

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Abbeville County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5276

RECEIVED

JAN 22 2015

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

DWAYNE EDDIE STARKS,

PETITIONER

APPELLATE CASE NO. 2015-000013

APPENDIX

JOHN EDWARD ROBINSON
Pro Bono Appellate Counsel
McDowell & Robinson
P.O. Box 670
Charleston, SC, 29401
(843) 723-5152

ALAN WILSON
Attorney General

JOHN W. MCINTOSH
Chief Deputy Attorney General

ROBERT M. DUDEK
Chief Appellate Defender
Second Counsel
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

CHRISTINA C. BIGELOW
Assistant Attorney General
Office of the Attorney General
PO Box 11549
Columbia, SC 29211
(803) 734-6305

DAVID STUMBO
Solicitor, Eighth Judicial Circuit
Suite 203 Park Plaza
600 Monument St.
PO Box 516
Greenwood, SC 29469
(864) 942-8800

ATTORNEYS FOR PETITIONER

ATTORNEYS FOR RESPONDENT

INDEX

INDEX.....	i
<u>STATE V. STARKS</u> , 76 5 S.E. 2d 148 (FILED OCTOBER 29, 2014).....	1
PETITION FOR REHEARING.....	4
ORDER DENYING PETITION FOR REHEARING	10

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

The State, Respondent,

v.

Dwayne Eddie Starks, Appellant.

Appellate Case No. 2013-000869

Appeal From Abbeville County
Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5276
Heard October 8, 2014 – Filed October 29, 2014

AFFIRMED

John Edward Robinson, of Charleston, and Chief
Appellate Defender Robert Michael Dudek, of Columbia,
for Appellant.

Attorney General Alan McCrory Wilson and Assistant
Attorney General Christina Catoe Bigelow, both of
Columbia, for Respondent.

FEW, C.J.: Dwayne Starks appeals his conviction for armed robbery and possession of a deadly weapon during the commission of a violent crime. Starks argues the trial court erred in refusing to suppress evidence of an out-of-court identification of Starks by the sole eyewitness, Nakelia Williams. Starks contends the evidence should have been suppressed because the one-man show-up identification procedure used by police was unnecessarily suggestive and created a

substantial likelihood of misidentification under *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972). We affirm.

On the night of February 27, 2012, Starks robbed a convenience store where Williams worked as a clerk. Because Starks wore a ski mask during the robbery, Williams did not see his face, but Williams testified she recognized his voice and body build based on her prior knowledge of Starks as a regular customer of the store. Immediately after the robbery, Williams called the police and told the dispatcher she had been robbed and Starks was the person who did it. Shortly thereafter—before the show-up—she told an investigating officer she was "robbed by Dwayne Starks." One hour after the robbery, police brought Starks to the store in the back seat of a patrol car, and Williams identified Starks after viewing his face.

As to Starks' argument the trial court erred in finding the identification procedure was not unnecessarily suggestive, we agree and find the trial court's ruling was clearly erroneous. *See State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) (stating "[s]ingle person show-ups are particularly disfavored in the law," and holding that "it is patent the show-up procedure used was . . . suggestive").

However, we question whether *Biggers* applies to the facts of this case. Williams used one criterion—Starks' face—to identify Starks during the identification procedure but used other criteria—Starks' voice and body build—to identify Starks during the commission of the crime. Therefore, the reliability of Williams' testimony that Starks committed the crime depended only upon the accuracy of her recognition of Starks' voice and body build during the crime sequence, and did not depend upon any likelihood of misidentification the police created when she viewed Starks' face during the show-up procedure. *See Biggers*, 409 U.S. at 198, 93 S. Ct. at 381-82, 34 L. Ed. 2d at 410 ("It is the likelihood of misidentification which violates a defendant's right to due process . . ."). The show-up served the primary purpose of identifying Starks as the person Williams knew before the crime, and she identified him as the person who committed the crime based on her prior knowledge of him—not as a result of suggestive police procedures. *See State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) ("Due process requires courts to assess . . . whether the identification *resulted from* unnecessary and unduly suggestive *police procedures*" (emphasis added)). *Compare Liverman*, 398 S.C. at 134-35, 140-41, 727 S.E.2d at 424, 427 (finding *Biggers* applies where the witness saw the suspect's face during the crime and identified the

suspect upon viewing his face in a show-up) *with State v. McGee*, 408 S.C. 278, 286-87, 758 S.E.2d 730, 734-35 (Ct. App. 2014) (holding *Biggers* did not apply to an identification because the "testimony related to seeing [the defendant] a year before the [crime] and was for the purpose of showing that [the defendant] knew [the victim]").

In any event, we find the trial court acted within its discretion in applying the *Biggers* reliability factors and in determining the identification procedure "was nevertheless so reliable that no substantial likelihood of misidentification existed." *Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (citing *Biggers*, 409 U.S. at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411). "Whether an eyewitness identification is sufficiently reliable is a mixed question of law and fact." 398 S.C. at 137-38, 727 S.E.2d at 425. "Generally, the decision to admit an eyewitness identification is at the trial judge's discretion and will not be disturbed on appeal absent an abuse of discretion." 398 S.C. at 138, 727 S.E.2d at 425. "[T]he factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Biggers*, 409 U.S. at 199-200, 93 S. Ct. at 382, 34 L. Ed. 2d at 411; *see also Liverman*, 398 S.C. at 138, 727 S.E.2d at 426 (listing factors).

In this case, the trial court considered all the *Biggers* factors and discussed its findings as to those factors on the record. The trial court placed particular emphasis on the fact that Williams knew Starks before the crime. *See Liverman*, 398 S.C. at 141, 727 S.E.2d at 427 ("[T]he fact that an identification witness knows the accused remains a significant factor in determining reliability."). The trial court's finding that the identification was sufficiently reliable is supported by the evidence, and thus was not an abuse of discretion.

AFFIRMED.

LOCKEMY, J., concurs.

THOMAS, J., concurs in result only.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

DWAYNE EDDIE STARKS,

APPELLANT

Appeal from Abbeville County

Thomas L. Hughston, Jr., Circuit Court Judge

Opinion No. 5276

PETITION FOR REHEARING

On October 29, 2014, this Court affirmed Appellant's conviction and sentence for armed robbery and possession of a weapon during commission of a crime, *State v. Starks*, Op. No. 2014-5276 (S.C. Ct. App. Oct. 29, 2014). The sole issue raised by Appellant in his appeal was whether the trial judge erred in admitting a "show up" identification after a pretrial *Neil v. Biggers* hearing. In affirming the trial court's decision to admit the identification, this Court reviewed the trial court's procedure for admitting the identification. This Court found that while the trial court clearly erred in ruling that a show up identification is not unduly suggestive, nonetheless the trial court reviewed all elements of the identification in conformity with *Neil v. Biggers*, 409 U.S. 188, 93 S. Ct. 375

(1972) and that additionally, the identification was technically an independent, confirmatory identification. This Court questioned whether *Biggers* applied to this case. Pursuant to Rule 221(a), SCACR, Appellant files this petition for rehearing because this Court overlooked or misapprehended the issue presented for appeal.

Pursuant to the requirements of *Biggers*, the trial court must use threshold test to determine whether an identification was unduly suggestive. If the identification was unduly suggestive, as this Court found, then the trial court must review the *Biggers* elements to determine if the statement should still be admissible. Those elements are: (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. *State v. Liverman*, 398 S.C. 130, 727 S.E.2d 422 (2012) at 138; 727 S.E.2d at 426. *See also State v. Stewart*, 275 S.C. 447, at 450, 272 S.E.2d 628, 629 (1980). The evidence presented during the pretrial hearing, and during the trial, indicated some confusion of the nature of the identification, and whether it was an independent identification or a *Biggers* analysis from the identification at the time of commission of the underlying crime. The record shows that in addition to the trial court's erroneous ruling that stand-up identifications are not inherently suggestive, that only some of the *Biggers* elements were reviewed by the trial court. The trial court's analysis and ruling follows:

THE COURT: All right. I appreciate that, but I find that there's nothing unduly suggestive in the way he show-up was done, given the short period of time, as I understand it, really less than an hour or so involved from when the time the robbery occurred or thereabouts, an hour or so and him being presented to her in the backseat of a patrol car for a few brief seconds with the light on. I don't think that was unduly suggestive, particularly since she identified him, as I understand it from out the outset, as being the person that robbed her. She recognized him at the time in the store, told the police that's who

that was, and then presented with him and she confirmed, that's him. So I don't see where it was unduly suggestive under all the circumstances and I think it is a reliable identification based on her prior knowledge of Mr. Starks and identifying him that night. So I don't think it's that it is an impermissible show-up identification and I'll allow it to be presented to the jury here in court....

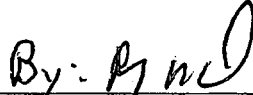
(R. 100, lines 10- R.101 line 3). Respectfully, Appellant does not believe these statements in the trial court's ruling constitute a summary of the *Biggers* factors. The witness was unable to see the face of her assailant, so prong 1 could not be satisfied under a strict reading of the elements, and this element was not expressly addressed by the trial court. The witness' degree of attention was not noted in the trial court's ruling. The accuracy of the prior description was not directly addressed in the trial court's ruling. The only element the trial court appears to review clearly is the element of the short duration between the crime and confrontation. (R. 100, lines 10-16). While the trial court may have stated grounds for an independent identification, it did not enumerate the *Biggers* factors. The trial court erred in admitting the identification which was both suggestive, and nevertheless admitting the identification while failing to enumerate the factors in making that ruling. At the conclusion of the pre-trial hearing, Appellant argued the show up identification was inadmissible because it was both highly suggestive and unreliable under the totality of the circumstances (R.100 lines 7-9). Nevertheless, the trial court denied the motion to suppress and allowed the introduction of the identification.

This Court held that the trial court may have admitted an independent identification which may not have required a *Biggers* analysis. However, the record begins and ends with this identification being couched as a *Biggers* hearing, and both the State's and Appellant's arguments were directed to a *Biggers* analysis. Because the trial court undertook a *Biggers* analysis that led to the admission of the identification in evidence, any legal error in that analysis should be subject to

review and reversal. This Court properly determined that the trial court erred in stating stand up identifications are not suggestive. Appellant does not suggest that there was no basis for the trial court to consider an independent confirmatory identification. Instead, the issue is that a *Biggers* hearing that was conducted was defective and there was no express ruling on an independent, confirmatory identification. If this case falls into the exception to a "full" *Biggers* hearing created by *State v. Liverman* where there is merely a confirmatory identification, then there would have been no need for the confusing proceeding conducted by the trial court. While this Court's analysis of the *Neil v. Biggers* factors corrects the trial court as to the first prong of the test, it affirms the trial court's ruling on the basis of inferences rather than a strict reading of the record from the hearing.

This Court overlooked or misapprehended the issue presented because the opinion concerned whether the witness' identification was still admissible as an independent identification rather than a *Biggers* identification requiring review of a *Biggers* analysis and each element therein, and even though this Court held that the identification was inherently suggestive. Therefore, Appellant respectfully requests this Court rehear the matter pursuant to Rule 221(a), SCACR, and issue a new opinion granting Appellant a new trial, or in the alternative, a remand to the trial judge to determine if all of the *Biggers* factors were met in order to allow admission of a suggestive identification.

Respectfully submitted,

By: 

John Edward Robinson
Attorney for Appellant
McDowell Law Offices
36 Broad St.,
Charleston, SC 29401
(843-723-5152)

Robert Dudek
Second Counsel
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

This 12th day of November, 2014.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County
The Honorable Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

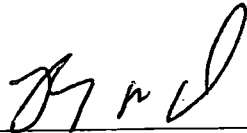
V.

DWAYNE EDDIE STARKS,

APPELLANT

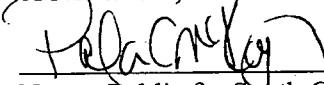
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Christina Catoe, Esquire, at the Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, and Mr. Dwayne Eddie Starks, at McCormick Correctional Institution, 386 Redemption Way, McCormick, SC 29899, this 12th day of November, 2014.



Robert M. Dudek
Chief Appellate Defender

SWORN TO BEFORE ME this 12th day
of November, 2014.



(L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022

The South Carolina Court of Appeals

The State, Respondent,

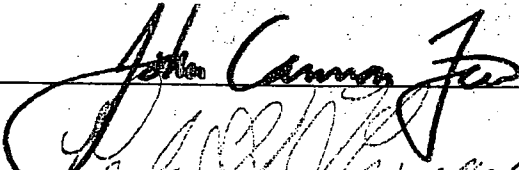
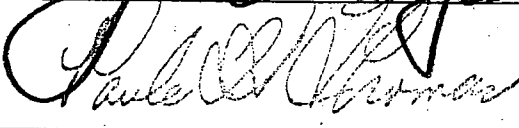
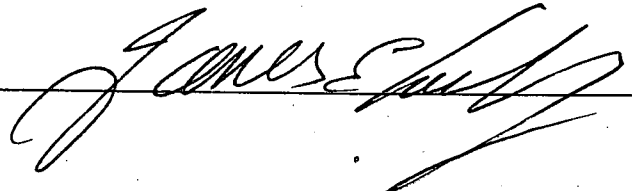
v.

Dwayne Eddie Starks, Appellant.

