witness in its entirety. You can reject the
18 testimony of a witness in its entirety. You can consider
19 the witness and whether or not that witness has expressed
20 any interest or bias or prejudice or other motive in the
21 case. You can consider obviously the appearance of the
22 witness while on the witness stand. You can ask yourself
23 questions such as whether the witness was straightforward or
24 hesitant in answering? How consistent that testimony was of
25 that witness? How did the witness come to know the fact to

1 which he or she testified? What was the ability to know
2 these facts? How consistent was the testimony with other
3 witnesses who testified? Was it strengthened or weakened by
4 other evidence in the record? It's totally your
5 prerogative, ladies and gentlemen, to determine the
6 credibility of the witnesses.

7 Now, as I stated briefly to you, in this case there was
8 a person called who was qualified as an expert. And
9 normally witnesses don't give opinions about matters, but
10 when a person is qualified to state an opinion, if they're
11 qualified based on experience or education in some
12 particular area, they are permitted then to give an opinion
13 and the basis of that opinion and give their testimony as to
14 any particular idea that they may set forth in their
15 testimony. In this case, the witness was qualified as an
16 expert in sound engineering and you, of course, as I stated
17 to you earlier, you can give that opinion whatever value
18 that you deem necessary. You can accept it or reject it.
19 You can, even though there's no testimony contradicting it,
20 you can reject that testimony in its entirety, you can
21 accept it in its entirety. You should treat testimony of
22 experts, as with all other witnesses, and give it the value
23 and the effect that you think is necessary.

24 Now, witnesses who testified in this case have made
25 prior statements which were perhaps not consistent with the

1 witness's present testimony. You can use this evidence to
2 decide whether to believe a witness if there has been a
3 prior inconsistent statement made. You may also use the
4 evidence of the earlier contradictory statements if you find
5 them to be contradictory to determine the truth of those
6 statements. It's up to you to decide whether to believe the
7 earlier statement or the testimony given at trial.

8 Now, if a witness is shown to have knowingly testified
9 untruthfully concerning any material matter, you may
10 consider this in determining whether to trust the witness's
11 testimony as to other matters. You may reject all the
12 testimony of that witness or give all or part of the
13 testimony the weight that you think it deserves of that
14 particular witness. A person who has a past criminal record
15 is competent to testify during a trial. Any past record
16 does not affect the ability of that person to testify. The
17 past record may only be considered by you if at all to
18 determine the witness's believability. Remember, ladies and
19 gentlemen, you're the sole judges of the facts in this case
20 and of the believability of any and all of the witnesses.

21 Now, Mr. Foreman and ladies and gentlemen, I instruct
22 you and I emphasize to you the fact that the Defendant did
23 not testify in this particular case, that's not a factor to
24 be considered by you in anyway in your deliberations and in
25 your consideration of the question of the guilt or the

1 innocence of the Defendant. It must not be considered by
2 you in any manner whatsoever. The Defendant has a
3 constitutional right to remain silent. And the assertion of
4 this right must not be considered by you in your
5 deliberations. I repeat, under your oath, you're to draw no
6 conclusions whatsoever from the fact that the Defendant in
7 this case did not testify. The fact that he did not testify
8 should not even be discussed by you in the jury room. The
9 burden of proof, as I've stated to you, is on the State of
10 South Carolina. The Defendant is not required to prove his
11 innocence. The burden of proof remains on the State to
12 prove guilt beyond a reasonable doubt.

13 Now, a statement or statements that have alleged to
14 have been made by the Defendant have been admitted into
15 evidence in this case. Now, while the court has determined
16 the statement's admissibility, I instruct you that you make
17 the ultimate decision of whether or not the Defendant made
18 the statement. If the Defendant did make the statement, you
19 must determine whether the statement was made by the
20 Defendant voluntarily and of his own free will. This means
21 that the statement was not caused by pressure or force,
22 fear, threats, coercion or intimidation or hope or a promise
23 of leniency or a reward of any kind. In determining whether
24 the statement was voluntary, you should consider both the
25 characteristics of the Defendant and the details of the

1 questioning. Some of the factors that you may consider,
2 should consider, are the age of the Defendant and the
3 Defendant's education or lack of education, the mental
4 abilities and capacities of the Defendant, the background
5 and the environment, the place and length of the detention,
6 the nature of the questioning, advice or lack thereof as to
7 the Defendant's constitutional rights, including but not
8 limited to the right to remain silent, that any statements
9 could be used against him in a court of law, that the right
10 to have a lawyer present, if he could not afford a lawyer,
11 then a lawyer would be appointed to represent him without
12 any cost, that he could stop the statement at any time. You
13 must carefully consider all the surrounding circumstances
14 before you give any weight to an alleged statement. The
15 State has the burden of proving beyond a reasonable doubt
16 that the alleged statement was voluntary. If you determine
17 that it was, you may give the statement any other further
18 consideration that you deem proper. You must decide what
19 weight, if any, should be given to the alleged statement.
20 If you determine that the alleged statement was not the free
21 and voluntary statement of the Defendant, then you should
22 not consider the statement at all.

23 In order to establish criminal liability, criminal
24 intent is required and it must be proven by the State beyond
25 a reasonable doubt. Criminal intent is always a matter that

1 must be determined by the jury from the circumstances
2 surrounding the situation. There's no way to prove intent
3 to a mathematical certainty. There's no way medical science
4 can dissect a person's brain and make a determination as to
5 what that person had in mind. So the law says that criminal
6 intent may be inferred from the circumstances shown to have
7 existed and may be established by inference in the same way
8 as any other fact by taking into consideration the facts of
9 the parties and all the facts and circumstances in this
10 case. Criminal intent is a mental state. It's a conscious
11 wrongdoing. It's up to you to determine what the Defendant
12 intended to do based upon the circumstances shown to have
13 existed.

14 In this case, the Defendant is charged with the offense
15 of assault with intent to commit first degree criminal
16 sexual conduct. Now the State must prove beyond a
17 reasonable doubt that the Defendant committed an assault on
18 the victim with the intent to commit first degree criminal
19 sexual conduct. The first element which the State must
20 prove beyond a reasonable doubt is that the Defendant
21 committed an assault. An assault occurs when a person
22 violently or forcefully attempts to hurt or injure another
23 person and has the present ability to complete that
24 attempted injury. An assault is the intentional creation of
25 fear of immediate bodily harm. Next, the State must prove

1 beyond a reasonable doubt that the Defendant intended to
2 engage in a sexual battery with the victim. Intent means
3 intending the result which actually occurs, not accidentally
4 or involuntary. Intent may be shown by acts and conducts of
5 the defendant and other circumstances from which you
6 naturally and reasonably would infer intent.

7 The sexual battery is sexual intercourse, cunnilingus,
8 fellatio, anal intercourse or any other intrusion, however
9 slight, of any part of a person's body or any other object
10 into the genital or anal openings of another person's body.
11 Of course, except when the intrusion is accompanied for
12 medically recognized treatment or diagnostic purposes.

13 The State must also prove beyond a reasonable doubt
14 that the Defendant intended to use aggravated force to
15 accomplish the sexual battery. Aggravated force means the
16 use of physical force or physical violence of a high and
17 aggravated nature to overcome the victim. And this would
18 include the threat of using a deadly weapon.

19 Now, Mr. Foreman and ladies and gentlemen, of course,
20 in this case there's two possible verdicts. You can either
21 find that the State has met its burden of proof beyond a
22 reasonable doubt and find the Defendant guilty. Or if you
23 find the State has failed to meet its burden of proof, then
24 the verdict would be not guilty. I've prepared a verdict
25 form for you. The two options are listed. Obviously

1 there's no significance to the order in which they're
2 listed. One has to be listed before the other. But after
3 you've deliberated about this matter, Mr. Foreman, I'll ask
4 that you check the appropriate blank, sign the sheet as
5 foreperson on behalf of your fellow jurors, date it. Let
6 the bailiffs know that you have reached a unanimous verdict
7 and we'll receive the verdict back here in the courtroom.

8 Let me remind you, the verdict must be unanimous. All
9 twelve of you must agree on the verdict. Your verdict can't
10 be based on sympathy or passion, prejudice, emotion or any
11 other consideration not in evidence in this case. And I'll
12 remind you again that you certainly are free to ask me any
13 questions concerning the law in this case. But remember,
14 it's impermissible for me to answer any questions that you
15 have regarding the facts of the case. You're the sole fact
16 finders, the sole judges of the facts and that'll be your
17 determination and yours alone.

18 Mr. Foreman, ladies and gentlemen, I'm gonna ask you to
19 go back to your jury room. There's one final matter of law
20 that I need to take care of with the attorneys so I'm asking
21 now that you not start your deliberations just yet. In a
22 few moments we'll give you instructions to begin your
23 deliberations with the verdict form and the exhibits. But
24 for right now if you'll go back to your jury room, I have
25 one final matter of law I must take care of with the

1 attorneys.

2 (WHEREUPON, the jury exited the open court at
3 approximately 2:57 p.m.)

4 THE COURT: Any exceptions?

5 MR. THEM: Nothing on behalf of the State, Your
6 Honor.

7 MR. DEJONG: Your Honor, again I note you did not
8 charge assault and battery of a high and aggravated nature,
9 and I would renew my request that that be charged, Your
10 Honor.

11 THE COURT: Your objection is noted for the
12 record.

13 MR. DEJONG: Thank you, Your Honor.

14 THE COURT: If y'all would make sure your exhibits
15 are all in proper order, I do have a verdict form I'd like
16 for you to review, make sure we've got everything in good
17 shape there.

18 MR. THEM: Your Honor, I don't know what your
19 position, I don't know what your position is about letting
20 the tape player go back into the jury room.

21 THE COURT: If they ask for it ---

22 MR. THEM: That's okay?

23 THE COURT: If they ask for it, we'll see what
24 they want to do. We can bring them out here and let them
25 hear it or we can let them hear it back there, depending on

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Charge

403

1 ---

2 MR. THEM: Well, if we let them take it back
3 there, there's about twenty seconds of that tape spread out
4 over about a hundred and eighty seconds that they're gonna
5 want to play back and forth, back and forth, to try to pick
6 up exactly what the word is. If we bring them out here to
7 do it, we're gonna end up playing the tape Lord knows how
8 many times. If we give it to them, they can do it back
9 there, because there's gotta be somebody ---

10 THE COURT: Mr. Dejong has no objection to that, I
11 gather? Do you object to them taking it back?

12 MR. DEJONG: I do have an objection to that. If
13 they ask for it, then I think we address that issue at that
14 point.

15 THE COURT: Okay. We'll see if they ask for it.

16 MR. DEJONG: No objection to the verdict form.

17 MR. THEM: No objection.

18 THE COURT: All right. No objection to the verdict
19 form. If you would, put that with the exhibits and, Mr.
20 Evans, if you'll take those back and have the alternate come
21 out, please, when you take those back. Then you can tell
22 them to start deliberating.

23 BAILIFF: Start deliberating?

24 THE COURT: Start deliberating when they get all
25 the exhibits and the verdict form. Send the alternate out

1 if you would, please, sir.

2 (WHEREUPON, the verdict form and exhibits were
3 delivered to the jury to begin deliberations.)

4 THE COURT: Ms. Landers, thank you very much for
5 your service. Obviously your fellow jurors survived the
6 ordeal so you're not going to be needed. So thank you for
7 your participation with us. You're welcome to stay if you'd
8 like to. You're free to go. We're not gonna have anymore
9 work that will require jury services this week, so you're
10 free to go for the week. Thank you for your service to us.
11 Again, you can stay if you'd like. If you want to leave
12 though -- if you need any statements for employers or
13 otherwise, the clerk's office will help you with that. You
14 can go out that way or we'll let you go out that way. He
15 can get your badge that way if you'll just go that way.
16 Have you got anything else in the room? You'll need to go
17 out this door here rather than -- you don't have anything in
18 the jury room; do you? You can just go out this way. Thank
19 you very much for serving us this week.

20 (WHEREUPON, Court stood at recess awaiting the verdict
21 of the jury.)

22 THE COURT: I've been handed a question from the
23 foreperson of the jury which states, can we please have the
24 CD player to listen to CD? It also says, what time did Mr.
25 Cochran speak to victim and date? Third question, what time

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Charge

405

1 did he and husband talk to her the next morning and date?
2 Signed by the foreman. What I intend to do, gentlemen, is
3 to bring the jury back, instruct them that I will allow them
4 to have the CD player back to listen to the evidence that's
5 in. I'll explain to them that I can't comment on the facts
6 about Mr. Cochran's testimony or other testimony, but we'll
7 play whatever testimony they wish, if they'll just let us
8 know what testimony they want to hear. We'll bring them
9 back in here and I'll explain all that to them. Any
10 exception to my intended instructions or any input from
11 either one of you?

12 MR. THEM: None on behalf of the State.

13 MR. DEJONG: None on behalf of the Defendant, Your
14 Honor.

15 THE COURT: Obviously I'm asking you for
16 exceptions before I say anything. I'll give you another
17 opportunity after I say something to make an exception.

18 If you would, if they're all ready, have the jury come
19 back in.

20 (WHEREUPON, the jury entered the open court at
21 approximately 3.31 p.m.)

22 THE COURT: Mr. Foreman, ladies and gentlemen, I
23 have received an inquiry from you and I'll try to address
24 this as best I can. You indicated your desire to have a CD
25 player to listen to the CD that's been offered into

1 evidence. We can certainly provide that for you. We'll
2 have it sent back. If you need any assistance with it,
3 extension cord, whatever you may need, please let us know.
4 We'll assist you with that.

5 You've also asked about the time and dates of certain
6 conversations between the husband and Mr. Cochran. As I
7 stated to you, I can't comment on the facts of the case.
8 That's your determination to decide what the facts are. Of
9 course, as I told you when we started this case, Ms. Hanks
10 is here, she's taken down everything that's been said. We
11 can play back any testimony you need. You just let us know
12 what you need, which person's testimony. If it's one
13 witness or part of another witness, whatever you desire, and
14 we'll play it as long as you need to hear it. But that'll
15 have to be played here in the courtroom. I want you to
16 understand, I can't answer those kind of questions about
17 facts, but we can give you the assistance of playing back
18 any testimony that you feel like you need to hear.

19 So at this time I'm gonna ask you to go back to your
20 jury room. We'll have the player, the CD player there for
21 you. If you do want certain testimony, just write that
22 down. We'll call you back and we'll have Ms. Hanks to get
23 it in the right place on her machine to play it for you and
24 you can continue your deliberations. Thank you very much.
25 You may go back to your jury room at this time.

1 (WHEREUPON, the jury exited the open court at
2 approximately 3:34 p.m.)

3 (WHEREUPON, Court Exhibit Number 4 was marked for
4 identification.)

5 THE COURT: Any exceptions to the instructions?

6 MR. THEM: Nothing on behalf of the State, Your
7 Honor.

8 MR. DEJONG: Nothing on behalf of the Defendant,
9 Your Honor.

10 THE COURT: All right. We'll be at ease until we
11 hear from the jury.

12 (WHEREUPON, court stood at recess awaiting the verdict
13 of the jury.)

14 THE COURT: It's ten till seven and the jury has
15 been deliberating since three o'clock with no questions.
16 I've proposed an inquiry of them, written a note, will make
17 that Court Exhibit Number 5 or the next court exhibit,
18 discussed it with the attorneys and they're in agreement
19 with giving the jury the option to order food if they desire
20 to have food or if they wish to recess their deliberations
21 for the evening and resume tomorrow morning, we can do that,
22 give them an option, just let them know that they -- we
23 couldn't have food instantaneously and we'd have to have a
24 little time to get them food if they needed it. Any
25 objections?

1 MR. THEM: State agrees.

2 MR. DEJONG: No objection from the Defense, Your

3 Honor.

4 THE COURT: All right.

5 (WHEREUPON, Court Exhibit Number 5 was marked for

6 identification and delivered to the jury.)

7 (WHEREUPON, the court stood at recess awaiting the

8 verdict of the jury.)

9 THE COURT: We got a note back from the jury, we

10 think we are close. We will go ahead without any food.

11 Thank you. We'll mark that as a Court exhibit too.

12 (WHEREUPON, Court Exhibit Number 6 was marked for

13 identification.)

14 THE COURT: Anything we need to take care of

15 before the jury is called back in?

16 MR. THEM: Nothing on behalf of the State, Your

17 Honor.

18 MR. DEJONG: Nothing on behalf of the Defense,

19 Your Honor.

20 THE COURT: Let's bring our jury in.

21 (WHEREUPON, the jury entered the open court at

22 approximately 7:10 p.m.)

23 THE COURT: Mr. Foreman, I understand the jury has

24 reached a verdict; is that correct?

25 FOREMAN: Yes, sir.

1 THE COURT: Is it a unanimous verdict?

2 FOREMAN: Yes, sir.

3 THE COURT: If you would, please, hand the verdict
4 form to the bailiff.

5 (WHEREUPON, the verdict form was handed to the Court.)

6 THE COURT: All right, Madam Clerk, you may
7 publish the verdict.

8 MADAM CLERK: In the case 2008-GS-39-499, the
9 State of South Carolina versus Kent Clayton, Defendant, as
10 to the charge of assault with intent to commit criminal
11 sexual conduct in the first degree, we the jury unanimously
12 find the defendant guilty. Foreperson, Junius R. Smith,
13 III.

14 If this is your verdict, so say you all by raising your
15 right hand.

16 (WHEREUPON, all jurors' hands were raised.)

17 THE COURT: Thank you very much. Anything we need
18 to take care of with the jury before they're discharged in
19 this case?

20 MR. THEM: Nothing on behalf of the State, Your
21 Honor.

22 MR. DEJONG: Nothing on behalf of the Defense,
23 Your Honor.

24 THE COURT: Ladies and gentlemen, thank you very
25 much for your participation in this case. You've been very

1 conscientious and I've enjoyed working with you. You've
2 been a -- you've stayed alert, you've kept abreast of what
3 was going on. It's been an honor for me to serve with you.
4 You've certainly been diligent in your service. The need
5 for you to serve tomorrow -- we've got other matters to take
6 care of tomorrow that will not involve your services, so
7 you're free to go for the rest of the week. You fulfilled
8 your jury service for the next two years, based upon the
9 exemption I told you, but I can't guarantee you that you
10 might not be called for other courts, federal or state or
11 municipal -- or federal or magistrate or municipal.

12 Thank you for your service. You've done a valuable
13 service to your community. We couldn't operate without
14 jurors, as I told you on Monday when we qualified you. It's
15 a high calling and I'm blessed to have had the opportunity
16 to work with you. It's been a real treat for me.

17 Some of you may need statements for your employers. I
18 don't know if we've got any available tonight from the
19 clerk's office, but if not we can get one to you tomorrow if
20 you'll just call and let us know that.

21 I've insisted so much about not talking about the case,
22 of course, you certainly can do that now. After the case is
23 over, I know I practiced law for more years than I like to
24 admit, sometimes it was helpful to me to get a little
25 feedback from a juror as to what I did that was beneficial,

1 what I did that maybe was not beneficial. It always helped
2 me to be a better lawyer. And there's certainly nothing the
3 matter with these attorneys now asking you questions about
4 the case. You have a right to talk to them. You have a
5 right not to talk to anyone also. So I don't expect any of
6 these attorneys, if they did contact you, would continue to
7 want to talk to you if you didn't want to talk to them. You
8 just tell them you would rather not talk about the case, or
9 anyone else for that matter. And if anyone were to persist
10 in wanting to talk with you, you let me know and I'll take
11 care of that matter for you, I assure you.

12 Thank you for your service. You've discharged at this
13 time. You can go with the bailiff out the back, if you'll
14 turn your badges in. Mr. Foreman, we do need you to stay
15 just for a minute in the hallway, there's one other document
16 I need for you to sign.

17 (WHEREUPON, the jury existed the open court at
18 approximately 7:17 p.m.)

19 THE COURT: All right. Anything we need to take
20 care of before sentencing?

21 MR. DEJONG: Your Honor, at this point in time, on
22 behalf of the Defendant, I would make a motion for a new
23 trial in that the evidence does not substantiate the
24 verdict. I would incorporate the argument I made at the
25 time of directed verdict as part of my motion for the new

1 trial, Your Honor.

2 THE COURT: I believe, based upon your earlier
3 grounds, I believe it was a jury issue for them to make that
4 decision in considering it. I think they deliberated long
5 and hard, certainly weighed all the evidence. I
6 respectfully deny your motion, Mr. Dejong.

7 MR. DEJONG: Thank you, Your Honor.

8 THE COURT: Anything else we need to ...

9 (WHEREUPON, the Defendant, Mr. Them, Mr. Dejong, Mr.
10 Ball and Ms. Roper approached the bar.)

11 THE COURT: Yes, sir, Mr. Them, I'll be glad to
12 hear from you and then I'll be glad to hear from Mr. Dejong
13 and from Mr. Clayton.

14 MR. THEM: Your Honor, obviously we want a strong
15 active sentence. This is a rather unusual situation. I'm
16 looking at some typewritten notes by Detective Fowler and
17 I'm gonna quote from them. While in route to the Pickens
18 County Sheriff's Office, Clayton stated that he had been
19 charged with having sex with a fifteen year old when he was
20 twenty-seven years old. He maintained that he had not been
21 involved in this incident. A check of the criminal history
22 did not show any prior convictions, including the one he
23 stated that he had. I'm interpreting that to mean when he
24 said including the conviction he stated he had, that the
25 Defendant may have communicated to the deputies that he had

1 been charged with having sex with a sixteen year old when he
2 was twenty-seven, as I quoted right here, a records check
3 didn't show any arrest and it didn't show any conviction.
4 That's all I have to offer, Your Honor.