Appellate Case No. 2013-000869

ORDER

After careful consideration of the Appellant's petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

Robert Michael Dudek, Esquire
Alan McCrory Wilson, Esquire
John Edward Robinson, Esquire
Christina Catoe Bigelow, Esquire
The Honorable Thomas L. Hughston, Jr.

FILED

December 12, 2014

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM ABBEVILLE COUNTY

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DWAYNE EDDIE STARKS,

APPELLANT

Appellate Case No. 2013-000869

RECORD ON APPEAL

JOHN EDWARD ROBINSON
S.C. Bar No. 75919
36 Broad St.
Charleston, SC, 29401
(843) 723-5152

ROBERT DUDEK
Second Counsel

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

Attorneys for Appellant

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General
S.C. Bar No. 73562

Office of the Attorney General
PO Box 11549
Columbia, SC 29211

(803) 734-3727

Attorneys for Respondent

INDEX

INDEX.....	i
HEARING TRANSCRIPT DATED APRIL 1-3, 2013	1
<u>JACKSON V. DENNO HEARING</u>	25
TESTIMONY	
JONATHAN MCALLISTER	
Direct Examination by Mr. Stumbo	26
Cross Examination by Ms. Bolen	37
THOMAS THOMASON	
Direct Examination by Mr. Stumbo	40
Cross Examination by Ms. Bolen	51
DWAYNE STARKS	
Direct Examination by Ms. Bolen.....	58
<u>NEIL V. BIGGERS HEARING</u>	61
TESTIMONY	
CHRIS WILKIE	
Direct Examination by Mr. Stumbo	63
Cross Examination by Ms. Bolen	68
PRETRIAL MOTION TO AMEND INDICTMENT (BY CONSENT) AND CONSENT STIPULATION TO SEQUESTER WITNESSES	
	71
<u>NEIL V. BIGGERS HEARING CONTINUED</u>	83
TESTIMONY	
NAKELIA WILLIAMS	
Direct Examination by Mr. Brown	83
Cross Examination by Ms. Bolen	90
Examination by the Court	92
ARGUMENT BY MS. BOLEN	95
ARGUMENT BY MR. STUMBO	98

REPLY BY MS. BOLEN	99
RULING BY THE COURT.....	100
TRIAL TRANSCRIPT DATED APRIL 1-3, 2013.....	102
OPENING ARGUMENT OF MR. BROWN	107
OPENING ARGUMENT OF MS. NELSON	110
TESTIMONY	
NAKELIA WILLIAMS	
Direct Examination by Mr. Brown	115
Cross Examination by Ms. Bolen	133
TEALEE KENO	
Direct Examination by Mr. Brown	142
Cross Examination by Ms. Bolen	147
KIMBERLY WELLS	
Direct Examination by Mr. Brown	149
THOMAS THOMASON	
Direct Examination by Mr. Stumbo.....	152
Cross Examination by Ms. Bolen	172
JONATHAN MCALLISTER	
Direct Examination by Mr. Stumbo.....	182
Cross Examination by Ms. Bolen	190
CHRIS WILKIE	
Direct Examination by Mr. Brown	192
Cross Examination by Ms. Bolen	225
AMY STEPHENS	
Direct Examination by Mr. Brown	236
DORIS YARBOROUGH	
Direct Examination by Mr. Brown	241
VERONA GIBSON	
Direct Examination by Mr. Brown	243
Cross Examination by Ms. Bolen	251

PAT CROOKS	
Direct Examination by Mr. Brown	250
COURTNEY SMITH	
Direct Examination by Mr. Brown	261
LILY GALLMAN	
Direct Examination by Mr. Stumbo.....	267
Cross Examination by Ms. Bolen	286
DEFENDANT’S MOTION FOR DIRECTED VERDICT	293
DEFENDANT’S MOTION TO EXCLUDE BASED ON CHAIN OF EVIDENCE.....	294
DEFENDANT’S RENEWED MOTION FOR DIRECTED VERDICT	294
COURT’S ADVISEMENT ON DEFENDANT’S FIFTH AMENDMENT RIGHTS.....	295
CLOSING ARGUMENT BY MR. STUMBO.....	299
CLOSING ARGUMENT BY MS. BOLEN.....	308
CHARGING OF THE JURY.....	319
QUESTION FROM THE JURY	332
VERDICT	333
SENTENCING	338
INDICTMENTS.....	347
CERTIFICATE OF COUNSEL.....	352

THE FOLLOWING EXHIBITS ARE ON FILE WITH THIS COURT:

STATE’S EXHIBITS #24 (CD-911 AUDIO), #25 (AERIAL VIEW MAP), #27 (CD-IN-STORE VIDEO), and #32 (CASH FOUND ON APPELLANT).

STATE OF SOUTH CAROLINA	)	IN THE EIGHTH JUDICIAL CIRCUIT
COUNTY OF ABBEVILLE	)	THE COURT OF GENERAL SESSIONS
	)	2012-GS-01-00391,00392
THE STATE OF SOUTH CAROLINA,	)	
	)	
PLAINTIFF,	)	
	)	
VERSUS	)	
	)	
DWAYNE EDDIE STARKS,	)	
	)	DATE: April 1-3, 2013
DEFENDANT.	)	ABBEVILLE, SOUTH CAROLINA

TRIAL TRANSCRIPT

B E F O R E:

THE HONORABLE THOMAS L. HUGHSTON, JR.

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

DAVID STUMBO, ESQUIRE
YATES BROWN, ESQUIRE
ATTORNEYS FOR THE STATE

PATRICIA BOLEN, ATTORNEY AT LAW
JANNA NELSON, ATTORNEY AT LAW
ATTORNEYS FOR THE DEFENDANT

PROVIDED FOR: SCCID - SCCID

FOR COPIES CONTACT: JO RICE
jrice@sccourts.ORG
OFFICIAL SC COURT REPORTER

INDEX

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE-CROSS</u>
JURY VOIR DIRE				6-13
JURY SELECTION				13-24
JACKSON/DENNO HEARING				25-60
<u>JONATHAN MCALLISTER</u>				
DAVID STUMBO	26-37			
PATRICIA BOLEN		37-40		
<u>THOMAS THOMASON</u>				
DAVID STUMBO	40-51			
PATRICIA BOLEN		51-56		
<u>DWAYNE STARKS</u>				
PATRICIA BOLEN	58-61			
NEIL VERSUS BIGGARS HEARING				61-70
<u>CHRIS WILKIE</u>				
DAVID STUMBO	63-68			
PATRICIA BOLEN		68-70		
PRE-TRIAL MOTIONS				71-74
JUROR RELEASED				75-83
NEIL VERSUS BIGGARS HEARING CONTINUED				83-103
<u>NAKELIA WILLIAMS</u>				
MR. BROWN	83-90			
MS. BOLEN		90-91		
THE COURT	92-95			
INTRODUCTORY REMARKS TO THE JURY				103-106
OPENING STATEMENT - YATES BROWN				107-110
OPENING STATEMENT - MS. NELSON				110-114

<u>WITNESS</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RE-CROSS</u>
<u>NAKELIA WILLIAMS</u>				
MR. BROWN	115-133		141-142	
MS. BOLEN		133-140		
<u>TEALEE KEENO</u>				
MR. BROWN	142-147			
MS. BOLEN		147-148		
<u>KIMBERLY WELLS</u>				
MR. BROWN	149-153			
<u>THOMAS THOMASON</u>				
MR. STUMBO	153-172		181-182	
MS. BOLEN		172-181		
<u>JONATHAN MCALLISTER</u>				
MR. STUMBO	182-190			
MS. BOLEN		190-191		
<u>CHRIS WILKIE</u>				
MR. BROWN	192-225		235	
MS. BOLEN		226-235		
<u>AMY STEPHENS</u>				
MR. BROWN	237-241			
<u>DORIS YARBOROUGH</u>				
MR. BROWN	242-244			
<u>VERONA GIBSON</u>				
MR. BROWN	244-251			
MS. BOLEN		251		
<u>PAT CROOKS</u>				
MR. BROWN	251-261			
<u>COURTNEY SMITH</u>				
MR. BROWN	261-267			
<u>LILY GALLMAN</u>				
MR. STUMBO	267-287			
MS. BOLEN		287-289		
MOTIONS				289-294

FIFTH AMENDMENT RIGHTS	295
CLOSING ARGUMENT - MR. STUMBO	300-309
CLOSING ARGUMENT - MS. BOLEN	309-319
CHARGE ON THE LAW	319-333
QUESTION FROM THE JURY	333-334
VERDICT	334-339
SENTENCING	339-346
CERTIFICATE	347

EXHIBITSSTATE'S EXHIBITS

S)	1	CD (I.D. ONLY) (JACKSON/DENNO)	50,61
S)	2	4x6 PHOTOGRAPH - STORE	123
S)	3	4x6 PHOTOGRAPH	123
S)	4	4x6 PHOTOGRAPH	123
S)	5	4x6 PHOTOGRAPH	123
S)	6	4x6 PHOTOGRAPH	123
S)	7	4x6 PHOTOGRAPH	123
S)	8	4x6 PHOTOGRAPH	123
S)	9	4x6 PHOTOGRAPH	123
S)	10	4x6 PHOTOGRAPH	123
S)	11	4x6 PHOTOGRAPH	123
S)	12	4x6 PHOTOGRAPH	201
S)	13	4x6 PHOTOGRAPH	201
S)	14	4x6 PHOTOGRAPH	201
S)	15	4x6 PHOTOGRAPH	201
S)	16	4x6 PHOTOGRAPH	201
S)	17	4x6 PHOTOGRAPH	201
S)	18	4x6 PHOTOGRAPH	201
S)	19	4x6 PHOTOGRAPH	201
S)	20	4x6 PHOTOGRAPH	201
S)	21	4x6 PHOTOGRAPH	201
S)	22	4x6 PHOTOGRAPH	201
S)	23	4x6 PHOTOGRAPH	201
S)	24	CD - 911 CALL	153
S)	25	AERIAL VIEW - LARGE BOARD	156
S)	26	LAB REPORT - LARGE BOARD	271
S)	27	CD - IN-STORE VIDEO	147
S)	28	GREEN JACKET	210
S)	29	GRAY SKI MASK	213
S)	30	GREEN SKI MASK	213
S)	31	BLACK PANTS	214
S)	32	PAPER MONEY	216
S)	33	SILVER MONEY	216
S)	34	TENNIS SHOES	219
S)	35	SWAB - BUCCAL	224(250)
S)	36	BOX	239
S)	37	SWABS - CLOTHING	266(250)

DEFENSE EXHIBITS

NONE ENTERED

COURT EXHIBIT'S

C)	1	FIRST QUESTION FROM JURY	333
C)	2	SECOND QUESTION FROM JURY	334

1 JURY VOIR DIRE

2 MR. STUMBO: Your Honor, if it please the Court. The
3 State calls State versus Dwayne Eddie Starks to the
4 indictment for armed robbery, Indictment number:
5 2012-GS-01-391. The State also calls Indictment
6 2012-GS-01-392. That's The State versus Dwayne Eddie
7 Starks, indictment for possession of a firearm or knife
8 during the commission of a crime. Your Honor, both of
9 these indictments have been true billed by the grand jury
10 of Abbeville and the State is ready for trial. If I may
11 approach.

12 THE COURT: Sure. (Mr. Stumbo hands documents to
13 Judge Hughston) Thank you, Solicitor. All right. Members
14 of the jury panel, please give me your attention. We are
15 about to pick a jury for the trial of the case, The State
16 against Dwayne Eddie Starks. Is this Mr. Starks? If you
17 would stand, please, and turn so the jury can see you,
18 turn around that way. (Mr. Starks complies) Good. You can
19 be seated.

20 As the Solicitor has indicated, he's charged with
21 having violated two of the laws of this state and to those
22 charges, Mr. Starks has said I am not guilty and that
23 places the burden of proving him guilty on the State. We
24 will pick the jury now for the trial of these cases, these
25 charges against him, and I need to ask you some questions

 THE STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 to make sure you are qualified, again, to serve on the
2 jury.

3 Is there any member of the jury panel related by blood
4 or marriage or do you know, in any way, the Defendant,
5 Dwayne Eddie Starks, the gentleman that just stood over
6 here down front. If so, please stand. Anyone on the panel
7 related by blood or marriage or do you know, in any way,
8 Dwayne Eddie Starks? If so, please stand. No one is
9 standing.

10 Does any member of the jury panel have any knowledge
11 or information at all about any of the facts or
12 circumstances that may be involved in the trial of these
13 cases? If so, please stand. No one is standing.

14 We have a possible witness list that I have been
15 furnished that are witnesses that the State may call in
16 this case and I'm going to call out those names that have
17 been furnished to me and what I want to know is, if you are
18 related by blood or marriage or know, in any way, any of
19 these potential witnesses.

20 Nakelia, N-A-K-E-L-I-A, Williams. Tealee, T-E-A-L-E-
21 E, Keeno, K-E-E-N-O. Kimberly Wells. Thomas G. Thomason
22 of the Abbeville Police Department, I believe. Courtney C.
23 Caldwell of the Abbeville Police Department. Jonathan
24 McAllister of the Abbeville Police Department. Chris
25 Wilkie of the Abbeville Police Department. James Reepe of

1 the Abbeville Police Department. Veronica [verbatim] T.
2 Gibson of the South Carolina Law Enforcement Division, the
3 State Law Enforcement Division. Pat Crooks of the State
4 Law Enforcement Division. Amy Stephens of the State Law
5 Enforcement Division. Courtney L. Young [verbatim] of the
6 State Law Enforcement Division. Doris Yarborough of the
7 State Law Enforcement Division. Sheree J. Brown of the
8 State Law Enforcement Division and Lilly Gallman of the
9 State Law Enforcement Division.