5 THE COURT: All right. I won't be considering
6 that.

7 MR. DEJONG: Thank you, Your Honor.

8 THE COURT: Mr. Dejong or Mr. Ball, be glad to
9 hear from either one of you.

10 MR. DEJONG: Thank you, Your Honor. This
11 gentleman is forty -- fifty years old now. He had a
12 birthday while he was in jail. He's been in jail, Your
13 Honor, since September the 1st of 2007. He has been there
14 continuously. He was denied bond in February of this year.
15 Your Honor, he lived, prior to coming into this area,
16 in Evansville, Indiana. That's basically where his family
17 lives. He has a brother, a sister, himself, his mother is
18 still living. She is in very poor health. He has been
19 separated from his wife for five years, Your Honor. He does
20 have a four year college degree. That is in music
21 education. He has absolutely no prior record, Your Honor.
22 I have here some letters from people who live in the area
23 who have known him. I have others that I kind of picked and
24 chose -- chosen what I will hand up to Your Honor. With the
25 court's permission I would hand those up. While they're

1 being handed up, all of the letters I have, have stated that
2 this man is a gentle man. He loves animals. He has love
3 for his dogs. I think you heard part of that during the
4 course of the trial. And none of these people in any of
5 their letters, and I think Your Honor will read some of it,
6 they're just absolutely astounded that he would be involved
7 in any kind of violent act at all.

8 Your Honor, the jury obviously has spoken in this case.
9 I am not here to argue with their verdict. I would submit
10 to the Judge, to Your Honor, however, that this case,
11 although certainly had some degree of aggravation to it, I
12 can certainly stand here and say unequivocally, Your Honor,
13 that this man has a conscience. I think if you looked at
14 the size of the victim and you looked at the size -- look at
15 the size of my client, who quite honestly, Your Honor, has
16 not gained weight since he has been in jail, he has actually
17 lost weight since he has been in jail, I think -- Your
18 Honor, I'm not arguing with the jury's verdict, but from his
19 point of view, had he intended or carried through on that
20 intent, he certainly could have done a lot more harm that he
21 did. I'm not trying to belittle, again, the jury's verdict
22 of what he did do, but I would ask the court to take into
23 consideration that he has absolutely no prior record, that
24 according to all of these people that have sent these
25 letters, and I've had these letters in my file probably

1 since early this year sometime, maybe even late last year,
2 that he certainly is not a violent man, and I think his lack
3 of record would indicate that.

4 Obviously, Your Honor, this is an eighty-five percent
5 not parolable offense. I would ask the court to take that
6 into consideration. And we would certainly ask for mercy of
7 the court.

8 Is there anything you would like to share with His
9 Honor, Mr. Clayton?

10 MR. THEM: Your Honor, if I could, could I tender
11 to counsel so that he can pass on to his client, this is the
12 documentation from Walterboro Ford Mercury about the
13 automobile down there in the event he wants to have anybody
14 to recover it. There's a towing bill. I don't think the
15 repairs have been done.

16 THE COURT: Is the victim not going to be here?

17 MR. THEM: No, sir. Ms. Robinson will speak for
18 her. We felt like with her emotions and all that, it would
19 probably be best that she wasn't. That was her decision.

20 THE COURT: Anything you want to tell me, Ms.
21 Robinson?

22 MS. ROPER: The victim just asked that I speak
23 on her behalf due to her anxiety problems. She did not want
24 to continue to sit in court. She asked that I ask on her
25 behalf that you give him the maximum. She said that the

1 only thing she wanted you to know was that while she was on
2 the stand her record came out that she had convictions and
3 she paid the consequences for her mistakes and that it's
4 time for him to pay the consequences for his mistakes.
5 That's all that she asked for me to relay to you.

6 THE COURT: This is certainly a tragic event for
7 everyone. I'm sorry that it ever happened. The sentence of
8 the court is -- this is case 2008-GS-39-499. The sentence
9 of the court is the Defendant be committed to the State
10 Department of Corrections for a period of twenty-three
11 years. Wish you the best, Mr. Clayton.

12 MR. DEJONG: Thank you, Your Honor. Your Honor,
13 Monday we had a brief hearing on this matter, at which time
14 I made a motion to quash an indictment. I don't have that
15 indictment in front of me. If the charge was possession of
16 a weapon ---

17 MR. THEM: If I could interrupt you.

18 MR. DEJONG: Please.

19 MR. THEM: I will nol pros that with prejudice,
20 Your Honor.

21 MR. DEJONG: Thank you, sir.

22 THE COURT: Thank you for bringing that to my
23 attention.

24 MR. DEJONG: Thank you, Your Honor.

25 THE COURT: Wish you the very best, Mr. Clayton.

State of South Carolina -vs- Kent Clayton (2007-GS-39-499)
Verdict and Sentencing

417

1

(END OF REQUESTED TRANSCRIPT OF RECORD)

CERTIFICATE OF REPORTER

I, the undersigned Danette P. Hanks, Official Court Reporter for the Thirteenth 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/hearing of the captioned case, relative to appeal, in the Circuit Court for Pickens County, South Carolina, on the day 23rd of October, 2007.

This transcript may contain quoted material. Such material is reproduced as read by the speaker.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

February 10, 2009

Danette P. Hanks

Circuit Court Reporter

STATE OF SOUTH CAROLINA

FORM OF COURT
PICKENS COUNTY
SOUTH CAROLINACOUNTY OF PICKENS

2012 JAN -4 A 9:28 IN THE COURT OF COMMON PLEAS

2012-CP-39-1 0001

Full name and prison number (if any) of Applicant.

KENT R. CLAYTON #331402

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention LIEBIA Correctional
2. Name and location of Court which imposed sentence PICKEN County; Pickens, S. C.; 13th CIRCUIT
3. Name(s) of co-defendant(s) (if any) 0
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 1682799; ASSAULT W/INTENT TO COMMIT CSC, 1ST
 - (b) _____
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 10-23-2008; 23 years at 85%
 - (b) _____

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- (b) after a plea of not guilty ✓
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. SOUTH CAROLINA Court of Appeals
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. AFFIRMED
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. 2-10-11
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. 268(d)(2)
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) INEFFECTIVE COUNSEL FOR FAILURE TO REPRESENT DEFENDANT'S DUE PROCESS RIGHTS
- (b) 8th AMENDMENT VIOLATION
- (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Counsel failed to represent defendant at preliminary hearing & bond hearing.
"S. CAROLINA HAS LONG RECOGNIZED THE CONCEPT REQUIRING THE SENTENCE TO BE IN PROPORTION TO THE CRIME."
- (b) E.g. S. Carolina Constitution Article XL(1778). More recently this has been reaffirmed the concept that
SENTENCE, though not cruel & unusual in kind, may be so severe in duration as to be cruel &
- (c) UNUSUAL STATE V. KIMBERG, 212 S.C. 348, 46 S.E. 2d 273 (1948).

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? S.C. Court of Appeals
- (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
- (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
- (d) any other petitions, motions or applications in this or any other Court? NO

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. "IN & OUT OF COURT ID" (TRIAL COURT ERRED, ABUSED ITS DISCRETION & VIOLATED DUE PROCESS.)
 - ii. TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE TESTIMONY THAT WAS PREJUDICIAL & SPURIOUS
 - iii. _____
 - iv. _____
- (b) the name and location of the Court in which each was filed:
 - i. S.C. Court of Appeals ; Columbia, S. Carolina
 - ii. _____
 - iii. _____
 - iv. _____
- (c) the disposition thereof:
 - i. Affirmed
 - ii. Affirmed (HARMLESS ERROR)
 - iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. 1. 20. 11
- ii. 1. 20. 11
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. NO Error
- ii. HARMLESS Error
- 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?
- No
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) DEFENDANT WAS UNAWARE OF procedural rights .
- (b) DEFENDANT WAS UNAWARE OF RIGHTS.
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? ? (No)
- (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. Jon DeJong, Pickens S. CAROLINA
 - ii. Dallas Ball, Pickens S. CAROLINA
 - iii. Robert Pachack, S.C. Commission on Indigent Defense, Division on Appellate Defe
P.O. Box 11589, Columbia, SC. 29211-1589
- (b) the proceedings at which each such attorney represented you:
 - i. trial
 - ii. jury selection
 - iii. Appeal

19. State clearly the relief you seek in filing this application:

I would ask for an evidentiary hearing, as to whether due process rights of defendant are violated

20. Are you now under sentence from any other court that you have not challenged?

No

STATE OF SOUTH CAROLINA
 CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

2012-CP-39-0001

VERIFICATION

County of

2012 JAN -4 A 9 23

I, _____, 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.

Kris Clayton #331402
R. E. G. A.

SWORN to and subscribed before me this 30
 day of December, 2011.

Sylvia Jones (L.S.)
 Notary Public

My Commission Expires:

1/24/2018

2012-CP-39-0001

APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF

^{Kent}
I, ~~Clayton~~ 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.

Kent Clayton #331402
Applicant
Kent Clayton

SWORN or affirmed to and subscribed before me this
30 day of December, 2011.

Sylvia Jones
Notary Public

My Commission Expires: 1/24/2018

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
2012 JAN -4 A 9 27

State
RECEIVED
AUG 30 2011
MAIL ROOM

2012-CP-39-000

Lieber
RECEIVED
AUG 19 2011
MAIL ROOM
JEBER C.I.

**INMATE TRUST FUND ACCOUNT REPORT
for SOUTH CAROLINA COURT FILING FEES**

INSTRUCTIONS TO INMATE: Complete top portion then give to your mailroom. **Returned from Accounting, you must mail this form with any payment to the Court.**

By signing my name below, I am asking the Financial Accounting Office of the South Carolina Department of Corrections to complete this report. In accordance with SC Code of Laws §24-27-100 and 150, I authorize payment of the full filing fee. If I have insufficient funds in my account at this time to pay the court's full filing fee, I authorize SCDC to deduct the initial and subsequent payments until payment is completed.

INMATE NAME (print): KENT R. Clayton WB241

SCDC# 331402 INMATE SIGNATURE: K. Clayton

I plan to file this action in the SC County of Pickens

The section below is for SCDC - Financial Accounting Branch's use ONLY.

- (1) Total deposits to inmate's account for preceding six months' period* \$ 0.00
- (2) Twenty percent (20%) of line 1 \$ 0.00
- (3) Account balance - current date \$ 0.00 0.07
- (4) **PAYMENT AMOUNT ****
(lesser of line 2 or line 3)
Enclosed check # _____ \$ 0

SCDC-FINANCIAL ACCTG.
2011 AUG 22 PM 1:57

****NOTE to COURT:** If payment is for partial fee, Court must notify SCDC once case is accepted and filed. Send notice with case # and balance owed to address below. SCDC NOT process any additional payments until notification is received from Court.

South Carolina Department of Corrections
Financial Accounting - Room 234
PO Box 21787
Columbia, SC 29221-1787

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

*Admission date is noted here if inmate incarcerated less than six months _____

State of S. CAROLINA
County of Pickens

IN THE COURT OF GENERAL SESSIONS
13th Judicial Circuit

St of S.C.

CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

Kent Clayton

Motion of Discovery
2012 JAN -4 A WARRANT # I 682799

2011-CP-39-0001

Now comes the petitioner, (Kent R. Clayton) with his motion of Discovery of the Court's transcript(s), as well as any electronic or/and written recordation, i.e., wiretaps, defense and prosecutions notes of investigations

Certificate of Service

This is to certify that copies of the foregoing have been delivered to the offices of the Clerk of Court located at Pickens Cty. Courthouse 214 Main St. & or P.O. Box 215 Pickens, S.C., 29671

Respectfully submitted
Dec 30th 2011

Kent Clayton
Kent Clayton

FORWORN TO AND SUBSCRIBED BEFORE ME

THIS 30th DAY OF December

20 11

Sylvia Jones

NOTARY PUBLIC

STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES 1/24/2018

Clerk of Court
Pickens County
Jette H. Gatlin
P.O. Box 215
Pickens, S.C.
29671

Kent Clayton # 2014
LIEBER Court Inst.
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA
WANDO # 241
P.O. Box 205
Ridgeville, S.C.
29472
2012 JAN -4 A 4:20

2012-CP-39-0001-

I humbly petition you to "time stamp"
both copies of the submitted P.C.R. and
return one copy back to the aforementioned
name & address.

Sincerely
K. Clayton

Certificate of Service

This is to certify that copies of the foregoing
have been delivered to the offices of the
Clerk of Ct (Pickens Cty), located at
P.O. Box 215, Pickens, SC.

SWORN TO AND SUBSCRIBED BEFORE ME

THIS 30th DAY OF December

2011

NOTARY PUBLIC
STATE OF SOUTH CAROLINA

MY COMMISSION EXPIRES

29671

Respectfully Submitted Dec. 30th
2011
Kent Clayton
petitioner
K. Clayton

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	C.A. No. 2012-CP-39-0001
COUNTY OF PICKENS	)	
	)	
Kent R. Clayton,	)	
S.C.D.C. No. 331402,	)	
	)	
Applicant,	)	
	)	RETURN
v.	)	
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
_____	)	

In response to the post-conviction relief application filed January 4, 2012, the Respondent would show this Court:

I.

The Applicant is incarcerated with the South Carolina Department of Corrections pursuant to the Pickens County Clerk of Court's orders of commitment. The Applicant was indicted at the March 2008 term of the Pickens County Grand Jury for assault with intent to commit first-degree criminal sexual conduct (2008-GS-39-0499). John W. DeJong, Esquire and Dallas Ball, Esquire represented the Applicant.

After the State brought the case to trial, the Applicant was found guilty. On October 23, 2008, the Honorable G. Edward Welmaker sentenced the Applicant to twenty-three (23) years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Clayton, Op. No. 2011-UP-003 (S.C. Ct. App. filed Jan. 20, 2011).

Attached herewith and incorporated herein by reference are the records of the Pickens County Clerk of Court regarding the subject convictions, the Applicant's records from the South Carolina Department of Corrections, the trial transcript, and the appellate records.

II.

In his application for post-conviction relief the Applicant alleges he is being held in custody unlawfully for the following reason:

1. Ineffective assistance of trial counsel:
 - a. Failed to represent defendant at preliminary hearing and bond hearing.
 - b. Unduly harsh sentence.

III.

The Respondent asserts the Applicant's allegation that his attorney was ineffective is without merit. The Respondent asserts the Applicant's attorney rendered effective assistance well within the standard of "reasonableness within professional norms" for a defense attorney.

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 on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064 (1984); Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985).

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The Applicant must overcome this presumption in order to receive relief. See Cherry v. State, 300 S.C. 115, 118, 386

S.E.2d 624, 625 (1989).

A two-pronged test is used in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under prevailing professional norms." Cherry v. State, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). 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).

The Respondent submits the Applicant cannot satisfy either requirement of the Strickland v. Washington 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, 265, 305 S.E.2d 247, 248 (1983) (citing Norman v. State, 276 S.C. 278, 277 S.E.2d 707 (1981)).

IV.

The Respondent denies each allegation not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the Respondent requests that a hearing be held and counsel appointed to represent the Applicant.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Assistant Deputy Attorney General

KAREN C. RATIGAN
Assistant Deputy Attorney General

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for Respondent

July 31, 2012

STATE OF SOUTH CAROLINA)

COUNTY OF PICKENS)

IN THE COURT OF COMMON PLEAS

2012-CP-39-0001

KENT R. CLAYTON, 331402)

Applicant,)

vs)

AFFIDAVIT OF SERVICE BY MAIL

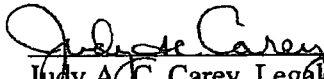
STATE OF SOUTH CAROLINA,)

Respondent.)

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 **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kent R. Clayton, 331402
Lieber Correctional Institution
Post Office Box 205
Ridgeville SC 29472

DATED this 31st day of July, 2012.


 Judy A.C. Carey, Legal Assistant
 For Respondent

1. STATE OF SOUTH CAROLINA)
2. COUNTY OF PICKENS) IN THE COMMON PLEAS COURT
3.
4. Kent Clayton,)
5. Applicant,) TRANSCRIPT OF RECORD
6. -vs-) 2012-CP-42-0001
7. The State.) August 26, 2013
8.) Pickens, South Carolina
9.

10. B E F O R E :

11. HONORABLE ROBIN B. STILWELL, JUDGE
12.

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

14. R. MILLS ARIAIL, JR., ESQUIRE
15. Attorney for the Applicant

16. KAREN C. RATIGAN, ESQUIRE
17. Attorney for the State
18.

19. Linda D. Moffitt
20. Circuit Court Reporter
21.
22.
23.
24.
25.

1	<u>INDEX</u>	
2	<u>WITNESSES</u>	<u>PAGE</u>
3	KENT CLAYTON (AW)	
4	Direct examination by Mr. Ariail	4
5	JOHN WILLIAM DE JONG (SW)	
6	Direct examination by Ms. Ratigan	13
7	Cross-examination by Mr. Ariail	17
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18	No exhibits entered into evidence.	
19		
20		
21		
22		
23		
24		
25		

Kent Clayton
Direct examination by Mr. Ariail

1 THE COURT: Call to bar the case of Kent Clayton vs.
2 the State of South Carolina, Case No. 2012-CP-39-0001,
3 first case filed in Pickens in 2012.

4 Mr. Ariail, again, you represent the applicant in this
5 matter. I'll defer to counsel.

6 MS. RATIGAN: Thank you, Your Honor. May it please
7 the Court.

8 This is the case of Kent Clayton vs. the State.
9 Mr. Clayton was arrested -- well, pardon. He was indicted
10 for assault with intent to commit first degree criminal
11 sexual conduct. He was represented on that charge by Mr.
12 DeJong.

13 After the case was brought to trial he was found
14 guilty. On October 23rd of 2008 Judge Welmaker sentenced
15 him to 23 years imprisonment.

16 He did have an appeal that was perfected by the office
17 of appellate defense. The Court of Appeals affirmed his
18 conviction and sentence in January of 2011. The
19 application was timely filed. And the state's ready to
20 proceed.

21 THE COURT: Mr. Ariail.

22 MR. ARIAIL: Thank you, Your Honor. I'm told by my
23 client he wishes to proceed and have a trial in this
24 matter.

25 THE COURT: Good enough. You may call your first

Kent Clayton
Direct examination by Mr. Ariail

1 witness.

2 MR. ARIAIL: Call Mr. Clayton to the stand.

3 KENT CLAYTON, having been
4 first duly sworn, testified as follows:

5 THE CLERK: State your full name for the record.

6 THE WITNESS: Kent Clayton.

7 DIRECT EXAMINATION BY MR. ARIAIL

8 Q Mr. Clayton, you may scoot up to that. Make sure we
9 can hear you.

10 You filed this P.C.R. application, I guess, on
11 January 4th of 2012, is that right?

12 A Correct.

13 Q Okay. And have you made any amendments or any
14 additions to this?

15 A No, I haven't, but I'd like to bring up the
16 ineffective counsel in that. And I think I just handed you
17 that piece of paper if I might.

18 Q Yeah. We'll go through that.

19 A Okay.

20 Q I'm going to take you through each step real quick. I
21 just want to make sure what we've got here in front of us
22 real quick.

23 You were convicted I guess in the trial, assault with
24 intent to commit C.S.C. first, is that right?

25 A Correct.

Kent Clayton
Direct examination by Mr. Ariail

1 Q Okay. You were represented by Mr. DeJong in this
2 matter.

3 A Yes.

4 Q Okay. I think Dallas Ball -- was he also involved?

5 A He was -- he was hired to get a continuance.

6 Q Okay.

7 A And that was really the extent of his participation.

8 Q Okay. And so you didn't get a continuance, I guess,
9 in regards to that.

10 A No.

11 Q Okay. Now, you went to trial. And I guess there
12 were -- this was an issue with an attempted C.S.C.
13 involving a lady that accused you of trying to assault her
14 outside the fairgrounds, is that correct?

15 A Correct.

16 Q Okay. And as part of that I guess there was --
17 information was an in-court or identification by her at the
18 fair, is that correct?

19 A 50 percent -- 50 percent, yes.

20 Q Basically she had indicated that she was only
21 50 percent sure it was you, correct?

22 A No facial -- no facial, no tattoos, no facial hair,
23 that is.

24 Q Okay.

25 A I had a big old Fu Manchu.

Kent Clayton
Direct examination by Mr. Ariail

1 Q And Mr. DeJong tried to get that information excluded,
2 correct?

3 A Correct.

4 Q And he was denied on that, right?

5 A Denied.

6 Q Okay. Also, there was an issue -- interestingly,
7 message whether or not the police -- I guess it was the
8 Pickens County Sheriff's Department -- had an individual
9 that worked with you at the fair. And he came into the law
10 enforcement center, basically had a wire on him. And you
11 provided information during that conversation.

12 A Yes. And it's -- it's either in the transcript
13 that -- I think it's in the transcript where he says that
14 he was asked to come down to do that. And then on the
15 stand he turns around and says that he offered his
16 services.

17 Q Okay. But Mr. DeJong had made a motion to exclude
18 that information, correct?

19 A Yes.

20 Q Okay. And that was denied too, right?

21 A Yes.

22 Q Okay. So you went through. You had -- and during the
23 trial clearly I guess it was a -- information provided by
24 the victim. And you had an opportunity at some time to
25 testify, correct?

Kent Clayton
Direct examination by Mr. Ariail

1 A I'm not sure.

2 Q At some point in the trial the judge asked you do you
3 understand you have the right to testify during your trial,
4 correct?

5 A And I wasn't familiar that I had that right. And then
6 Peter Them jumped in and -- and mentioned something. And
7 we never came back around to -- to -- or any.

8 Q One of the issues I guess you talked to me about is
9 that you were denied or Judge Welmaker denied a charge on
10 the -- what you believe is a lesser included offense of
11 assault and battery of a high and aggravated nature.

12 A Yes.

13 Q Correct?

14 A Yes, he did.

15 Q Okay. And a synopsis of the reason why is basically
16 he said there was a legal basis for it but there was no
17 factual finding that you had presented any evidence or any
18 evidence was out there from the state that fit within the
19 ABHAN requirements, is that correct?

20 A Correct.

21 Q Okay. So prior to -- and this is where I think you
22 discussed with me -- did you have a discussion with
23 Mr. DeJong in regards to what needed to be -- what the
24 elements of ABHAN were?

25 A Well, and that's just it. I didn't know all of that.

Kent Clayton
Direct examination by Mr. Ariail

1 I'm completely ignorant of the law. Even now I'm still.

2 But then I was very cherry to the whole system. And I did
3 not realize all of the elements that were required to make
4 a lesser included offense come about.