10 Is anyone on the panel related by blood or marriage or
11 do you know, in any way, any of those potential witnesses
12 whose names I just called out to you? If so, please stand.
13 All right. Tell me your name and number.

14 MR. BROWN: A.J. Brown, Adam Brown, #12, and I know
15 Wilkie and Thomason.

16 THE COURT: You know Chris Wilkie and...

17 MR. BROWN: Thomas Thomason.

18 THE COURT: Thomas Thomason. And how do you know
19 them?

20 MR. BROWN: We graduated together, friends.

21 THE COURT: What?

22 MR. BROWN: We graduated together and we are friends.

23 THE COURT: All right. Thank you very much for that
24 information. All right. Yes, ma'am, your name and number.

25 MS. WILSON: Number 153, Pamela Wilson. I went to

THE STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 school with two of the officers. I know the officers in
2 the courtroom.

3 THE COURT: Who are they? Which ones?

4 MS. WILSON: Courtney, Chris Wilkie and Tommy
5 Thomason.

6 THE COURT: Courtney Caldwell?

7 MS. WILSON: Uh-huh.

8 THE COURT: Who else? Chris Wilkie?

9 MS. WILSON: And Tommy Thomason.

10 THE COURT: Tommy Thomason. Okay. And you know them
11 from growing up with them and then going to school with
12 them? Is that what you're saying?

13 MS. WILSON: Yeah.

14 THE COURT: Thank you very much for that information.
15 Yes, sir, your name and number.

16 MR. JONES: Jotaun Jones, #70. I went to school with
17 Chris Wilkie and Tommy Thomason.

18 THE COURT: You went to school with Chris Wilkie and
19 Tommy Thomason?

20 MR. JONES: Yes, sir.

21 THE COURT: Thank you very much for that information.
22 Yes, sir, your name and number.

23 MR. PRICE: I went to school with ---

24 THE COURT: Well, tell me your name.

25 MR. PRICE: Number 101, Stewart Price. I know

1 Courtney Caldwell through playing baseball. My son plays.

2 THE COURT: All right. Thank you very much. Yes,
3 ma'am, your name and number.

4 MS. SCHREIER: My name is Andrea Schreier. My number
5 is 108 and my husband is a fellow police officer with all
6 those officers.

7 THE COURT: All right. So, you know them through that
8 association. Thank you very much for that information.
9 Yes, ma'am, your name and number.

10 MS. MCDUFFIE: I'm Chandra McDuffie, #81. I was in
11 school with Courtney Caldwell.

12 THE COURT: Thank you. Yes, ma'am, your name and
13 number.

14 MS. FIELDS: Number 47, Tammy Fields, and I'm friends
15 with Courtney Caldwell.

16 THE COURT: Did y'all hear that?

17 MS. FIELDS: I'm friends with Courtney.

18 THE COURT: Caldwell. All right. Thank you. What
19 was your name and number again, please?

20 MS. FIELDS: Tammy Fields, 47.

21 THE COURT: Thank you. All right.

22 MS. BOLEN: Your Honor, may I approach for just a
23 minute?

24 THE COURT: Pardon?

25 MS. BOLEN: May I approach for just a minute?

THE STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 THE COURT: Sure. All right. Sure. As long as
2 Somebody from the other side comes up. Just one.

3 (Brief bench conference off the record)

4 THE COURT: All right. In addition to that list of
5 potential witnesses I called out, I've been furnished now
6 with two names that are possible defense witnesses, Denise
7 Niles. Is that correct? Niles?

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

9 THE COURT: And Jeffrey Brown. Anyone on the jury
10 panel related by blood or marriage or do you know Denise
11 Niles or Jeffrey Brown? If so, please stand. No one is
12 standing. All right. And I'll asked the attorneys that
13 are going to be involved in this case, trying the case --
14 over here, who is going to -- if both of y'all are
15 representing the Defendant, stand and introduce yourself to
16 the jury.

17 MS. BOLEN: Thank you, Your Honor. My name is
18 Patricia Bolen. I'm with the Eighth Circuit Public
19 Defender's Office. I'm an assistant public defender for
20 Abbeville County and I represent Mr. Dwayne Starks.

21 I'm Janna Nelson with the same office and, along with
22 Ms. Bolen, have the privilege of representing the
23 Defendant.

24 THE COURT: All right. Mr. Solicitor, who is going to
25 prosecute?

1 MR. STUMBO: Both of us, Your Honor.

2 THE COURT: All right. Introduce yourselves.

3 MR. STUMBO: Thank you, Judge. My name is David
4 Stumbo, I am the elected Solicitor here in the Eighth
5 Circuit, which is Abbeville County and also Newberry,
6 Greenwood, and Laurens. We prosecute all the criminal
7 cases here in court in those four counties in the circuit.
8 Standing here to my left is Assistant Solicitor Yates
9 Brown. He runs our docket here in Abbeville County.

10 THE COURT: All right. Thank you. Anybody on the
11 jury panel know any of these lawyers in any way, have any
12 association with them, know them in any way? If so, please
13 stand. No one is standing.

14 All right. Has anyone on the jury panel formed or
15 expressed an opinion about any issue or matter that may be
16 involved in the trial of this case or these cases? If so,
17 please stand. No one is standing.

18 Is any member of the jury panel aware of any bias or
19 prejudice, either in favor of or against the State or the
20 Defendant, Mr. Starks? If so, please stand. No one is
21 standing.

22 Is there any member of the jury panel that knows of
23 any reason why you cannot give both the State and the
24 Defendant, Dwayne Eddie Starks, a fair and impartial trial
25 in this case? If so, please stand. (No one stood)

THE STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 Anyone on the jury panel know of any reason
2 whatsoever, why you should not be picked and serve as a
3 juror in this case? If so, please stand. No one is
4 standing.

5 Any additional questions from the State?

6 MR. STUMBO: None from the State, Your Honor.

7 THE COURT: From the Defense?

8 MS. BOLEN: None from the Defense, Your Honor.

9 THE COURT: All right. Come get your list, then if
10 you haven't already gotten it. Have you got it?

11 MS. BOLEN: Yes, sir.

12 THE COURT: Okay. Are y'all ready to start?

13 MR. STUMBO: Yes, sir.

14 THE COURT: Are y'all ready?

15 MS. BOLEN: Yes, sir, Your Honor.

16 THE COURT: All right. Members of the jury panel, as
17 I said, we have a list of names drawn out at random by the
18 computer and we've placed that list of names starting with
19 the first one drawn as #1, down to the last one drawn as
20 #30. The number that you hear called out in no way
21 corresponds to your juror number so don't try to figure out
22 if they are talking about you by the number that you hear,
23 because it does not correspond. Would the State accept or
24 excuse Juror #1?

25 MR. STUMBO: Your Honor, we accept Juror #1.

THE STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 THE COURT: The Defendant?

2 MS. BOLEN: We accept Juror #1, Your Honor.

3 THE COURT: Number 2, the State?

4 MR. STUMBO: The State accepts Juror #2.

5 THE COURT: Defendant?

6 MS. BOLEN: The Defendant excuses #2.

7 THE COURT: Number 3, the State?

8 MR. STUMBO: The State accepts Juror #3, Your Honor.

9 THE COURT: Defendant?

10 MS. BOLEN: The Defendant excuses #3, Your Honor.

11 THE COURT: Number 4?

12 MR. STUMBO: The State accepts Juror #4, Your Honor.

13 THE COURT: Defendant?

14 MS. BOLEN: The Defense accepts Juror #4, Your Honor.

15 THE COURT: Five, State?

16 MR. STUMBO: The State accepts Juror #5, Your Honor.

17 MS. BOLEN: The Defense accepts #5, Your Honor.

18 THE COURT: Six?

19 MR. STUMBO: The State accepts Juror #6, Your Honor.

20 MS. BOLEN: Defense accepts #6, Your Honor.

21 THE COURT: Seven.

22 MR. STUMBO: Your Honor, the State accepts #7.

23 MS. BOLEN: The Defense accepts #7, Your Honor.

24 THE COURT: Eight.

25 MR. STUMBO: State accepts juror #8, Your Honor.

THE STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 MS. BOLEN: The Defense accepts #8, Your Honor.
2 THE COURT: Nine.
3 MR. STUMBO: The State accepts Juror #9, Your Honor.
4 MS. BOLEN: The Defense excuses #9, Your Honor.
5 THE COURT: Ten.
6 MR. STUMBO: State excuses Juror #10, Your Honor.
7 THE COURT: Eleven.
8 MS. BOLEN: Defense accepts #10, Your Honor.
9 THE COURT: No, they excused him.
10 MS. BOLEN: Oh, I'm sorry.
11 THE COURT: Number 11.
12 MR. STUMBO: The State accepts juror #11, Your Honor.
13 THE COURT: Twelve -- oh, excuse me. The Defense?
14 MS. BOLEN: Defense accepts #11, Your Honor.
15 THE COURT: All right. Twelve.
16 MR. STUMBO: The State accepts Juror #12, Your Honor.
17 THE COURT: Defense?
18 MS. BOLEN: The Defense accepts #12, Your Honor.
19 THE COURT: Thirteen.
20 MR. STUMBO: The State accepts juror #13.
21 MS. BOLEN: Defendant accepts #13, Your Honor.
22 THE COURT: Fourteen.
23 MR. STUMBO: The State accepts juror #14, Your Honor.
24 MS. BOLEN: Defense accepts #14, Your Honor.
25 THE COURT: Fifteen.

1 MR. STUMBO: State accepts Juror #15, Judge.

2 MS. BOLEN: The Defense accepts #15, Your Honor.

3 THE COURT: Sixteen.

4 MR. STUMBO: The State accepts Juror #16, Your Honor.

5 MS. BOLEN: Defense accepts #16, Your Honor.

6 THE COURT: All right. I believe that's our twelve
7 jurors. We will pick one alternate juror. We'll have one
8 for the State and two for the Defense. Will the State
9 accept or excuse Juror #17 as the alternate?

10 MR. STUMBO: The State accepts Juror #17, Your Honor,
11 as the alternate.

12 MS. BOLEN: Defense accepts #17, Your Honor.

13 THE COURT: All right. Let me call back the numbers
14 of those that we have serving to make sure I've recorded
15 them correctly and the clerk has that and everything. We
16 have serving as the twelve jurors numbers: #1, #4, #5, #6,
17 #7, #8, #11, #12, #13, #14, #15, #16, and then the
18 alternate is #17. Everybody agree on that?

19 MS. BOLEN: Yes, sir.

20 MR. STUMBO: Yes, Your Honor.

21 THE COURT: The Clerk will call the names of the
22 jurors who are serving. If she calls your name, bring any
23 personal belongings, come on up here and have a seat over
24 here in the jury box to my left.

25 CLERK OF COURT: Winfield Lohr.

1 (Whereupon, Winfield Lohr, a white male, comes forward)

2 CLERK OF COURT: David Bonds.

3 (Whereupon, David Bonds, a white male, comes forward)

4 CLERK OF COURT: Andrea Lollis.

5 (Whereupon, Andrea Lollis, a white female, comes forward)

6 CLERK OF COURT: Jenae Jackson.

7 (Whereupon, Jenae Jackson, a black female, comes forward)

8 CLERK OF COURT: Deborah Scott.

9 (Whereupon, Deborah Scott, a white female, comes forward)

10 CLERK OF COURT: Sheryl Pittard.

11 (Whereupon, Sheryl Pittard, a white female, comes forward)

12 CLERK OF COURT: Bessie Darby.

13 (Whereupon, Bessie Darby, a white female, comes forward)

14 CLERK OF COURT: Denita Burdette.

15 (Whereupon, Denita Burdette, a white female, comes forward)

16 CLERK OF COURT: Lucy Hauptvogel.

17 (Whereupon, Lucy Hauptvogel, a white female, comes forward)

18 CLERK OF COURT: Reggie Smith.

19 (Whereupon, Reggie Smith, a black male, comes forward)

20 CLERK OF COURT: James W. Gilchrist.

21 (Whereupon, James Gilchrist, a black male, comes forward)

22 CLERK OF COURT: Ronald Chapman.

23 (Whereupon, Ronald Chapman, a white male, comes forward)

24 CLERK OF COURT: The alternate is Marie McMurtury.

25 (Whereupon, Marie McMurtury, a white female, comes forward)

1 THE COURT: We're missing somebody.

2 CLERK OF COURT: I know.

3 THE COURT: How about Ronald Chapman. Is he here?
4 Where is Ronald Chapman? Is that you? All right. The
5 first thing I will ask this jury to do is, if you would,
6 follow that gentleman right there behind you, the bailiff.
7 He will take you to the jury room. I'll be back with you
8 in just a few minutes. If you would, go follow him to the
9 jury room. I'll be back with you in a few minutes.

10 (Jury out at 3:18 p.m.)

11 THE COURT: Any exceptions to the jury from the State?

12 MR. STUMBO: None from the State, Your Honor.

13 THE COURT: Defendant?

14 MS. BOLEN: None from the Defense, Your Honor.

15 THE COURT: All right. Emily, what do we want to tell
16 the balance of the jury panel? Do you have a call-in
17 system?

18 CLERK OF COURT: Yes. It's on the paper sent to them.

19 THE COURT: All right. Members of the jury panel, I
20 can release you at this time. Of course, we would be glad
21 to have you stay with us if you'd like to. We are going to
22 be working this afternoon for the rest of the afternoon,
23 but you don't have to. You will be free to go in just a
24 minute. I want to tell you, I think you have been
25 furnished with a piece of paper that has a telephone number

1 on it for you to call in. You don't have to call in this
2 evening, but tomorrow, call in after 6:00 to receive a
3 recorded message about whether we want you to come back or
4 call back the next day or whatever. We try to keep you
5 here only such periods of time as is absolutely necessary
6 for you to be here, for you to help us being here by
7 picking a jury for a trial of a case, so you will be free
8 to go in just a minute. And as I said, call in tomorrow
9 after 6:00 to receive the recorded message about whether we
10 want you to come back or call back or whatever. You've got
11 your handout.

12 JUROR: After 6:00 A.m., Your Honor?

13 THE COURT: After 6:00 p.m. I'm glad you asked that.
14 After 6:00 tomorrow afternoon. We will know then whether
15 we need to you to come back or tell you to call back or
16 whatever, 6:00 p.m. tomorrow. If it tells you to call
17 back, it will be after 6:00 in the evening. It won't be
18 6:00 in the morning. Okay? All right. With that, thank
19 you very much for coming. You are free to go.

20 (Jury panel out at 3:19 p.m.)

21 THE COURT: Now, are y'all ready to start the trial
22 today or what do you want to do?

23 MR. STUMBO: Your Honor, I believe we have some pre-
24 trial motions. I know we have a Jackson v. Denno that we
25 need to do. I believe the Defense has one or two motions,

1 as well. So, we may want to hear those today and start in
2 the morning if that pleases Your Honor.

3 THE COURT: All right.

4 MR. STUMBO: However you want to do it.

5 THE COURT: Y'all have got some motions. I haven't
6 heard about anything. Y'all have got some motions I need
7 to hear before we actually start the jury trial?

8 MS. BOLEN: Yes, sir. We've got a Jackson v. Denno,
9 we've got a Neil v. Biggars, and then we've got just a few
10 motions in limine that shouldn't take a whole lot of time,
11 but we do have a few things.

12 THE COURT: Well, usually those -- I don't know what
13 kind of motions in limine you have, you know, but usually I
14 find that most of those I have to take them up during the
15 course of the trial, but I'll be glad to hear from you,
16 anything that you want to say.

17 MR. STUMBO: Your Honor, I do know that the Jackson v.
18 Denno issue, I think we can -- obviously, we want to put in
19 a statement of the Defendant. I would guess that we would
20 like to proffer the statement of the officer, and the
21 witnesses at the sheriff's department, or the police
22 department, to testify about the voluntariness of the
23 statement before the trial. If we could go ahead and take
24 care of that one.

25 THE COURT: Okay. All right. Well, since y'all have

1 motions, I'm going to send the jury home and have them come
2 back tomorrow morning at 9:30 and we'll get started with
3 the trial then.

4 MR. STUMBO: I think that's a good idea, Your Honor.

5 THE COURT: Okay. All right. We'll bring the jury
6 out, then. I'm not going to swear them until tomorrow.

7 MR. STUMBO: Yes, sir.

8 (Jury in at 3:23 P.m.)

9 THE COURT: Let's see, are you Mr. Lohr?

10 MR. LOHR: Yes, sir.

11 THE COURT: If you would, come down here and take that
12 first seat. Let him have that first seat there. Mr. Lohr,
13 I'm going to ask you to serve as foreperson of the jury,
14 foreman of the jury. (Mr. Lohr complies) Come on in. You
15 don't have any assigned seats. Just come on in and fill up
16 the jury box. The only assigned seats are going to be that
17 one right there for the alternate juror, Ms. ---

18 MS. MCMURTURY: McMurtury.

19 THE COURT: There you go. Thank you. That's your
20 seat for the trial. And then I just appointed Mr. Lohr as
21 foreman of the jury. If you would, occupy that seat at all
22 times during the trial. The rest of you are free to sit
23 anywhere you'd like in the jury box at such times you come
24 and go from the courtroom. But if you will, let the
25 foreman sit there and the alternate juror sit down there.

1 You've all been furnished with a pad. That will be
2 your individual pad during the course of the trial. Put
3 your name on the front page there, the first page up at the
4 top or somewhere so you can easily identify it as yours.
5 When you leave, we'll take up those notepads and keep them
6 here overnight locked up or whatever and then give them
7 back to you tomorrow. I do allow jurors to take notes
8 during the course of the trial. Some people don't think
9 that's a very good idea. Some people think it may
10 interfere, distract you from what is actually being said
11 and done during the course of the presentation of the
12 testimony and the evidence to you during the trial. If you
13 do take notes, do not allow your note taking to distract
14 you. Notes are to be used only as memory aids. Notes are
15 not entitled to any greater weight than the recollection or
16 the impression of each juror as to what the testimony or
17 the evidence actually was. Those are your notes and your
18 notes only. No one will be looking at them, checking on
19 them, anything of that sort. At the conclusion of the
20 trial, I'd ask you to tear out any notes you may have made,
21 take them with you, tear them up, whatever you want to do.
22 They're yours. As I said, they are your notes and your
23 notes only and notes are not entitled to any greater weight
24 than the recollection or the impression of each juror as to
25 what the testimony or evidence actually was.

1 Now, actually, we have some pre-trial matters that I
2 have to deal with, with the attorneys before we can
3 actually get started with the formal presentation of the
4 case, the trial, and all. So, I'm going to let you go at
5 this time in just a few minutes and ask you to come back
6 tomorrow morning at 9:30 when we will actually start with
7 the trial, with your part of the trial. I have some work
8 to do with the lawyers to get it ready to go to trial at
9 this point, so you don't need to sit here, back in that
10 jury room or whatever. I'm going to let you go and ask you
11 to be back with us tomorrow morning at 9:30.

12 You've been selected both by the State and by the
13 Defendant as fair and impartial jurors in this case. Don't
14 discuss the case with family, friends, or anyone else. You
15 don't know anything more about it than just the name and
16 the charges that have been made against Mr. Starks. And as
17 I told you, he has entered a plea of not guilty to these
18 charges and that places the burden of proving him guilty on
19 the State. That's what this trial will be all about. So,
20 don't talk about the case with family, friends or anyone
21 else while you are on this jury. The only time you are to
22 discuss it is at the conclusion of the case after you have
23 heard and seen everything presented to you in this case,
24 after you have heard the arguments from the attorneys, and
25 after you have received my instructions to you on the law.

1 That's when the twelve of you will decide it. That's when
2 you will discuss it, that's when you will talk it over, in
3 the privacy of the jury room. If your family member,
4 friend, whatever, wants to know what you're doing, you tell
5 them you are involved in the trial of a case, you're
6 actually on the jury that's trying a case. You're going to
7 be trying a case, you're going to be deciding this case,
8 and the judge, if you want to blame it on me, the judge
9 specifically told you, you cannot discuss the case with
10 anyone while you are on the jury. As I said, the only time
11 you are to discuss it is in the privacy of that jury room,
12 and so, you have to keep that in mind throughout the trial.
13 I will let you go and ask you to be back in the jury room
14 -- when you get to the courthouse tomorrow, don't hang
15 around outside. People that may be involved with the case
16 will be coming and going and all. Don't hang around out
17 there. Come on in, go directly to the jury room, and we
18 will get started just as soon as we can after 9:30. So, be
19 back in the jury room, back there, at 9:30 tomorrow
20 morning. Have a nice evening. Leave your note pads with
21 the bailiff. Give those to him as you go out. He will
22 keep them safe over the evening recess.

23 (Jury out at 3:28 P.m.)

24 THE COURT: What have y'all got? Who wants to go
25 first?

JACKSON V. DENNO HEARING

25

1 MR. STUMBO: Your Honor, we can go ahead and put our
2 Jackson v. Denno up. We have the officers here who
3 mirandized the Defendant and we can go ahead and get that
4 done.

5 JACKSON V. DENNO HEARING

6 Your Honor, what we are seeking to introduce is, after
7 the Defendant was mirandized, put into handcuffs and
8 custody, he was put into the back of an officer's car with
9 the City of Abbeville. And as you know, these days, Your
10 Honor, Officer McAllister here has one of these radios on.
11 Whenever they activate their blue lights, essentially, it
12 cuts on audio.

13 Your Honor, after they had mirandized the Defendant
14 here, Mr. Starks, they put him in the back of the car.
15 They drive him, essentially, from the incident location to
16 the jail and he makes a number of statements, Your Honor,
17 after Miranda, after he had been advised of his rights on
18 this videotape. We have provided that to the Defense.
19 They looked at it and that's what we are intending to
20 introduce, so if we can ---

21 THE COURT: Y'all know what he is talking about? Are
22 y'all trying to keep it from coming in?

23 MS. BOLEN: We are, Your Honor. More on the basis
24 that it is not probative of anything, that it is unduly
25 prejudicial and on the voluntariness.

JACKSON V. DENNO HEARING

26

1 THE COURT: All right. Well, that sounds like
2 something I can deal with during the trial. But anyway, go
3 ahead, then. I don't know whether -- let's just go ahead
4 and deal with it then now, if we can.

5 MR. STUMBO: Well, Your Honor, what I would -- since
6 we're seeking to introduce it, I would prefer Your Honor to
7 look at it in limine before the jury is struck, because if
8 we start playing that video and try to put it in and then
9 we ---

10 THE COURT: Okay. Well, if they've got an objection
11 to it, I wouldn't let it come in until, you know, I made my
12 ruling on it or whatever. But anyway -- All right. So
13 what do you want to do?

14 MR. STUMBO: We would call the witnesses, Your Honor.

15 THE COURT: All right. Call them.

16 MR. STUMBO: At this time, the State would call,
17 first, we would call Jonathan McAllister to the stand.

18 (After being first duly sworn, **JONATHAN MCALLISTER**,
19 testified as follows:)

20 THE COURT: Go right ahead.

21 MR. STUMBO: Yes, sir.

22 PROFFERED DIRECT EXAMINATION

23 BY MR. STUMBO:

24 Q I can tell by the uniform you're wearing you work in
25 law enforcement.

JACKSON V. DENNO HEARING

27

1 A Yes, sir.

2 Q And where do you work?

3 A With the City of Abbeville.

4 Q Okay. And what is your rank with the City of
5 Abbeville?

6 A Sergeant.

7 Q Okay. Sergeant McAllister, how long have you been
8 with the City?

9 A I've been on the force since July of '06.

10 Q And in that time, have you worked the road the entire
11 time or have you had other roles there?

12 A Yes, sir. I've been on the road the entire time.

13 Q Okay. About how many incidents or calls have you
14 responded to since 2006, just a rough estimate?

15 A I've been ---

16 THE COURT: This in non-jury. Let's just get to the
17 point.

18 MR. STUMBO: Yes, sir. We can do that.

19 Q Did you have the occasion to work a call related to
20 this Defendant, Dwayne Starks?

21 A Yes, sir.

22 Q Okay. What night was that?

23 MR. STUMBO: Your Honor, if I may approach the
24 witness.

25 THE COURT: Yes, sir.

JACKSON V. DENNO HEARING

28

1 Q Do you need to look at some notes? If you could just
2 look at that to refresh your memory, Sergeant
3 McAllister. (Hands document to witness)

4 (Witness looks at document)

5 Q What night was that?

6 A This was the 27th of February of last year, 2012.

7 Q Okay. 2012?

8 A Yes, sir.

9 Q All right. What was the call in relation to? What
10 type of incident was it?

11 A The call came in as a robbery in progress.

12 Q Okay. Where was the alleged robbery to have taken
13 place at?

14 A At the One Stop Shell Station on 72 West, here in the
15 city limits of Abbeville.

16 Q And at that time, did you have any information from
17 your dispatch about what kind of person you were
18 looking for?

19 A Yes, sir. She stated that D'won Starks had come in
20 and robbed her.

21 Q Okay. So, the victim. Is that correct?

22 A Yes, sir.

23 Q The victim stated that?

24 A The victim, the caller that initiated the call, called
25 and stated to law enforcement or to the dispatcher,

JACKSON V. DENNO HEARING

29

1 that.

2 THE COURT: So, you were given a name by your radio
3 operator that Dwayne Eddie Starks or Dwayne Starks or what
4 was the name that was given to you?

5 THE WITNESS: I believe it was D'won Starks is what
6 came over the radio.

7 THE COURT: Okay.

8 Q And the information had come from, essentially, the
9 store clerk who was robbed?

10 A It come from the victim.

11 Q Okay. Did you have a description of Mr. D'won Starks;
12 race, age, size, anything of that nature?

13 A Yes, sir.

14 Q Okay. What was his race? Did you get a description
15 of who you were looking for at that time? Or did you
16 know him before this in any way?