5 Q And let's just start. You were charged with assault
6 with intent to commit a C.S.C., correct?

7 A Right. Yes.

8 Q Did you discuss the elements with Mr. DeJong in
9 regards to that?

10 A I wasn't -- I did not realize all of the time that was
11 going to be accrued.

12 Q Well, I'm not worried about the time. I'm worried
13 about the elements as to what it specifically -- what the
14 state has to prove to convict you on that.

15 A I -- you know, I guess I -- I don't remember.

16 Q Okay. Do you remember discussing what needed to be
17 proved or what evidence there needed to be -- there -- to
18 get a charge for assault and battery of a high and
19 aggravated nature?

20 A Well, I understand that the testimony of not the
21 victim but of the -- of the coworker was paramount. But
22 the only way that I could -- and I did not realize that,
23 like I said earlier, that I could not get that lesser
24 charge. Well, I certainly couldn't get it if I was taking
25 the Fifth.

Kent Clayton
Direct examination by Mr. Ariail

1 Q Well, I guess this is --

2 A I mean, maybe I'm not catching --

3 Q Yeah. I'm just -- at the end of the trial -- the
4 state put up their evidence.

5 A Yeah.

6 Q And there was a time that you had to make a decision
7 as to whether or not to testify. Do you remember that?

8 A Yeah. I wanted to testify.

9 Q Okay. Did you have a discussion with Mr. DeJong as to
10 whether or not you had enough evidence in the record or
11 needed to testify to be able to get a charge for assault
12 and battery of a high and aggravated nature?

13 A We never had that discussion.

14 Q Did you ever discuss assault and battery of a high and
15 aggravated nature?

16 A Initially. As I recall, Mr. DeJong said that if he
17 could -- and he said he wasn't promising -- but if he could
18 get Solicitor Them to agree to an aggravated it would be 15
19 years, the ABHAN would be 15 years.

20 Q Okay.

21 A And that -- and I simply recall -- I'm sure Mr. DeJong
22 would correct me if I'm wrong -- that if I don't -- he came
23 back later and said that if I don't take it Them would
24 definitely go all the way to -- to court and go to the
25 maximum. And I don't recall what the maximum was.

Kent Clayton
Direct examination by Mr. Ariail

1 Q Okay. So you never got a response that you recall in
2 regards to an ABHAN.

3 A Never did.

4 Q Did you ever get an offer in regards to assault, I
5 guess, with intent to commit a sexual assault or C.S.C.?

6 A No.

7 Q Never got it. Did you get any offers in this case?

8 A No.

9 Q Now, as part of it -- I mean, if you had testified
10 what --

11 A If I had testified I would have been able to show my
12 intent that I had changed.

13 Q Okay. When you say your intent --

14 A To commit --

15 Q Intent at the time the act had occurred?

16 A Yes.

17 Q Okay. So what were you going to testify to?

18 A That I looked into those eyes and I realized I was
19 screwing up big time. I was remorseful and repentant at
20 that time.

21 Q Okay.

22 A I really was -- then I was scared but --

23 Q You also have indicated -- I guess there was a
24 testimony that there was a knife used in this case. What
25 would your testimony have been in regards to the knife?

Kent Clayton
Direct examination by Mr. Ariail

1 A There was no knife. It was a file I had just gotten
2 done using. And this is what I would like to point out, is
3 that it wasn't premeditated, is that it was -- I had gotten
4 done filing my two dogs' nails. It was the only time I had
5 to do it, was at night.

6 After that I met up with this woman. And I would have
7 mentioned that she was soliciting for crack --

8 Q Okay.

9 A -- in exchange for Lortabs, which I did not have. I
10 wanted something else.

11 Q Okay. So you had met this lady before?

12 A Just that night.

13 Q Okay. And she had solicited you for crack cocaine.

14 A Crack, yeah.

15 Q Okay.

16 A She had exchanged with Lortabs, their -- the
17 prescription bottle right there, the name and all.

18 Q Okay. I know we've gone over other items in regards
19 to this.

20 Did Mr. DeJong come and discuss I guess the case or the
21 facts that you had in regards to the case, what he thought
22 was going to be presented at trial?

23 A Yeah. He -- he mentioned the C.D., the wire tap.

24 Q Right.

25 A And it amazed me that -- that it was entered as

Kent Clayton
Direct examination by Mr. Ariail

1 evidence because my part of the conversation, you get the
2 old -- a mumble -- wa, wa, wa, wa, wa. You can hear him
3 clearly, but you can't hear me even after it was cleaned
4 up.

5 Q I think that's covered most of the items that we were
6 discussing. Any other items you want to bring up?

7 A Oh, and as far as the -- I was just reading what the
8 judge said about the battery being a fellatio and
9 cunnilingus and all of that.

10 I never even touched the woman's breasts. And I --
11 when I saw what I did it frankly scared me, and I let her
12 go. I'm 6'4", 220 pounds, been working 16 and 18 hours a
13 day lifting and putting together very heavy equipment. So
14 I'm in shape.

15 This woman is 5'3". And she said she escaped. I
16 could have refuted that. She's not going to escape me if I
17 didn't want you to go. I let her go. I threw her down
18 again when she started screaming. And then I finally just
19 let her go and grabbed her purse, grabbed the Lortabs and
20 partial payment for the -- what she never finished doing
21 and grabbed her cell phone so that she couldn't make the
22 phone call. And I can probably show you right where that
23 file is right to this moment. It's either second or third
24 post down while I was circling the -- the oval track.

25 MR. ARIAIL: Your Honor, I have no further questions.

John William DeJong
Direct examination by Ms. Ratigan

1 THE COURT: Cross-examination.

2 MS. RATIGAN: I don't have any questions for
3 Mr. Clayton.

4 THE COURT: Thank you, Mr. Clayton. I appreciate you
5 being here, sir.

6 MR. ARIAIL: That's our case, Your Honor.

7 THE COURT: All right. Anything from the state?

8 MS. RATIGAN: Your Honor, we'd call Mr. DeJong.

9 JOHN WILLIAM DE JONG, having
10 been first duly sworn, testified as follows:

11 THE CLERK: State your name for the record.

12 THE WITNESS: John William DeJong. D-E-J-O-N-G.

13 DIRECT EXAMINATION BY MS. RATIGAN

14 Q Mr. DeJong, do you recall representing Mr. Clayton on
15 this charge?

16 A I do.

17 Q And did you file discovery motions?

18 A I did.

19 Q Did you receive those items from the state?

20 A I did.

21 Q Did you review them both independently and with
22 Mr. Clayton?

23 A I did.

24 Q Did you receive a C.D. as part of that discovery
25 material?

John William DeJong
Direct examination by Ms. Ratigan

1 A I did. Now, there may have been some photos or
2 something. Because of limitations of technology, so shall
3 we say in the public defender's office I'm not sure that I
4 had a means of showing that? I believe we did listen to
5 the C.D. when the snitch came in.

6 Q And you were aware that the snitch not only -- that
7 the snitch wore a wire.

8 A Yes, yes.

9 Q And were you aware that he also got a confession from
10 your client?

11 A Very much so.

12 Q And did you discuss with your client the impact that
13 that statement to the snitch would have on the case?

14 A Yes, ma'am. I think that's why we tried so hard to
15 keep it out.

16 Q Did you go over the elements of the assault with
17 intent to commit first degree C.S.C. with Mr. Clayton?

18 A I did.

19 Q Did you explain to him the assault with intent part of
20 that meant that the act did not have to be accomplished?

21 A I suspect I did, Ms. Ratigan. I have no independent
22 recollection of that today.

23 Q The state ever make you any kind of a plea offer for
24 the indicted charge?

25 A I don't believe they did in this case.

John William DeJong
Direct examination by Ms. Ratigan

1 Q Mr. Clayton testified that he -- that y'all had a
2 discussion about an ABHAN plea for 15 years. Do you recall
3 anything about that?

4 A No, I don't. We may have talked about ABHAN. I don't
5 think it would have been an ABHAN plea for 15 years. That
6 would have been under the old law where ABHAN carried a
7 maximum penalty of ten years.

8 Q Did you tell him if he went to trial on this charge
9 that there'd be the possibility of getting ABHAN as a
10 lesser included? Is that something you discussed?

11 A I think we discussed that. I think that was something
12 I shared with him that would be, for want of a better term,
13 a goal when it came time to charge.

14 Q Did you discuss with Mr. Clayton his right to testify
15 at his trial?

16 A I'm sure I did.

17 Now, that -- not taking issue with what Mr. Clayton
18 said. Mr. Ball had a little more involvement in this case
19 other than trying to get a continuance, although he did --
20 excuse me -- he did attempt to do that. And I'm not trying
21 to pass the buck to Mr. Ball.

22 I noticed in the transcript it was Mr. Ball that
23 advised the Court that Mr. Clayton was not going to
24 testify. And I'm not trying to pass that back onto Mr.
25 Ball. But I feel certain we had a discussion about that.

John William DeJong
Direct examination by Ms. Ratigan

1 I always -- I don't really see it in the transcript,
2 although I think we broke for a -- had a break in there.
3 Usually after the state rests I discuss not for the first
4 time but again discuss the defendant's right to testify or
5 not to testify.

6 Q Did you have an opinion about whether or not your
7 client should testify in the case?

8 A Did I then or do I now?

9 Q Did you then?

10 A Having a client testify at a trial is always
11 questionable. However, I never try to tell a client to
12 testify or not to testify.

13 I may share with clients that I've seen a lot of
14 clients testify that if the state already had not convicted
15 them, they convicted themselves. But that would probably
16 be about the extent of what I would say.

17 Q In your opinion would his testimony have aided your
18 case?

19 A I -- I don't really think it would. The only place it
20 might have would have been on the lesser included of ABHAN.
21 Of course, again, you know, I really don't know. And,
22 candidly, I don't know that we discussed that in terms of
23 his right to testify, frankly.

24 Q Is there anything Mr. Clayton asked you to do to
25 prepare for trial that you were unable to do?

John William DeJong
Cross-examination by Mr. Ariail

1 A I don't -- well, I wasn't able to get him an offer
2 obviously. And I don't recall that he ever asked, talked
3 to me about the continuance. I know Mr. Ball kind of came
4 in at the midnight hour, so to speak. But I don't recall
5 that. Other than that, I don't recall anything.

6 Q There were no witnesses or evidence or anything like
7 that he wanted you to chase down?

8 A The one witness that was called, is my recollection
9 was the only one.

10 MS. RATIGAN: That's all I have, Your Honor.

11 THE COURT: Cross-examination.

12 CROSS-EXAMINATION

13 BY MR. ARIAIL

14 Q John, in regards to -- I guess you've heard
15 Mr. Clayton testify that I guess he wanted an ABHAN charge
16 and wanted to get -- did you discuss in any way with him
17 what needed to be presented to the jury to get an ABHAN
18 charge?

19 A In all candor, I don't think I did, Mr. Ariail.

20 Q Do you think that -- I guess looking back at it, was
21 there an opportunity to get this if he testified, and did
22 you know what he was going to testify to?

23 A Certainly looking back that is a possibility that that
24 could have aided in getting a lesser included.

25 Q And I guess -- do you remember being a part of the

John William DeJong
Cross-examination by Mr. Ariail

1 discussions about I guess the risks with him testifying or
2 issues that could come up?