17 A Yes, sir. I've had several dealings with Mr. Starks
18 over the past few years.

19 Q So, you knew him?

20 A Yes, sir.

21 Q And so, you knew you were looking for a black male who
22 was over six feet tall, a pretty large individual?

23 A Yes, sir.

24 Q Okay. Now, did you find an individual that you knew
25 as D'won, Dwayne Starks?

JACKSON V. DENNO HEARING

30

- 1 A Yes, sir. Officer Thomason was first on the scene and
2 when I arrived on the scene, he had already located
3 Mr. Starks and was trying to put him in investigative
4 detention.
- 5 Q Okay. How far away was he from the One Stop on 72?
- 6 A Officer Thomason or Mr. Starks?
- 7 Q Well, both of them. When he found Mr. Starks.
- 8 A When he was found by Officer Thomason, he was in the
9 Summer Acres Trailer Park, which is ---
- 10 Q Where did you first see him?
- 11 A In Summer Acres Trailer Park.
- 12 Q All right. So you drive up and Officer Thomason and
13 the Defendant, he has the Defendant in custody?
- 14 A Yes, sir. He was ---
- 15 Q He was questioning him at that time?
- 16 A He was trying to put ---
- 17 Q How far is the trailer park from the gas station where
18 the incident happened?
- 19 A You want footage or ---
- 20 Q An estimate. I don't need an exact footage, but is it
21 a half mile, a mile, less than a half mile?
- 22 A It's well less than a quarter of a mile. You know, it
23 may be a tenth of a mile.
- 24 Q Okay. And at that time, when you approached Mr.
25 Starks and Officer Thomason, did you speak to Mr.

JACKSON V. DENNO HEARING

31

1 Starks at all at that point?

2 A Not at the initial point. We, I assisted Officer
3 Thomason in getting him in the vehicle. Once we got
4 him in the vehicle, we shut the doors and left him.
5 Officer Thomason advised him he was in investigative
6 detention, shut the doors, and we started to see if we
7 could locate the evidence.

8 Q Whose vehicle, yours or Officer Thomason's?

9 A Officer Thomason's.

10 Q Okay. So, he was in the back seat, a secure area, in
11 Officer Thomason's vehicle at this time?

12 A Yes, sir. He was placed on the driver's side rear.

13 Q And did you Mirandize him at any point?

14 A Not at that moment. Once we got him in the vehicle,
15 we shut the door. We advised him he was in
16 investigative detention, shut the door, we started ---

17 Q Did you have handcuffs on him?

18 A Yes, sir. I believe he did have cuffs on.

19 Q Okay. And at that time, did y'all go looking or
20 searching the area?

21 A We started scouring the area.

22 Q What were you looking for?

23 A We were looking for -- the clerk said that he had on a
24 ski mask, and pants and a jacket. So we were just
25 seeing if we could locate any of that along with any

JACKSON V. DENNO HEARING

32

1 money, things that may have been taken from the store.

2 Q You were looking for a weapon, as well?.

3 A Yes, a weapon, as well.

4 Q Did you or Officer Thomason happen to frisk, do any
5 kind of pat down to make sure he was not armed at that
6 point?

7 A I did not.

8 Q Okay. Thank you. Now, you said you didn't Mirandize
9 him or advise him of his Rights?

10 A Yes.

11 Q At what point did you do that?

12 A We started seeing that there was evidence laying
13 around the area where Mr. Starks was located. I then
14 went back to the vehicle, opened the door, and read
15 him his Miranda Rights off of a card that I carry.

16 Q Okay. Do you have that card with you today?

17 A Yes, sir.

18 THE COURT: What was the evidence that you found? You
19 said you looked -- I thought I heard you say you looked and
20 saw some evidence or whatever. What did you find?

21 THE WITNESS: Yes, sir. We saw loose change and
22 money, dollar bills. I believe -- well, one thing we saw
23 was a five dollar bill laying with a stack of change. We
24 also saw ---

25 THE COURT: Where did you find those?

JACKSON V. DENNO HEARING

33

1 THE WITNESS: The money and the change was laying next
2 to one of the trailers.

3 THE COURT: What else did you find?

4 THE WITNESS: (Pauses)

5 MR. STUMBO: Your Honor, I do have a supplemental
6 attached report. I don't believe I handed it to Mr. -- let
7 me do that.

8 Q (Hands document to witness) Did you find any clothes
9 at that time, Sergeant McAllister?

10 A Yes, sir.

11 Q Okay. What did y'all find?

12 A (Reviews document) The things that we did locate were
13 a pair of black in color pants lying on the ground
14 near where Mr. Starks was found. We began searching
15 the area, and in the area we also found a ski mask
16 that was in a trash can that was located within ten
17 feet of where officers found Mr. Starks. Another ski
18 mask was located against the underpinning of Lot #15,
19 along with several rolls of change and one five dollar
20 bill.

21 Q Okay. And now, when you say rolls -- she said loose
22 change. Are these rolls of change like we would see
23 in a cashier's drawer?

24 A Yes, sir. Actual rolls of change and a loose five
25 dollar bill.

JACKSON V. DENNO HEARING

34

1 THE COURT: You found a ski mask in a trash can and a
2 ski mask along with the money?

3 THE WITNESS: Yes, sir, against the trailer.

4 Q And some black pants, I believe you said that Sergeant
5 McAllister?

6 A Yes, sir. A pair of black in color pants.

7 Q Now ---

8 THE COURT: Well, did he have on some other pants?

9 THE WITNESS: Yes, sir. When he was picked up, he
10 did.

11 Q Now, were the black pants and ski mask consistent with
12 allegations made by the store clerk or seen in the
13 surveillance video, those type of clothes?

14 A Both. Yes, sir.

15 Q At what point did you advise this Defendant of his
16 Constitutional Rights?

17 A At that time, once we started locating the evidence, I
18 went to the vehicle, opened the door, and Mirandized
19 Mr. Starks at that point.

20 Q Okay. I believe a second ago you said you read it off
21 of a card?

22 A Yes, sir.

23 Q Do you have that card on your person today?

24 A It's this card here. (Produces card)

25 Q Okay. And did you read off that card verbatim or

JACKSON V. DENNO HEARING

35

1 word-for-word?

2 A Yes, sir, verbatim.

3 Q Okay. Could you read that card into the record
4 Sergeant McAllister?

5 A Yes, sir. At the top, it has Miranda Warning. It's
6 got five different sections. Number one, it says, you
7 have the right to remain silent. Number two, it says,
8 anything you say can and will be used against you in a
9 court of law. Number three, you have the right to
10 talk to a lawyer and have him present with you while
11 you're being questioned. Number four, if you cannot
12 afford to hire a lawyer, one will be appointed to
13 represent you before any questioning if you wish.
14 Number five, it says, you can decide at any time to
15 exercise these rights and not answer any questions or
16 make any statements.

17 Q Okay. Did the Defendant appear to understand those
18 Rights as you read them to him?

19 A Yes, sir.

20 Q Did you ask him if he understood them?

21 A Yes, sir.

22 Q Did he -- how did he respond?

23 A Mr. Starks was being very mouthy and just running off
24 at the mouth, saying he knew his Rights.

25 Q All right. So he said, "I know my rights"?

JACKSON V. DENNO HEARING

36

- 1 A (Nods head)
- 2 Q And at that time, did he invoke his right to a lawyer
- 3 at any time when you were speaking with him at that
- 4 point?
- 5 A No, sir.
- 6 Q Okay. Did you threaten him in any way to get him to
- 7 say anything?
- 8 A No, sir.
- 9 Q Did you coerce him in any way to get him to say
- 10 anything?
- 11 A No, sir.
- 12 Q Did you promise him any hope of reward or any kind of
- 13 deal or anything?
- 14 A No, sir.
- 15 THE COURT: Well, did you ask him any questions?
- 16 THE WITNESS: No, sir. Once the Rights were read, the
- 17 door was shut.
- 18 THE COURT: And you didn't ask him any questions?
- 19 THE WITNESS: No, sir.
- 20 THE COURT: Okay.
- 21 Q Okay. And at that time, was he speaking to you,
- 22 constantly?
- 23 A Yes, sir. He was just continuously running off, just
- 24 saying random things, just talking.
- 25 Q Okay. Now, did you transport him from that location

JACKSON V. DENNO HEARING

37

1 to the police department?

2 A No, sir..

3 Q Who did that?

4 A Officer Thomason did.

5 Q All right. Did the Defendant ever, at any time during
6 the time you were dealing with him that night, invoke
7 his Right to remain silent?

8 A No, sir.

9 Q Did he ever ask for a lawyer?

10 A No, sir.

11 Q Did his statement appear to be freely and voluntarily
12 given to you?

13 A Yes, sir.

14 MR. STUMBO: No further questions of this witness,
15 Your Honor.

16 THE COURT: Any questions you want to ask?

17 MS. BOLEN: Just a couple of questions.

18 PROFFERED CROSS-EXAMINATION

19 BY MS. BOLEN:

20 Q Thank you, Sergeant McAllister. So Sergeant Thomason
21 was there first. Correct?

22 A Thomason, yes, ma'am.

23 Q Okay. You got there, and your testimony was that you
24 put my client in the police car. Correct?

25 A Yes, I assisted ---

JACKSON V. DENNO HEARING

38

- 1 Q And then shut the door?
- 2 A --- I assisted Officer Thomason. Yes.
- 3 Q And he was in handcuffs at that time?
- 4 A Yes, ma'am.
- 5 Q What was he under arrest for at that time?
- 6 A He was not under arrest. He was told by Officer
- 7 Thomason that he was under investigative detention.
- 8 Q Well, what's the difference between investigative
- 9 detention and arrest?
- 10 A At that time, he was not taken into custody for any
- 11 violations. He was just -- we were trying to continue
- 12 our investigation.
- 13 Q But he wasn't free to leave. Right?
- 14 A No, he wasn't.
- 15 Q He couldn't get out of your cop car?
- 16 A No, ma'am.
- 17 Q He was locked into your car. So you put him in your
- 18 car and then you started looking around for evidence?
- 19 A He was placed in Officer Thomason's vehicle.
- 20 Q I'm sorry. Officer Thomason's car. And then you
- 21 started looking around for evidence?
- 22 A Yes, ma'am.
- 23 Q And is it your body cam that we have the video from of
- 24 the flashlight?
- 25 A No, ma'am.

JACKSON V. DENNO HEARING

39

1 Q Whose is that?

2 A That's Officer Thomason's

3 Q Thomason. Did you have yours activated?

4 A No, ma'am.

5 Q Could you have activated it?

6 A Yes, ma'am.

7 Q Okay. But you didn't.

8 A Huh-uh.

9 Q Okay. So, then, after you find some stuff lying
10 around you go back and then you inform my client of
11 his Miranda Rights?

12 A Yes, ma'am.

13 Q Okay. Did you formally arrest him at that time or
14 since he was already in cuffs, you didn't?

15 A I just read him his Rights and shut the door on him.

16 Q And was your body cam activated when you read him his
17 rights?

18 A No, ma'am.

19 Q Okay. Was officer Thomason with you?

20 A Yes, ma'am.

21 Q Okay. Was his body cam activated that you know of?

22 A No, ma'am.

23 THE COURT: Was his, what?

24 MS. BOLEN: Body cam. The body camera.

25 Q It was not activated?

JACKSON V. DENNO HEARING

40

1 A No, ma'am.

2 Q But it had previously been activated for looking
3 around, right?

4 A Yes, ma'am.

5 Q So, he actually turned it off?

6 A I'm not sure if it cut off or if he cut it off. I'm
7 not exactly sure what happened.

8 Q And you said that my client was, I think your direct
9 quote was, "saying random things". Is that correct?

10 A Yes, ma'am.

11 Q But he wasn't making any admissions. Correct?

12 A No, ma'am.

13 Q Just kind of talking about a lot of different stuff?

14 A Yes.

15 MS. BOLEN: Okay. That's all the questions I have for
16 this witness.

17 THE COURT: All right. Next witness.

18 MR. STUMBO: Your Honor, the State calls Officer
19 Thomas Thomason to the stand.

20 (After being first duly sworn, **THOMAS THOMASON**,
21 testified as follows:)

22 PROFFERED DIRECT EXAMINATION

23 BY MR. STUMBO:

24 Q Officer Thomason, you work for the Abbeville Police
25 Department?

JACKSON V. DENNO HEARING

41

- 1 A Yes, sir. That's correct.
- 2 Q And what's your rank there?
- 3 A At the time, I'm a corporal.
- 4 Q So, I'll call you Corporal Thomason.
- 5 A Okay.
- 6 Q Corporal Thomason, did you have the occasion to work a
7 case involving the Defendant, Dwayne Starks?
- 8 A Yes, sir, I did.
- 9 Q And that was back in February of last year?
- 10 A Yes, sir. February 27th, 2012.
- 11 Q Okay. Did you respond to a scene at the request of
12 your dispatch?
- 13 A Yes, sir. I did.
- 14 Q Okay. And what were you looking for?
- 15 A The call came in as the clerk stated there was a D'won
16 Starks, a tall black male in a green jacket, green ski
17 mask and black pants with white shoes.
- 18 Q Okay. And were you familiar with someone by that
19 name?
- 20 A Yes, sir.
- 21 Q Okay. Now, that night, did you find someone that you
22 were familiar with by that name?
- 23 A Yes, sir. I did.
- 24 Q Who did you find?
- 25 A I found Mr. Dwayne Starks.