3 A I don't have any recollection, but I'm sure I was
4 there and I'm sure I was part of that discussion. Whether
5 I led the discussion or Mr. Ball led that discussion, I
6 don't know.

7 Q Okay. I know he indicated -- do you remember having
8 any discussions with Peter Them in regards to getting an
9 ABHAN, or was ABHAN ever on the table?

10 A To my knowledge there was never an ABHAN on the table.
11 I think I -- I think I went to Peter Them and tried to get
12 an ABHAN, which was, shall we say, whistling in the wind.

13 Q Right. I understand that deal with Peter.

14 Did you ever get an offer in regards to the assault?

15 A I don't believe I did.

16 Q Okay. So there was nothing other than pleading
17 straight up, I guess.

18 A That is correct.

19 MR. ARIAIL: I have no further questions, Your Honor.

20 THE COURT: Redirect?

21 MS. RATIGAN: Nothing further, and the state rests
22 Judge.

23 THE COURT: Anything further from the applicant?

24 MR. ARIAIL: Nothing, Your Honor.

25 THE COURT: Good enough.

1 All right. I'll invite you to make any closing
2 statements or arguments if you'd like. I certainly don't
3 require you to. I just give you the opportunity if you'd
4 like. No?

5 MS. RATIGAN: I rest on the record, Your Honor.

6 THE COURT: Good enough.

7 All right. I have had the opportunity to read the
8 application. I've read the opinion of the Court of
9 Appeals, read the return. And I've looked at the salient
10 portions of the transcript as well.

11 viewing all of those materials in light of the
12 testimony that I've heard here today, Mr. Clayton, I'm
13 going to respectfully deny your application.

14 Under the law you have the burden of proving by a
15 preponderance of the evidence that the trial counsel's
16 representation was inadequate and he failed to exercise
17 significant decisions in the exercise of reasonable and
18 professional judgment.

19 In doing that you have to prove that not only was the
20 performance deficient but also but for that deficient
21 performance the result would have been different.

22 Based on your testimony here today, based on what
23 you've put into the record, I can't find that what you
24 would have said to the jury would have had a significant
25 and substantial effect on the jury's consideration in that

1 matter.

2 It could have potentially, have resulted in your
3 getting an ABHAN charge. It could have. I don't know
4 that. But that doesn't mean that the verdict would have
5 been any different, particularly given your testimony and
6 the facts that were given.

7 I also note for the record that in the salient
8 portions of the transcript counsel did argue for the lesser
9 included offense fairly vehemently and felt very strongly
10 that the Court should charge the lesser included offense.
11 So that attempt was made.

12 Again, I don't think that -- and I think that with
13 respect to your testifying based on what I heard that it
14 was a technical decision that was made by your defense team
15 in conjunction with you.

16 And like I've suggested to you, I don't think it would
17 have made much of a difference based on what you said,
18 because the elements of the crime were still met,
19 notwithstanding the qualifications that you made factually
20 to what happened.

21 All right. So again with all due respect, I'm going
22 to deny your application. And I wish you luck, sir.

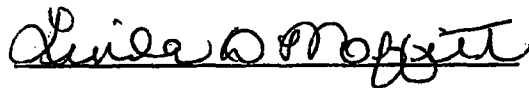
23 END OF REQUESTED TRANSCRIPT OF RECORD
24
25

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 Pickens County, South Carolina, on the 26th day of August 2013.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

March 28, 2014



Linda D. Moffitt
Circuit Court Reporter

STATE OF SOUTH CAROLINA
 COUNTY OF PICKENS
 Kent R. Clayton,
 S.C.D.C. No. 331402,
 Applicant,
 v.
 State of South Carolina,
 Respondent.

IN THE COURT OF COMMON PLEAS
 C.A. No. 2012-CP-39-0001
 CLERK OF COURT
 PICKENS COUNTY
 SOUTH CAROLINA

ORDER OF DISMISSAL

This matter comes before the Court by way of an application for post-conviction relief (PCR) filed January 4, 2012. The Respondent made its return on July 31, 2012. An evidentiary hearing into the matter was convened on August 26, 2013 at the Pickens County Courthouse. The Applicant was present at the hearing and represented by R. Mills Ariail, Jr., Esquire. Karen C. Ratigan, Esquire of the South Carolina Office of the Attorney General represented the Respondent.

The Applicant testified on his own behalf at the PCR hearing. Also testifying was the Applicant's trial counsel, John W. DeJong, Esquire. The Court had before it the trial transcript, the Pickens County Clerk of Court records, the Applicant's South Carolina Department of Corrections records, the PCR application, the return, and the appellate records.

PROCEDURAL HISTORY

The Applicant is confined in the South Carolina Department of Corrections pursuant to orders of commitment from the Pickens County Clerk of Court. The Applicant was indicted at the March 2008 term of the Pickens County Grand Jury for assault with intent to commit first-degree criminal sexual conduct (2008-GS-39-0499). He was represented by John W. DeJong,

R37

Esquire.¹

After the State brought the case to trial, the Applicant was found guilty. On October 23, 2008, the Honorable G. Edward Welmaker sentenced the Applicant to twenty-three years imprisonment.

A notice of appeal was filed at the South Carolina Court of Appeals. Robert M. Pachak, Esquire of the South Carolina Commission on Indigent Defense perfected the appeal. The Court of Appeals affirmed the Applicant's conviction and sentence. State v. Clayton, Op. No. 2011-UP-003 (S.C. Ct. App. filed Jan. 20, 2011).

ALLEGATIONS

In his application, the Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of trial counsel:
 - a. Failed to represent defendant at preliminary hearing and bond hearing.
 - b. Unduly harsh sentence.

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).

¹ The Applicant testified at the PCR hearing that Dallas D. Ball, Esquire had been retained solely to request a continuance in this case.

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).

For an applicant to be granted PCR as a result of ineffective assistance of counsel, he must show both: (1) that his counsel failed to render reasonably effective assistance under prevailing professional norms, and (2) that he was prejudiced by his counsel's ineffective performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984); Porter v. State, 368 S.C. 378, 383, 629 S.E.2d 353, 356 (2006). In order to prove prejudice, an applicant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry v. State, 300 S.C. 115, 117-18, 386 S.E.2d 624, 625 (1989). "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 v. Washington, 466 U.S. 668, 104 S. Ct. 2052).

The Applicant stated he should have been allowed to testify in his own defense at trial. Though the Applicant did admit he was advised that he had the right to testify. The Applicant, however, argued he should have testified because he would have been able to show he lacked intent at the time of the act and that he was remorseful.

Trial counsel testified he filed discovery motions, received those materials, and reviewed them with the Applicant. Trial counsel testified they reviewed the impact that the witness's statement – that the Applicant had confessed to him – would have upon their case. Trial counsel testified he reviewed the elements of assault with intent to commit first-degree criminal sexual conduct with the Applicant and stated it was a goal to have the trial judge charge the lesser-

included offense of assault and battery of a high and aggravated nature (ABHAN) to the jury. Trial counsel testified they discussed the Applicant's right to testify at trial and stated that he never tells his clients whether or not they should testify.

This Court finds the Applicant failed to meet his burden of proving trial counsel should have advised him or allowed him to testify because his trial testimony would have supported trial counsel's request for the trial judge to charge the lesser-included offense of ABHAN. Both the Applicant and trial counsel testified the Applicant had been advised of his right to testify. The trial judge also advised the Applicant of this right and informed him that whether to testify was his decision. (Trial transcript, p.331). The Applicant failed to present any credible evidence either that trial counsel misadvised him about this right or pressured him not to testify. Regardless, this Court finds the Applicant did not prove he was prejudiced because he did not testify at his trial. Trial counsel strongly argued for the ABHAN charge. (Trial transcript, pp.355-59). This Court finds, however, that it is unlikely the Applicant's trial testimony would have changed the trial judge's decision not to issue an ABHAN charge.²

Accordingly, this Court finds the Applicant has failed to prove the first prong of the Strickland test – that trial counsel failed to render reasonably effective assistance under prevailing professional norms. The Applicant failed to present specific and compelling evidence that trial 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 trial counsel's performance. This Court concludes the Applicant has not met

² The Applicant testified at the PCR hearing that he wanted to be able to explain his intent to the jury. In explaining how he would have testified at trial, however, the Applicant made several statements that would have been damaging to the defense, such as that "when I saw what I did, it scared me and I let her go" and after throwing the victim to the ground more than once he "finally let her go."

his burden of proving counsel failed to render reasonably effective assistance. See Frasier v. State, 351 S.C. at 389, 570 S.E.2d at 174.

All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this Order, this Court finds the Applicant failed to present any testimony, argument, or evidence at the hearing regarding such allegations. Accordingly, this Court finds the Applicant has abandoned any such allegations.

CONCLUSION

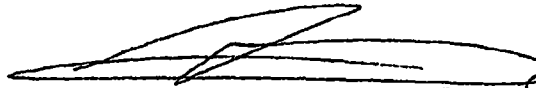
Based on all the foregoing, this Court finds and concludes the Applicant has not established any constitutional violations or deprivations before or during his trial and sentencing proceedings. Counsel was not deficient and the Applicant was not prejudiced by counsel's representation. Therefore, this PCR application must be denied and dismissed with prejudice.

This Court advises the Applicant that he must file a notice of intent to appeal within thirty (30) days from the receipt of this Order if he wants to secure appropriate appellate review. His attention is also directed to Rules 203, 206, and 243 of the South Carolina Appellate Court Rules for the appropriate procedures to follow after notice of intent to appeal has been timely filed.

IT IS THEREFORE ORDERED:

1. That the application for post-conviction relief be denied and dismissed with prejudice; and
2. That the Applicant be remanded to the custody of the Respondent.

AND IT IS SO ORDERED this 22 day of OCT, 2013.



Robin B. Stilwell
Presiding Judge
Thirteenth Judicial Circuit

G'VILLE, South Carolina.

2013 OCT 24 PM 4 09
CLERK OF COURT
PICKENS COUNTY
SOUTH CAROLINA

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS 461

COUNTY OF Pickens
STATE VS.
Kent Clayton

AKA: _____

Race: W Sex: M Age: 50

DOB: _____ SS#: _____

Address: _____

Evansville, IN 47708

DL#: _____ SID#: _____

INDICTMENT/CASE#: 2008GS3900499A/W#: 1682799Date of Offense: 8/31/2007S.C. Code § : 16-03-0656, 0652CDR Code #: 0253

SENTENCE SHEET

In disposition of the said indictment comes now the Defendant who was ☒ CONVICTED OF or ☐ PLEADS
TO: Sex / Assault with intent to commit criminal sexual conduct - First degreein violation of § 16-03-0656, 0652 of the S.C. Code of Laws, bearing CDR Code # 0253☐ NON-VIOLENT ☒ VIOLENT ☐ SERIOUS ☒ MOST SERIOUS ☒ Mandatory GPS(CSC ☐ §17-25-45
w/minor 1st or Lewd Act)The charge is: ☒ As Indicted, ☐ Lesser Included Offense, ☐ Defendant Waives Presentment to Grand Jury. (Defendant initial)The plea is: ☐ Without Negotiations or Recommendation, ☐ Negotiated Sentence, ☐ Recommendation by the State.