JACKSON V. DENNO HEARING

42

1 Q The Defendant that's here in the courtroom?

2 A Yes, sir.

3 Q And where did you find him?

4 A I found him between the third and fourth trailers in
5 Sawmill Acres Trailer Park.

6 THE COURT: And you said you found him there? I mean,
7 was he standing there, sitting down, what do you mean?

8 THE WITNESS: When I located him, he was walking
9 through the trailers, back towards Cherokee Trail from
10 where my patrol car was, the main driveway into the trailer
11 park in between the trailers. He was walking away from
12 where I found him, towards Cherokee Trail. He was actually
13 walking away from me when I located him.

14 Q Cherokee Trail, what is that?

15 A It's a convenience store.

16 Q That's another convenience store?

17 A Yes, sir.

18 Q Not the one that's alleged to have been robbed.

19 Correct?

20 A Yes, sir.

21 Q Is that between the trailer park and the Shell station
22 where the robbery took place?

23 A Yes, sir.

24 Q So a BP Station called Cherokee Trail. Is that
25 correct?

JACKSON V. DENNO HEARING

43

1 A That's correct.

2 Q Now, when you find the Defendant walking through at
3 that point, did you stop him?

4 A Yes, sir.

5 Q Okay. Did you have to chase him at all?

6 A No, sir.

7 THE COURT: Did you call out his name or what?

8 THE WITNESS: Yes, sir. I stepped out of my vehicle
9 and shouted, Dwayne, stop. And he stopped, turned around
10 and put his hands up.

11 Q Okay. Now, at that time did you tell him what you
12 were looking for or why you were looking for him?

13 A No, sir. I asked him to step back towards me and his
14 immediate remarks were, I didn't do anything. I
15 didn't do anything and then he proceeded to step
16 towards me like I asked him to.

17 Q Okay. Now, at that time did you put him in
18 investigative detention?

19 A Yes, sir. I did.

20 Q All right.

21 A First, actually, he was -- a Terry Frisk was
22 performed, then he was placed into investigative
23 detention.

24 Q Okay. By Terry Frisk, you mean checking to see if he
25 had any weapons or that sort of thing?

JACKSON V. DENNO HEARING

44

1 A Absolutely, because I -- I mean, I was looking for a
2 suspect that had just robbed a gas station with a
3 firearm.

4 Q Okay. Did he have a bulge in his pockets anywhere at
5 that time?

6 A Yes, sir.

7 Q Okay. Were you able to get out what was in the
8 pockets?

9 A Yes, sir. I asked him what he had in his pockets.
10 Mr. Starks was not able to tell me what he had in his
11 pockets at that time. So for my safety, and his, I
12 removed what he ---

13 THE COURT: What do you mean, he wasn't able to?
14 Didn't do it or what?

15 THE WITNESS: No, sir. I asked Mr. Starks what the
16 large bulge was in his front pocket and Mr. Starks said he
17 did not know what was in his pocket.

18 Q Okay. What was the bulge? Did you pull it out?

19 A Yes, sir. Once I removed it from his pocket, it was a
20 large wad of cash money of tens, fives and ones.

21 Q And at that point, you said you had him in
22 investigative detention. Did you secure him in
23 handcuffs?

24 A Yes, sir. I secured him in the back, double locked.

25 Q Okay. In your vehicle?

JACKSON V. DENNO HEARING

45

1 A Yes, sir. Then, he was -- I attempted to put Mr.
2 Starks in the vehicle by myself. Mr. Starks was,
3 became irate and uncooperative at that time and
4 another officer proceeded to -- Officer, Sergeant
5 McAllister come up and we coaxed him into getting into
6 the vehicle.

7 Q Okay. About how long was this after the call had come
8 in through dispatch to report the robbery, that you
9 found Mr. Starks out there at the trailer?

10 A I'm not even sure if it was an entire minute. I mean,
11 it was immediately after.

12 Q Okay.

13 THE COURT: Where were you when you got the call?

14 THE WITNESS: I was on Carwellyn Road.

15 THE COURT: How far is that ---

16 THE WITNESS: It's ---

17 THE COURT: --- from where you found him?

18 THE WITNESS: --- maybe a mile-and-a-half or so.

19 Q Did you run blue lights and code down to that
20 location?

21 A Yes, sir.

22 Q Now, when Sergeant McAllister gets there, y'all were
23 able to get him in the car at that point?

24 A Yes, sir.

25 Q Okay. And at some point, at this time, were his

JACKSON V. DENNO HEARING

46

1 Constitutional Rights read to him?

2 A Not at that time. It was after he was placed in the
3 vehicle.

4 Q Okay. And y'all, I believe, looked for some stuff
5 before then?

6 A Yes, sir. Once we started finding evidence that
7 showed that Mr. Starks may actually be the one, you
8 know, that's when he was read his Rights.

9 Q Was there a bunch of other people out there at that
10 time or just Mr. Starks?

11 A I don't recall a crowd or anything like that. I mean,
12 somebody may have been standing on their porch or
13 something like that, but I didn't see them. It was
14 very -- I mean, it was pitch black dark and raining.

15 Q Did you hear Sergeant McAllister read the Rights to
16 the Defendant?

17 A Yes, sir.

18 Q Okay. And did he read them off the card?

19 A Yes, sir. He does that with everybody, the same exact
20 card.

21 Q Reads them word-for-word?

22 A Yes, sir.

23 Q Did he threaten Mr. Starks in any way?

24 A Absolutely not.

25 Q Did you threaten Mr. Starks in any way?

JACKSON V. DENNO HEARING

47

1 A No, sir.

2 Q Did you promise him anything in exchange for him to
3 talk?

4 A No, sir.

5 Q Did he appear to understand his Rights at that time?

6 A Yes, sir. He actually made the statement, "Yeah, man,
7 I know my rights.

8 Q Okay. So, he said, I know my rights.

9 A Yes, sir.

10 Q All right. And you said he mentioned to you that he
11 didn't do anything wrong. Was this the type thing he
12 was saying to y'all, that, "I didn't do anything. I
13 didn't do anything"?

14 A Yes, sir. That was the first statements he made to me
15 as soon as I asked him to step over to my vehicle.

16 Q Okay. Now, after this time, who was the one that
17 transported Mr. Starks back to the police department?

18 A That was me.

19 Q Okay. In the back of your car?

20 A Yes, sir.

21 Q All right. At that time -- and by the way, what
22 activates your body cam?

23 A That's, it's a voice activated cam. A loud noise,
24 high pitch noise activates it.

25 Q Okay. When you turn the siren and lights on, does

JACKSON V. DENNO HEARING

48

- 1 that activate your cam?
- 2 A Yes, sir.
- 3 Q Okay. If you cut your lights off and you power down
4 the lights, does that cut the cam off?
- 5 A Yes, sir.
- 6 Q Now, when you get in the car and go to pull out, did
7 you cut your lights on?
- 8 A Yes, sir.
- 9 Q Okay. And during that time, between there and -- did
10 you go anywhere between the trailer park where you
11 found him and the police department?
- 12 A Yes, sir.
- 13 Q Okay. Where did you go?
- 14 A I went -- I was instructed by my supervisor to ---
15 THE COURT: Just say where you went.
- 16 THE WITNESS: Okay.
- 17 A Back up to the Shell Station at 810 West Greenwood
18 Street.
- 19 Q Okay. That's the incident location.
- 20 A Yes, sir.
- 21 Q All right. Did you pull your vehicle in at that time?
- 22 A Yes, sir.
- 23 Q Did you stop your vehicle?
- 24 A I may have. I'm not sure I stopped, but it's possible
25 I did stop, yes, sir.

JACKSON V. DENNO HEARING

49

1 Q Did you cut your interior light on at that time?

2 A Yes, sir.

3 Q Now, after that, did you pull out and proceed on to
4 the police station?

5 A Yes, sir.

6 Q All right. Now, did the Defendant, Mr. Starks, make
7 statements to you in that ride?

8 A Multiple statements. He actually -- there was never a
9 moment of silence the whole time.

10 Q He was talking the whole time to you?

11 A Yes, sir.

12 Q What kind of stuff was he saying to you?

13 A He made statements that he was not worried about this,
14 that he was gonna beat it in jury trials, and then he
15 was going to sue the city of Abbeville. And there was
16 something about y'all were looking for a man with a
17 mask and y'all found me and she can't say that it was
18 me because I had a mask on, how could -- or whoever it
19 was had a mask on, how could she say it was me.

20 Q Now, he didn't say, I had a mask on. He just said,
21 how can y'all tell the guy is the guy, he had a mask
22 on?

23 A That's right. Yeah. How could she tell who it was if
24 he had a mask on.

25 Q At any time before then, had you mentioned anything to

JACKSON V. DENNO HEARING

50

1 him about, we're looking for a man with a mask or
2 anything like that?

3 A No, sir. Once he was placed in the rear of the car, I
4 spoke with him one other time, but other than that,
5 that was all.

6 Q Okay. Have you...

7 MR. STUMBO: Your Honor, if I may approach the
8 witness.

9 THE COURT: Sure.

10 Q I'm going to hand you a disk here.

11 MR. STUMBO: Your Honor, for purposes of this
12 hearing, if we could have this marked.

13 (Whereupon, State's Exhibit #1, is marked for
14 identification.)

15 Q Corporal Thomason, I'm going to hand you what has been
16 marked as State's #1. It's a CD. Have you had a
17 chance to review the contents of that disk?

18 A Yes, sir. I have.

19 Q Okay. Are there any -- did you have an opportunity or
20 occasion to initial that disk after you watched it?

21 A Yes, sir. I did.

22 Q Did you watch it today?

23 A Yes, sir.

24 Q Is it a fair and accurate representation of the car
25 ride from the incident location back to the police

JACKSON V. DENNO HEARING

51

1 department that night?

2 A Yes, sir.

3 Q And that included the trip through the Shell Station?

4 A Yes, sir. It did.

5 Q And those are your initials?

6 A Yes, sir. T-G-T.

7 Q T-G-T on the front of the disk?

8 A Yes, sir.

9 MR. STUMBO: Your Honor, at this time, sufficient
10 foundation having been laid, we would offer State's Exhibit
11 #1 into evidence and publish it.

12 THE COURT: Any questions you want to ask him?

13 MS. BOLEN: I have some questions, sure.

14 THE COURT: Go ahead.

15 MS. BOLEN: We're obviously objecting to the admission
16 of that.

17 PROFFERED CROSS-EXAMINATION

18 BY MS. BOLEN:

19 Q Corporal Thomason, you said my client was cooperative.
20 Right? You didn't have to chase him down, he was just
21 walking?

22 A Yes, ma'am.

23 Q And you also said you weren't sure that you stopped at
24 the Shell Station?

25 A Yes, ma'am.

JACKSON V. DENNO HEARING

52

1 Q Okay. So you pulled up and you're not sure if you
2 stopped?

3 A Yes, ma'am.

4 Q Okay. Regarding this -- let's go back a little bit to
5 the body cams. How is it that they're activated?

6 A Ma'am?

7 Q How are the body cams activated?

8 A Mine's activated by a -- it has a voice command. Any
9 loud noise or high pitched noise turns it on.

10 Q Okay. But it was on when you were searching and
11 looking for evidence. Correct?

12 A Yes, ma'am. It came on right after I got there.

13 Q Okay. When did it go off?

14 A I'm not sure at the exact time, by no means.

15 Q Were you standing with Sergeant McAllister when my
16 client was read his Rights?

17 A Yes, ma'am.

18 Q So, that should have been caught on your body cam?

19 A It's possible. I mean, those are very temperamental
20 cameras, but ---

21 THE COURT: Do you know when it's on?

22 A --- it was not on.

23 THE COURT: Do you know when it's on and when it's
24 off?

25 THE WITNESS: Yes, sir. It has a small blinking light

JACKSON V. DENNO HEARING

53

1 but they sit right up under your chin, pretty much.

2 THE COURT: So, you don't really, you don't see that,
3 I don't guess.

4 THE WITNESS: No, sir. It turns on and off and a lot
5 of times and we don't even know it, actually.

6 Q But it was on the whole time that you're searching for
7 stuff?

8 A No. It was not on the whole time. No.

9 Q Oh. Okay. When did it go off, then?

10 A I don't know. It was sometime during the walk, while
11 I was walking around with my flashlight.

12 THE COURT: Do we have that?

13 MR. STUMBO: Your Honor, it's actually on State's #1,
14 as well.

15 THE COURT: Okay.

16 Q So, I guess you don't know if it was when he was being
17 read his Miranda Rights?

18 A No, ma'am. It was not. I've already reviewed the
19 video. It was not on when he was being read his
20 Miranda Rights.

21 Q Okay. So, did you -- you turned it off?

22 A Ma'am?

23 Q Did you turn it off?

24 A No, ma'am. I never turned it off.

25 Q Okay. Regarding the -- let's back up a little bit.

JACKSON V. DENNO HEARING

54

1 So, my client was put in your car. Correct?

2 A That's correct.

3 Q Was the engine running?

4 A Yes, ma'am.

5 Q Okay. So, your radio was on. Right?

6 A My radio?

7 Q Uh-huh.

8 A Yes, ma'am.

9 Q Okay. And it's safe to say, based on the 9-1-1 crime
10 report, that you were receiving updates through
11 dispatch. Correct?

12 A Yes, ma'am.

13 Q And one of those updates was a correction about the
14 color of the ski mask that the alleged robber was
15 wearing?

16 A I believe so. I think I do remember hearing that.

17 Q And my client was in the car with the radio running.
18 Correct?

19 A Yes, ma'am.

20 Q And for at least a portion of time he was in the car
21 with the radio running by himself. Right?

22 A Yes, ma'am. And there was an officer standing by with
23 the vehicle ---

24 Q But not in the car?

25 A No, ma'am.

JACKSON V. DENNO HEARING

55

1 Q So he was hearing the radio as the car was running and
2 you were getting updates from dispatch. Right?

3 A Yes, ma'am.

4 Q And you weren't there. Right?

5 A I weren't where?

6 Q You weren't in the car.

7 A No, ma'am. I was not in the vehicle.

8 Q So, it is entirely possible that he heard on the radio
9 from dispatch about the person wearing a mask.
10 Correct?

11 A Yes, ma'am. It's very possible.

12 THE COURT: Well, Officer, did you show it to him when
13 you came back? Y'all found two, didn't you?

14 THE WITNESS: Yes, sir.

15 THE COURT: Did you show it -- did you come walking
16 back to the car with a ski mask in your hand?

17 THE WITNESS: Absolutely not.

18 THE COURT: Well, where was it?

19 THE WITNESS: One was in a trash can.

20 THE COURT: Well, I know that. But after you found
21 them, what did you do with them?

22 THE WITNESS: We left them there and we contacted our
23 detective and he came and picked them up -- I mean, took
24 pictures, then placed them into evidence, evidence bags and
25 everything.

JACKSON V. DENNO HEARING

56

1 THE COURT: So, you didn't pick them up when you found
2 them?

3 THE WITNESS: No, sir.

4 THE COURT: You found one in a trash can and one over
5 where the money was?

6 THE WITNESS: Yes, sir.

7 THE COURT: And you just left them there?

8 THE WITNESS: Yes, sir. I mean, we secured the scene
9 and called our detective.

10 THE COURT: All right. Any other questions?

11 MS. BOLEN: Nothing further, Your Honor.

12 THE COURT: Okay. All right. Well, let's play it.

13 (Whereupon, State's Exhibit #1 published for the
14 Court.)

15 THE COURT: All right. Do you want to present any
16 evidence prior to my ruling on whether that could be
17 admissible or not, have your client testify or anything
18 like that on this issue? This is not on anything else, but
19 just on the issue of what he said during the course of that
20 ride.

21 MS. BOLEN: Yes, Your Honor. We're asking that this
22 statement ---

23 THE COURT: You're through with this witness. Right?

24 MS. BOLEN: Yes.

25 THE COURT: You can step down. Do you want to have

JACKSON V. DENNO HEARING

57

1 him testify about anything that he said during the course
2 of that ride?

3 MS. BOLEN: Your Honor, I don't think we have any
4 other witnesses. But I would like to make a brief argument
5 at the appropriate time.

6 THE COURT: Well, okay. Go ahead.

7 MS. BOLEN: Okay. Thank you, Your Honor. We're
8 objecting to this evidence coming in really on the basis
9 more that it is prejudicial without being probative of
10 anything. There are no statements that my client makes in
11 there that make any kind of admissions about this case and
12 so it's just not -- nothing that he says is relevant to
13 what he is on trial for. He makes a couple of statements,
14 Your Honor, that are prejudicial to him without being
15 probative of anything that he is on trial for; the parts
16 about taking a jury trial and suing Abbeville Police
17 Department. He also, there is also prejudice in that he
18 makes, at least inferences, of a prior history in his
19 statement about, "Yeah, I'll do eight or nine months in a
20 county jail and then beat your trial." I think the State
21 is using this just to make my client look bad and it
22 doesn't prove anything, Your Honor. There's nothing that
23 he says that goes to any element of either crime charged
24 and so ---

25 THE COURT: Why do y'all want it in?

JACKSON V. DENNO HEARING

58

1 MR. STUMBO: Your Honor, I think the very nature of
2 him protesting so vociferously and in so much detail about
3 the mask. It reminds me of the line, he doth protest too
4 much.

5 THE COURT: Well, I agree. That's why I asked you
6 about if you wanted him to testify about whether or not,
7 how he knew about the mask or whatever and all. Now, you
8 suggest that he heard it over the radio during the time the
9 officers were not there or whatever, but I don't know that.
10 I don't have any evidence of that.

11 MS. BOLEN: Your Honor, I can call my client.

12 THE COURT: Okay. That's why I asked if you wanted to
13 call him. Just about the statements made during the course
14 of that ride or whatever.

15 (After being first duly sworn, **DWAYNE STARKS**,
16 testified as follows:)

17 MS. BOLEN: Thank you, Your Honor.

18 PROFFERED DIRECT EXAMINATION

19 BY MS. BOLEN:

20 Q Dwayne, I've got some very, very limited questions for
21 you. How did you know about the mask that the robber
22 was wearing?

23 A Well, when they detained me, they put me in the back
24 of the police car, the radio was on in the car there.
25 They came over the radio and said it was a mask that

JACKSON V. DENNO HEARING

59

1 they had got the color wrong on it and she was telling
2 them what color it really was and that's how I knew.

3 THE COURT: Well, what color did she saying it really
4 was?

5 MR. STARKS: They said at first it was -- at first the
6 color they said was green, but then she said no, it wasn't
7 green, she thought it was really, it was gray.

8 Q That's all I have. Thank you.

9 THE COURT: Okay. Any questions you want to ask him
10 about that?

11 MR. STUMBO: I don't have any questions at this time,
12 Your Honor.

13 THE COURT: All right. Thank you very much. You can
14 return to your place in the courtroom. Any other statement
15 or position by either side?

16 MR. STUMBO: Your Honor, just briefly. We believe it
17 is incriminating just in the sense that the protests are so
18 over-the-top, I guess, for lack of a better term. The jury
19 is, I think, entitled to draw whatever inference they want
20 from these statements. There is nothing prejudicial in it
21 in the sense that he doesn't make any direct admissions,
22 nothing directly incriminating, but our position is, it's
23 indirectly incriminating based on the statements about the
24 mask and he's putting this ---

25 THE COURT: That would be the only thing that I would

JACKSON V. DENNO HEARING

60

1 see that would be in any way possibly relevant was in the
2 statements about the mask, and how are you going to prove
3 it if he's wearing a mask and so forth and all. But with
4 the explanation and all, I accept his explanation as being
5 correct, that he heard it over the radio that he had a mask
6 on prior to the officer getting back into the car and all.
7 That's enough explanation for me to say that there is
8 nothing really probative in the statements that were made,
9 prejudicial in the sense of, it puts him in a bad light,
10 but it doesn't prove anything as far as his committing a
11 crime is concerned. So, any possible probative value I
12 feel is outweighed by the potential for unfair prejudice.
13 So, I sustain the objection to the introduction of that
14 video.

15 MS. BOLEN: Thank you, Your Honor.

16 MR. STUMBO: How about, Your Honor, just to clarify
17 your ruling, I believe Corporal Thomason testified to some
18 of these things that ---

19 THE COURT: Well, I didn't have any objections along
20 those lines. I thought it was all leading up to the video.
21 Now, he -- if they object and I haven't dealt with any
22 other objections, other than the introduction of the video,
23 if, during the course of the testimony, if she wants to
24 object to anything that the officers have said during the
25 course of the presentation and stuff. And I would -- one

NEIL V. BIGGARS HEARING

61

1 thing I would ask the officers to remember when you're
2 talking about -- just try to remember when you testify,
3 it's not evidence until it comes in at the trial. So, you
4 can say you were searching for items that may have been
5 related to the crime, we found a mask and so forth and so
6 on, but it's not evidence until it comes in. Anyway,
7 that's just a little English lesson, so to speak. But
8 anyway, if there's objections to anything that the officers
9 testify to, y'all make them and I'll rule on them at that
10 time. But as far as the introduction of the video, I
11 sustain the objection to that.

12 MS. BOLEN: Thank you, Your Honor.

13 NEIL V. BIGGARS HEARING

14 THE COURT: All right. So, what else?

15 MS. BOLEN: I was under the impression they were going
16 to try to use another video, as well.

17 THE COURT: Maybe not.

18 MR. STUMBO: Well, a part of this video, Your Honor,
19 as well, is corroboration of the identification, which I
20 believe is going to be challenged under Neil v. Biggars.

21 THE COURT: I haven't heard anything about an ID
22 issue.

23 MR. STUMBO: Well, Your Honor, we were going to save
24 that for Lieutenant Wilkie, who was with the victim at the
25 time the ID was made. But at the point of the video when

NEIL V. BIGGARS HEARING

62

1 they pull into Shell Station and over the radio, it says,
2 cut your light on. That's what they're doing. They're
3 coming into the parking lot for the victim to identify ---

4 THE COURT: Well, I haven't dealt with any ID issues.

5 MR. STUMBO: That's correct.

6 MS. BOLEN: Right.

7 THE COURT: So, if you have an ID issue, I'll deal
8 with that.

9 MS. BOLEN: Thank you, Your Honor. If I could just
10 ask Mr. Stumbo a question.

11 (Ms. Bolen and Mr. Stumbo confer off-the-record)

12 Ms. BOLEN: Your Honor, I believe our next motion is a
13 motion to suppress the show-up ID made by the victim in the
14 case on the basis that it's unduly suggestive and
15 unreliable. It basically falls under the Neil v. Biggars.

16 THE COURT: All right. Call your witnesses. The
17 State intends to offer some ID evidence?

18 MR. STUMBO: Yes, sir.

19 THE COURT: All right. Call the witnesses.

20 MR. STUMBO: We would call Lieutenant Chris Wilkie to
21 the stand.

22 THE COURT: Do you have the victim here?

23 MR. STUMBO: She's been here the entire time.

24 THE COURT: Okay. I just wanted to make sure.

25 MR. STUMBO: I think we took her to the back so she

NEIL V. BIGGARS HEARING

63

1 wouldn't have to sit through all this.

2 THE COURT: Okay.

3 (After being first duly sworn, **CHRIS WILKIE**, testified
4 as follows:)

5 PROFFERED DIRECT EXAMINATION

6 BY MR. STUMBO:

7 Q Lieutenant Chris Wilkie, you work for the Abbeville
8 Police Department. Correct?

9 A Yes, sir.

10 Q How long have you been there?

11 A Almost eight years.

12 Q Okay. What is your role there? Do you do
13 investigations?

14 A Yes, sir, criminal investigator.

15 Q And you come in and follow-up with investigative work
16 after the uniformed officers respond?

17 A Yes, sir.

18 Q Is that what you did in this case involving the
19 Defendant, Dwayne Starks?

20 A Yes, sir. I was called out by my supervisor.

21 THE COURT: I couldn't understand you.

22 THE WITNESS: I was called out to the scene by the
23 supervisor.

24 THE COURT: Okay. You got out there. Tell us what
25 you found.

NEIL V. BIGGARS HEARING

64

1 THE WITNESS: Your Honor, I found two ski masks, the
2 change ---

3 THE COURT: Did you actually find them?

4 THE WITNESS: I observed them, I photographed them,
5 and placed them into evidence.

6 THE COURT: So, you didn't find them. Somebody
7 pointed them out to you, you went and took photographs of
8 them?

9 THE WITNESS: Yes, sir.

10 THE COURT: Okay. Where were they?

11 THE WITNESS: One of the ski masks was in a trash can.
12 The other ski mask was located beside it in front of a
13 trailer, a mobile home, along with some rolled change and a
14 five dollar bill. There was a pair of black pants in
15 between the two trailers. Also, another piece of evidence
16 that was found by ---

17 THE COURT: Don't call it evidence. Just tell me what
18 it was.

19 THE WITNESS: A green jacket was found near the
20 Cherokee Trail Convenience Store by Officer Thomason. He
21 called me to that location to photograph it and to take it
22 in as property.

23 THE COURT: A green jacket?

24 THE WITNESS: Yes, sir.

25 THE COURT: Did you find black pants somewhere?

NEIL V. BIGGARS HEARING

65

1 THE WITNESS: Yes, sir. The black pants were found in
2 between the two mobile homes at the Sawmill Acres Trailer
3 Park.

4 THE COURT: Okay.

5 Q You said a green jacket. Was that in between the
6 trailer park and the Shell Station?

7 A Yes, sir.

8 Q Now, did you photograph all of these pieces of
9 clothing or articles of clothing, as they lay when you
10 found them?

11 A I did.

12 Q Did you move them?

13 A No sir, not until they were photographed.

14 Q After you photographed, did you collect them?

15 A I did.

16 Q And did you bag them as evidence?

17 A They were bagged as evidence and submitted ---

18 Q As potential evidence?

19 A Potential evidence. Yes, sir.

20 Q Now, at that point, did you go back to the incident
21 location at some time?

22 A I did.

23 Q Okay. Were you able to speak with the victim in this
24 case?

25 A I was.

NEIL V. BIGGARS HEARING

66

1 Q What's her name?

2 A Nakelia Williams.

3 Q Ms. Nakelia Williams. She's the store clerk at the
4 Shell Station?

5 A Yes, sir.

6 Q And she was the one that was held up at gunpoint?

7 A Yes, sir.

8 Q Okay. Now, did she give you any more information
9 about this guy, the alleged robber, at the time?

10 A Nothing other than when myself and Sergeant McAllister
11 requested that Officer Thomason bring Mr. Starks to
12 the parking lot in his patrol vehicle.