ATTEST:

Them, PeterDefendantAttorney for DefendantSC Bar#WHEREFORE, the Defendant is committed to the ☒ State Department of Corrections, ☐ County Detention Center,
for a determinate term of 23 days/months/years or ☐ under the Youthful Offender Act not to exceed _____ years
and/or to pay a fine of \$ _____; provided that upon the service of _____ days/months/years and/or payment
of \$ _____; plus costs and assessments as applicable*; the balance is suspended with probation for _____
months/years and subject to South Carolina Department of Probation, Parole and Pardon Services standard conditions of
probation, which are incorporated by reference.☐ CONCURRENT or ☐ CONSECUTIVE to sentence on: _____☒ The Defendant is to be given credit for time served pursuant to S.C. Code § 24-13-40 to be calculated and applied
by the State Department of Corrections.☐ The Defendant is to be placed on the Central Registry of Child Abuse and Neglect pursuant to S.C. Code §17-25-135.

SPECIAL CONDITIONS:

☐ RESTITUTION: ☐ Deferred ☐ Def. Waives Hearing ☐ Ordered PTUP _____

Total: \$ _____ plus 20% fee: \$ _____

Payment Terms: _____

☐ set by SCDPPPS _____

Recipient: _____

*Fine: \$ _____

§ 14-1-206 (Assessments 107.5 %) \$ _____

§ 14-1-211(A)(1) (Conv. Surcharge) \$100 \$ 100.00

§ 14-1-211(A)(2) (DUI Surcharge) \$100 \$ _____

§ 56-5-2995 (DUI Assessment) \$12 \$ _____

§ 35.13 (Public Def/Prob) \$500 \$ _____

§ 73.3, 1B TP (Law Enforce. Funding) \$25 \$ 25.00

§ 33.7, 1B TP (Drug Court Surcharge) \$100 \$ _____

§ 50-21-114(BUI Breath Test Fee) \$50 \$ _____

§ 56-5-2942(J) (Vehicle Assessment) \$40/ea \$ _____

3% to County (if paid in installments) \$ 3.90§ 90.11 TP (SCCJA Surcharge) \$5 \$ 5.00TOTAL \$ 133.90Leyth H. Gathin
Clerk of Court/ Deputy Clerk

Court Reporter: _____

_____ days/hours Public Service Employment

Obtain GED _____

Attend Voc. Rehab. or Job Corp. _____

May serve W/E beginning _____

Substance Abuse Counseling _____

Random Drug/Alcohol testing _____

Fine may be pd. in equal, consecutive weekly/monthly
pmts. of \$ _____ beginning _____

\$ _____ paid to Public Defender Fund

Other: _____

☐ Appointed PD or appointed other counsel, §35.13 TP
Requires \$500 be paid to Clerk during probation.PRESIDING JUDGE [Signature]Judge Code: 21-11-317Sentence Date: 10-23-08

WITNESSES

David Fowler

Pickens County Sheriff's Office

9/1/2007

DOCKET NO. 2008-GS-39-499

PT

The State of South Carolina

County of Pickens

COURT OF GENERAL SESSIONS

TERM 2008

THE STATE

VS.

KENT CLAYTON

ARREST WARRANT NUMBER

1682799

TRUE BILL ACTION OF GRAND JURY

DATE MAR 04 2008

Foreperson of Grand Jury

VERDICT

Guilty

James R. Smith III 10/23/08
Foreperson of Petit Jury Date:

Indictment for

0253

ASSAULT WITH INTENT TO COMMIT CRIMINAL
SEXUAL CONDUCT

VIOLATION § 16-03-0656, 0652

STATE OF SOUTH CAROLINA)
COUNTY OF PICKENS)

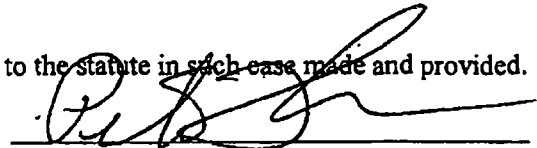
INDICTMENT FOR
ASSAULT WITH INTENT TO COMMIT CRIMINAL SEXUAL
CONDUCT

At a Court of General Sessions, convened on **MAR 04 2008** the Grand Jurors of Pickens
County present upon their oath:

Assault With Intent to Commit CSC

That KENT CLAYTON did in Pickens County, on or about the 31st day of August, 2007, commit an assault upon
ALEATHA MARCHESTA JONES, with the intent to commit criminal sexual conduct and was accompanied by
one or more of the following circumstances, to wit: the defendant was armed with a knife. This is in violation of §
16-3-656 of the South Carolina Code of Laws (1976) as amended.

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


SOLICITOR

ARREST WARRANT 01-3850

1-682799

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Pickens

THE STATE

2007-21559

against

Kent Clayton

Address:

Evansville, IN 47708-

Phone: SSN:

Sex: M Race: W Height: 6 2 Weight: 220

DL State: DL #:

DOB: Agency OR #: SC0390000

Prosecuting Agency: Pickens County Sheriff's Office

Prosecuting Officer: David Kett Fowler - 1422

Offense: Sex / Assault with intent to commit criminal sexual conduct - First degree

Offense Code: 0253

Code/Ordinance Sec: 16-03-0656, 0652

This warrant is CERTIFIED FOR SERVICE in the

☐ County/ ☐ Municipality of

is to be arrested and brought before me to be dealt with according to the law. The accused

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Kent Clayton on 09-01-2007

Sgt. M. Pate

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

Pickens - Pickens County Sheriff's Court

216A L. E. C. Road

Pickens, SC 29671

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

ORIGINAL

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Pickens

Personally appeared before me the affiant David Kett Fowler

being duly sworn deposes and says that defendant Kent Clayton

did within this county and state on or about 08/31/2007

State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Pickens)

in the following particulars:

DESCRIPTION OF OFFENSE Sex / Assault with intent to commit criminal sexual conduct - First degree

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

The defendant, Kent Clayton, did on or about 8/31/2007, assault Aleatha Marchesia Jones in an attempt to commit Criminal Sexual Conduct in the First Degree. The defendant was armed with a knife. The victim asked what he intended to do with the knife he told her he was going to rape her. He then placed the knife to the victim's throat, threw her to the ground, and placed his hand over her mouth to prevent her from screaming. The victim managed to escape only to have the defendant grab her again and throw her to the ground. He then told the victim he was leaving her go, took her cell phone and told her he would kill her if she told anyone. The offense occurred in a back parking lot at the Upper State Fairgrounds located in Pickens County while the defendant was walking the victim towards her residence. 1. PCSO Incident Report # 2007-21559. 2. Victim's statement. 3. Photographs of victim's injuries.

Signature of Affiant

STATE OF SOUTH CAROLINA

☒ County/ ☐ Municipality of

Pickens

Affiant's Address 216 Lec Road

Pickens, SC 29671-

Affiant's Telephone (864)898-5500

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

If appearing from the above affidavit that there are reasonable grounds to believe that

on or about 8/31/2007

defendant Kent Clayton

did violate the criminal laws of the State of South Carolina (or ordinance of ☒ County/ ☐ Municipality of Pickens) as set forth below:

DESCRIPTION OF OFFENSE: Sex / Assault with intent to commit criminal sexual conduct - First degree

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable. Sworn to and subscribed before me on 09/01/2007

(L.S.)

Judge's Address

216A Law Enforcement Center Rd

Pickens, SC 29671-

Judge's Telephone

(864)898-5552

Judge Code: 7089

ORIGINAL

ORIGINAL

ORIGINAL

Form Approved by
S.C. Attorney General
April 21, 2003
SCCA 516

on

Type and Amount:

Name of Surety:

PRELIMINARY HEARING held by

budget

9

Defendant Attorney:

Decision:

DISPOSITION before

Judge

ॐ

by

(indicate jury trial, bench trial, plea, nol. pros., etc.)

Disposition:

Sentence:

JURORS

Telephone:

Telephone:

Telephone:

Telephone:

Telephone:

Telephone:**Telephone:****Telephone:**

CODEFENDANTS

1

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Kent Clayton, Appellant.

Appeal From Pickens County
G. Edward Welmaker, Circuit Court Judge

Unpublished Opinion No. 2011-UP-003
Submitted September 1, 2010 – Filed January 20, 2011

AFFIRMED

Appellate Defender Robert M. Pachak, South Carolina
Commission on Indigent Defense Division of Appellate
Defense, of Columbia, for Appellant.

Attorney General Henry Dargan McMaster, Chief Deputy
Attorney General John W. McIntosh, Assistant Deputy
Attorney General Salley W. Elliott, Senior Assistant Attorney
General Norman Mark Rapoport, Office of the Attorney
General, of Columbia; Solicitor Robert M. Atrial, of Greenville,
for Respondent.

PER CURIAM: Appellant, Kent Clayton, was convicted of assault with intent to commit criminal sexual conduct in the first degree. He appeals, asserting the trial judge erred in failing to suppress the out-of-court and in-court identifications of appellant by the victim, and further erred in admitting testimony concerning a number of knives found in appellant's vehicle.[1] We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Victim testified that she visited the Upstate Fair in Pickens County on the night of August 30, 2007. Around 11:30 or 12:00 that night, she started to exit the fairground, intending to walk to her home only a few blocks away. She stopped at the front gate and spoke with a man named Keith. Another man was standing there at the time, and as Victim began to leave, the other man told her he would walk her out of the area. Victim declined, but the man accompanied her anyway. As she walked through the fair parking lot, the man brandished a fixed-blade knife. When Victim asked him what it was, he put the knife to her throat and threw Victim to the ground. The man pointed the knife at Victim's neck and told her he was going to rape her. Victim began fighting and screaming and momentarily managed to escape her attacker. However, the man caught Victim and threw her back to the ground, straddling her and holding the knife to her neck. Victim continued to scream and fight until the man eventually told her he was going to let her go. He took Victim's cell phone so she could not call for help, and told Victim he would kill her if she reported the crime. Victim described the lighting in the area of the gate where she exited the area as "pretty lit up" and

After the attack, Victim ran home, where she told her husband what had occurred. However, she did not contact law enforcement until the following day, September 1, 2007, out of fear from the attacker's threat. Officers interviewed Victim at her home and returned later that day to take her to the fairground to see if she could identify the person who attacked her. Victim described her attacker as a being white, in his late forties or early fifties, between two hundred and two hundred and forty pounds, 6'1" or 6'2" tall, and having blonde hair. On the second or third time walking around the fairground, Victim recognized someone she believed was her attacker standing at one of the fair games. Victim made an in-court identification of appellant as the person she thought had attacked her, but testified she was "not really for sure that that's him." Victim testified the officers asked how sure she was at the time she pointed him out at the fairground and she told them she was not quite sure, but was fifty percent sure. However, when asked on cross-examination where the person was that she was "fifty percent sure of" when she walked around the fairground, Victim replied that she now remembered he was standing at one of the games holding a basketball and that she was "starting to remember that it is really him, too now."

The State also presented the testimony of Steve Young, a friend and fellow fair worker of appellant. Young testified that the fair opened in Easley on a Thursday, and in the early morning hours on Friday appellant approached Young and indicated he needed to speak with Young.[2] Appellant then told Young that if anyone asked, appellant was with Young the whole night. Young asked appellant why he asked him to do that, and appellant replied that "he half-heartedly tried to rape someone." Subsequently, Young contacted the authorities and informed them of his conversation with appellant. The next day, around noon on Saturday, officers found Young at the fairground and asked him about the matter. Young told them what had occurred and directed them to the booth where appellant worked. When appellant was arrested later that day, he gave Young the keys to his van and asked him to look after his animals.

Within a day of his arrest, appellant called Young and asked him to come see him. A day or two later, Young contacted the officers and requested he be wired for his visit with appellant. Thereafter, Young visited with appellant while wired, at which time Young told appellant he thought all the authorities had was a witness who identified appellant. Appellant responded that was all he knew that the authorities had against him, and that it was "his word against hers." He further instructed Young to "go ahead and give the alibi that [the two of them were] together the whole night" except for approximately ten minutes. Young asked appellant if there was anything the police could get that he should take care of, and appellant indicated that he had "disposed of everything." Appellant then told Young the cell phone battery may be in the van, though, and he should dispose of that for him. When asked if there was any weapon in the van that was involved, appellant stated that he had disposed of it, "but the police took a picture of all his knives."

Detective Kett Fowler testified he was apprised of the matter by Deputy Raines, who happened to respond to the call of Young as well as the call from Victim. Detective Fowler accompanied Victim during the walk through the fairground. He testified that on the second trip around, Victim identified appellant as a possible suspect. On the third trip around, Victim again indicated appellant might be the suspect, stating that he looked similar to her attacker, but noted she was not one hundred percent positive. When asked to scale her certainty, Victim responded she was fifty percent sure. Detective Fowler pointed out appellant to Young and asked him if that was the person Young had had the previous conversation with that he reported, and Young indicated it was. Detective Fowler then made contact with appellant and took a statement from him, wherein appellant claimed he was with Young until 2 a.m. on the night in question, then walked his dogs and went to his van to sleep. The detective obtained appellant's consent to search his van. Over defense counsel's objection, Detective Fowler testified the only thing found in the van connected to the Victim's report were various knives, mostly folding but some fixed-blades, which were located in a footlocker. The discovered knives were ultimately not tied to this crime. Thereafter, Detective Fowler contacted the magistrate and explained the facts and the magistrate issued a warrant for appellant's arrest.

ISSUES

SC, July 19, 2014. Department of Justice, Office of the Attorney General, No. 468. Whether the trial court erred, abused its discretion and violated due process of law under the State and Federal Constitutions when it failed to suppress out-of-court and in-court identifications of appellant when the only witness to the incident could only say there was a fifty percent chance appellant was her attacker.

2. Whether the trial court erred in admitting into evidence testimony about a number of knives found in appellant's trunk that were not connected to the crime, were prejudicial, and raised spurious instances of prior bad acts.

STANDARD OF REVIEW

The admission or exclusion of evidence is left to the sound discretion of the trial court, and the court's decision will not be reversed absent an abuse of discretion. State v. Morris, 376 S.C. 189, 205-06, 656 S.E.2d 359, 368 (2008). An abuse of discretion occurs when the trial court's decision is based on an error of law or on factual findings that are without evidentiary support. Id. at 206, 656 S.E.2d at 368. Further, for an error of law to warrant reversal based upon the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the verdict was influenced by the challenged evidence or the lack thereof. State v. Gault, 375 S.C. 570, 574, 654 S.E.2d 98, 100 (Ct. App. 2007).

LAW/ANALYSIS

I. Identification

On appeal, appellant argues the trial court erred in allowing Victim's out-of-court and in-court identification testimony. Noting that "reliability is the linchpin in determining the admissibility of identification evidence," appellant contends Victim's failure to make a positive identification was not relevant, and that a show-up identification procedure with only a tentative identification violates due process. We disagree.

Prior to trial, a suppression hearing was held regarding Victim's pre-trial identification of appellant. Victim testified about how she observed the assailant for ten to fifteen minutes before she left the fairground's gate, and further testified to how the attack occurred, noting the assailant straddled her during that time and their faces were "pretty close." Victim additionally described her assailant, stating he was a white man in his late forties or early fifties, was a little taller than her 6'1" husband, he weighed "two something," and he wore a fair uniform shirt. Victim stated that the next day, or the day after, she accompanied officers to the fairground with two hundred or more people in the area, and she observed a man on her second or third walk around that looked like her attacker. She pointed the man out to the officers and told them she was fifty percent sure, but she wasn't really positive. Victim further pointed out the appellant in the hearing and stated, "He resembles the guy sitting over at [the defense] table." Victim clarified that she saw the person twice in her walks around the fairground, and that she was "pretty sure it was him." Detective Fowler testified during the suppression hearing that he knew where appellant was prior to walking around with Victim, but there was no suggestive conversation between him and Victim and he said nothing to suggest Victim should look over at appellant.

Defense counsel argued any in-court identification of appellant by Victim should be suppressed based upon the fact that Victim was only fifty percent sure of her identification. Additionally, counsel argued the identification procedure was suggestive because the Victim walked around the area three times with law enforcement and Detective Fowler could have knowingly or unknowingly communicated his identity as the suspect to Victim. The trial judge found the walk-through was not suggestive and the reliability of the identification was a question for the jury. Defense counsel maintained, while the State could elicit testimony from Victim regarding what she stated at the fairground regarding appellant, she should not be allowed to make an in-court identification of appellant or state appellant resembled her attacker. The trial judge ruled the threshold for Biggers[3] had been met and the matter went to weight and not admissibility of the evidence. During Victim's testimony before the jury, defense counsel made a continuing objection to testimony concerning her identification of her attacker.

SC-16-00001
The decision to admit an eyewitness identification is generally within the trial judge's discretion, whose decision will not be disturbed on appeal absent an abuse of such, or the commission of prejudicial legal error. State v. McCord, 349 S.C. 477, 481, 562 S.E.2d 689, 691 (Ct. App. 2002). A criminal defendant may be deprived of due process of law by an identification procedure which is unnecessarily suggestive and conducive to irreparable mistaken identification. State v. Turner, 373 S.C. 121, 127, 644 S.E.2d 693, 696 (2007). Thus, an in-court identification of an accused is inadmissible if a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification. Id. The United States Supreme Court has developed a two-prong inquiry to determine the admissibility of an out-of-court identification. State v. Traylor, 360 S.C. 74, 81, 600 S.E.2d 523, 526 (2004) (citing Neil v. Biggers, 409 U.S. 188 (1972)). First, the court must determine whether the identification process was unduly suggestive. Next, it must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447 (2000). Only if the procedure was suggestive need the court consider whether there was a substantial likelihood of irreparable misidentification. Id. at 287, 540 S.E.2d at 447-48.

We find no error in the admission of Victim's identification of appellant.[4] There is no evidence the identification procedure in the case at hand was in any way suggestive. As noted by the State, Victim was not taken to a standard show-up where individual suspects are presented to a victim. Rather, accompanied by law enforcement, Victim merely walked the fairground during operating hours with over two hundred people in the area and pointed out the person she believed might be her attacker. Additionally, there is no evidence law enforcement suggested, either knowingly or unknowingly, that appellant was the suspect. Because the procedure was not suggestive, we need not consider whether there was a substantial likelihood of irreparable misidentification. We further note, although the level of certainty demonstrated by Victim at the confrontation is troubling, such is simply a factor for consideration in whether there was a substantial likelihood of irreparable misidentification, and that factor alone is insufficient to require suppression, for the key issue is whether under the totality of the circumstances the identification is reliable even though a confrontation may have been suggestive. See State v. Washington, 323 S.C. 106, 111-12, 473 S.E.2d 479, 481-82 (Ct. App. 1996) (wherein this court, in analyzing the factors in determining whether there was a likelihood of misidentification, noted that an identification is not unreliable simply because it may be phrased in uncertain terms, and held identification was not unreliable where the jury had the opportunity to observe the witness and attach the credibility it deemed proper to his testimony, including the certainty or uncertainty of his identification).

II. Testimony regarding knives

Appellant asserts on appeal that the trial judge erred in admitting testimony about the knives found in his trunk into evidence as they were not connected to the crime, the evidence was prejudicial, and it "raised spurious instances of prior bad acts." He argues, pursuant to State v. McConnell, 290 S.C. 278, 350 S.E.2d 179 (1986), the evidence concerning the knives was inadmissible.

During direct examination of Detective Fowler, the solicitor asked what, if anything, was found in the consensual search of appellant's van. The following colloquy then occurred:

A: The only thing we found that had been mentioned as far as the report and all, there was a footlocker that had numerous knives - - -

[Defense Counsel]: Your Honor, I'm gonna object to that.

[The Court]: Your objection?

[Defense Counsel]: Unless they can show some nexus between what they are now talking about and this crime it is not relevant.

At this point a bench conference was held, and the trial judge overruled counsel's objection. Thereafter, Detective Fowler testified they found numerous knives in the footlocker, mostly folding but some fixed-blade knives, but they ultimately were not able to tie any of the knives found there to the crime.

Assuming arguendo that the evidence was improperly admitted, we find any error to be harmless in light of 476 unobjected to testimony of Steve Young, as well as the minimal impact of Detective Fowler's testimony considering the record as a whole. During direct examination, Young recounted his conversation with appellant while appellant was jailed. Young stated he and appellant talked about "a cell phone battery and a knife." When Young asked appellant if there was anything he needed to take care of for him before the police could find it in the van, and if there was any weapon in there "that was involved in it," appellant told him there was not, that he had disposed of it, "but the police took a picture of all his knives." Accordingly, there is cumulative, unobjected to evidence concerning the knives, and any error in the admission of Detective Fowler's testimony regarding the knives is harmless. See State v. Holder, 382 S.C. 278, 289, 676 S.E.2d 690, 696-97 (2009) (holding the erroneous admission of evidence is harmless beyond a reasonable doubt where it is minimal in the context of the entire record and cumulative to other testimony admitted without objection); State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) (the admission of improper evidence is deemed harmless if it is merely cumulative to other evidence); State v. Page, 378 S.C. 476, 483-84, 663 S.E.2d 357, 360 (Ct. App. 2008) (holding error is harmless where it could not reasonably have affected the trial's outcome; no definite rule of law governs the finding that an error was harmless, rather the materiality and prejudicial character of the error must be determined from its relationship to the entire case; in considering whether error is harmless, a case's particular facts must be considered along with various factors including: the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case).

For the foregoing reasons, appellant's conviction is

AFFIRMED.

FEW, C.J., and HUFF and GEATHERS, JJ., concur.

[1] We decide this case without oral argument pursuant to Rule 215, SCACR.

[2] In a statement given to police on September 1, 2007, Young indicated this conversation took place around 4:30 or 5:00 a.m.

[3] Neil v. Biggers, 409 U.S. 188, (1972).

[4] Although appellant asserts in his question on appeal that the trial judge improperly admitted both the out-of-court and in-court identification of him, trial counsel clearly argued only that any in-court identification should be suppressed, specifically asserting the State could elicit testimony from Victim regarding what she stated at the fairground.