13 Q Okay. Did she give the name, D'won Starks, I believe?

14 A Yes, sir.

15 THE COURT: When did she tell you it was Starks? When
16 did she tell you it was him or did she tell you it was him?

17 THE WITNESS: She did.

18 THE COURT: When?

19 THE WITNESS: She told the dispatcher she was on the
20 phone with ---

21 THE COURT: Well, when did she tell you?

22 THE WITNESS: When she told me. As soon as I come in
23 the store, I asked her what her name was, and then I asked
24 her what happened.

25 THE COURT: And what did she say?

NEIL V. BIGGARS HEARING

67

1 THE WITNESS: And she stated she had been robbed by
2 Dwayne Starks.

3 THE COURT: She said robbed by Dwayne Starks?

4 THE WITNESS: Yes, sir.

5 THE COURT: Okay. Did you know Dwayne Starks before
6 any of this?

7 THE WITNESS: Yes, sir. I did.

8 THE COURT: Okay. Go ahead.

9 Q Okay. And did you request of your officers to have
10 any kind of show-up identification?

11 A I asked Officer Thomason to bring Mr. Starks through
12 the parking lot to be identified by the caller.

13 Q And did he do that?

14 A He did.

15 Q Okay. You've reviewed the videotape of that event,
16 have you not?

17 A Yes, sir.

18 Q Okay. And did you tell him to turn the light on?

19 A That was Sergeant McAllister that asked him to turn
20 the light on.

21 Q Okay. Were you there at the time with the victim,
22 Nakelia Williams?

23 A I was.

24 Q Okay. And was she able to make any kind of statements
25 or identification as to the person in the back of the

NEIL V. BIGGARS HEARING

68

1 patrol car?

2 A When I asked her if that was the person who done it,
3 she said, yes.

4 Q Okay. The person in the back of Officer Thomason's
5 patrol car, who was that? Was that the Defendant,
6 Dwayne Starks?

7 A Yes. Dwayne Starks.

8 Q And she said at the time that yes, that is Dwayne
9 Starks, that's who held me up?

10 A Yes.

11 Q Okay.

12 MR. STUMBO: Beg the Court's indulgence, Your Honor.

13 Q How long did that take? Was that a brief incident
14 there when she was able to identify the Defendant?

15 A It was less than a minute.

16 Q Okay.

17 MR. STUMBO: No further questions at this time.

18 THE COURT: All right.

19 MS. BOLEN: Thank you, Your Honor.

20 CROSS-EXAMINATION

21 BY MS. BOLEN:

22 Q Just a couple of questions, Investigator Wilkie. You
23 said it was less than a minute. It was really just a
24 couple of seconds according to that video. Right?

25 A Yes, ma'am.

NEIL V. BIGGARS HEARING

69

1 Q In fact, Sergeant Thomason didn't even really stop his
2 car.

3 A Correct.

4 Q It was very close to midnight, so it's fair to say it
5 was dark out?

6 THE COURT: Was that number on the video, 12:55, the
7 time?

8 THE WITNESS: The time of the morning.

9 THE COURT: Okay. So, almost 1:00.

10 Q Okay. And my client was in the back of the police
11 car. Correct?

12 A Yes, ma'am.

13 Q And he was wearing handcuffs?

14 A They were on him at the time. Yes, ma'am.

15 Q And he was obviously brought to the victim by the
16 police. Correct?

17 A Yes, ma'am.

18 Q Okay. And he was not wearing what she reported the
19 robber was wearing. Right?

20 A No, ma'am.

21 Q He was wearing a red shirt, I believe?

22 A A red shirt. Yes, ma'am.

23 Q His face was unobstructed?

24 A Yes, ma'am.

25 Q And he was wearing beige pants?

NEIL V. BIGGARS HEARING

70

1 A Yes, ma'am. He was.

2 Q And you were with her at the Shell Station, as well.
3 Right?

4 A I was.

5 Q And prior to Sergeant Thomason coming up, did you tell
6 her anything about who was coming up?

7 A I asked her if she felt comfortable viewing him or
8 seeing him so that she could identify him and she said
9 that was fine.

10 Q And there wasn't anyone else in the car, right? Other
11 than the officer and my client?

12 A That's correct.

13 Q And you didn't bring anyone else up there at any other
14 time to the victim to view. Correct?

15 A No, ma'am.

16 Q And you didn't do a lineup?

17 A No, ma'am.

18 MS. BOLEN: I have nothing further.

19 THE COURT: All right. Thank you very much. You may
20 step down.

21 MR. STUMBO: We do have the victim, Ms. Williams.
22 She's just right back here.

23 THE COURT: All right. Have her come on out.

24 MR. STUMBO: We'll bring her out. (Mr. Stumbo leaves
25 courtroom and then returns) Your Honor, I've just been told

PRE-TRIAL MOTIONS

71

1 she, Ms. Williams, had to leave to pick up her kids. I
2 thought she was in the back, but I guess we inadvertently
3 released her. We can call her first thing in the morning
4 before the jury's sworn.

5 THE COURT: All right. We'll deal with it then, the
6 first thing tomorrow morning then. All right. Anything
7 else today? What is her name?

8 MR. STUMBO: Nakelia Williams.

9 THE COURT: Nakelia Williams.

10 MR. STUMBO: She's the first name on the list.

11 THE COURT: Yeah. I see it. I see it. I see it.

12 All right. So anything else we can deal with today, then?

13 MR. BROWN: Judge, one other thing.

14 THE COURT: Excuse me. Go ahead.

15 MR. BROWN: I talked with the Defense and the
16 indictment says the location was One Stop Gas Station. The
17 gas station was a One Stop at one point. It's now a Shell
18 Station. We would just move to amend the indictment to
19 reflect the name of the Shell Gas Station.

20 THE COURT: Well, what was it called when it happened?

21 MR. BROWN: Shell Gas Station.

22 THE COURT: It was?

23 MR. BROWN: Yes, sir.

24 THE COURT: Any objection to that?

25 MS. BOLEN: No objection, Your Honor. I've discussed

PRE-TRIAL MOTIONS

72

1 this with my client. He's ---

2 THE COURT: What?

3 MS. BOLEN: I've discussed this with my client. He's
4 indicated he's ---

5 THE COURT: So, what do you want me to put in here?
6 What do you want? Y'all write it in there the way you want
7 it, then.

8 MR. BROWN: Yes, sir.

9 THE COURT: Look at it and make sure they put it on
10 there -- you look, Ms. Bolen, and you look and make sure
11 they write it on there right.

12 MR. BROWN: Thank you.

13 (Whereupon, the indictment was amended by Mr. Brown
14 and Ms. Bolen.)

15 MR. BROWN: The indictments. (Documents handed up to
16 the Court.)

17 THE COURT: All right. Anything else?

18 MS. BOLEN: Very briefly, Your Honor. There's just
19 two things I wanted to really put on the record. We do
20 have a motion to sequester witnesses. We've told the State
21 about ---

22 THE COURT: Any objection to sequestering witnesses?

23 MR. STUMBO: Just, under the law, Your Honor ---

24 THE COURT: You can keep the chief investigating
25 officer in here.

PRE-TRIAL MOTIONS

73

1 MR. STUMBO: And the victim.

2 THE COURT: And the victim if she wants to stay.

3 MR. STUMBO: Just those two, Your Honor.

4 THE COURT: Yeah. Those two, they can stay.

5 MR. STUMBO: Yes, sir.

6 THE COURT: Anybody else, keep them back here. Okay?

7 MR. STUMBO: Yes, sir.

8 THE COURT: All right.

9 MS. BOLEN: And just two other things I've already
10 discussed with the State but just wanted to put on the
11 record that we are in agreement upon. One was, Mr. Brown
12 had, a few weeks ago, told me about a video from Cherokee
13 Trail in which the officer apparently viewed the video.
14 And it apparently showed my client, but we've not been
15 provided with this video.

16 THE COURT: I don't quite follow you. Speak up.

17 MS. BOLEN: Okay. Mr. Brown, the Solicitor, had told
18 me a few weeks ago that Investigator Wilkie had gone to a
19 location very close to where this happened and viewed their
20 surveillance video. He told Mr. Brown that he saw my
21 client walking by, but was not able to retrieve the video.
22 So, neither myself nor Mr. Brown have seen this video. We
23 are in agreement that this video cannot be brought up in
24 any way, but we just wanted to put it on the record that
25 there is to be no testimony about that.

PRE-TRIAL MOTIONS

74

1 THE COURT: Agreed?

2 MR. BROWN: Agreed.

3 THE COURT: All right.

4 MS. BOLEN: And likewise, Your Honor, there were some
5 pictures taken of footprints and my client's shoes were
6 seized. There was no scientific analysis of these
7 footprints. There was a mention in the incident report
8 that the officer felt they were the same. But we also are
9 in agreement that there wouldn't be any representation that
10 they were the same because there was no scientific analysis
11 done.

12 THE COURT: You agree to that?

13 MR. STUMBO: That's fine, Your Honor. We don't intend
14 to call any expert testimony to elicit their opinion.

15 THE COURT: Well, I don't know what you're going to
16 do, but if you feel like there is something coming up that
17 you object to, you state your objection, object and I'll
18 rule on it at that time.

19 MS. BOLEN: Thank you, Your Honor.

20 MR. STUMBO: Your Honor, just as to that point, there
21 is a picture that was taken of a shoe print there at the
22 mobile home where the Defendant was taken into custody. We
23 are not going to elicit any opinion or comparison
24 testimony.

25 THE COURT: Are you going to introduce the footprint

1 photograph?

2 MR. STUMBO: We plan to put in the picture, yes, sir.

3 THE COURT: All right. Do you object to that?

4 MS. NELSON: We may object at the time, Your Honor.

5 THE COURT: All right. I'll deal with it at the time.

6 MS. NELSON: Yes, sir.

7 THE COURT: All right. Anything else?

8 MS. NELSON: I believe that's all, Your Honor.

9 THE COURT: Anything else over here?

10 MR. STUMBO: No, sir, Your Honor.

11 THE COURT: All right. Sounds good. Then we'll be
12 back tomorrow morning at 9:30.

13 MS. BOLEN: Thank you, Your Honor.

14 MR. STUMBO: Thank you, Your Honor. We'll have the
15 victim here to testify.

16 THE COURT: All right. Yes, we can't get the jury in
17 while we've got a witness on, so we'll start at 9:30.

18 (Whereupon, Court stood at recess.)

19 April 2, 2013 - Morning

20 QUESTIONING OF JUROR

21 THE COURT: All right. The Defendant is present along
22 with his attorneys. When I got to the courthouse this
23 morning, the Clerk informed me that yesterday when she got
24 home she had a note on her door, or whatever, at home from
25 Juror #17, Denita L. Burdette, who's her next door neighbor

1 and all, asking her to call. So she did call Ms. Burdette
2 and Ms. Burdette informed her at that time that yesterday
3 after she was selected as a juror in this case, that she
4 then recognized Mr. Starks from having served on a jury in
5 2009 that was the trial jury on a shoplifting charge, I
6 believe, that was made against Mr. Starks at that time.
7 She was on the jury and the jury found him not guilty of
8 that charge as I understand it. But anyway, she wanted to
9 make that known, that she has previously -- she didn't
10 recognize him at first, but after looking at him for some
11 time yesterday, she recognized him. And the Clerk pulled
12 the file and she was on that jury and that's what I've
13 learned. So I'll be glad to hear from anybody that wants
14 to say anything as far as anything that you think I should
15 do relative to that. I'll be glad to hear from the State
16 to start with.

17 MR. STUMBO: Your Honor, I don't know if we have a
18 position on it. Mr. Brown informed me of that a few
19 minutes ago and we discussed it. Obviously, we have an
20 alternate. I'll probably -- we'd feel comfortable if Your
21 Honor did inquire of this juror whether she could still be
22 fair and impartial in this trial. I mean, certainly, I
23 think to protect the record we need to do that at a
24 minimum. But there again, I do believe that's one of the
25 reasons why we pick alternates as well. So, Your Honor,

1 we'll leave that to your discretion.

2 THE COURT: Thanks a lot. What position do you take?

3 MS. BOLEN: Thank you, Your Honor. I've discussed
4 this with my client and unless there's a statement from
5 this juror that she can't be fair and impartial, we'd like
6 to keep her on the jury. So ---

7 THE COURT: Well, the problem very well -- I mean,
8 I'll be glad to make inquiries with her about that, you
9 know. One thing that that does do is, I would have to
10 bring her -- I would do that individually. I'd bring her
11 out of the jury room and question her out here and the
12 jury's going to wonder, somebody on the jury is going to
13 want to know -- I would think that they would think and
14 wonder what's going on and all. So I'm going to be calling
15 attention to it, to her, you know, in the minds of the
16 other jurors if I do that. But, you know, that's one thing
17 to consider also is if you want me to examine her, I will
18 and all, but it's going to be calling her to the attention
19 of the other jurors by my doing that and they're going to
20 wonder what's going on. Now, whether they'll read into it
21 negative or whatever or anything insofar as Mr. Starks is
22 concerned -- I assume one question, of course, I would ask
23 her is, have you mentioned this to any of the other jurors
24 and if she says, no, then we might be okay if I make
25 further inquiries and she says, and she says that she can

1 continue to be fair and impartial. So what do you want me
2 to do?

3 MR. STUMBO: Well, Your Honor, I think you have
4 highlighted some of the same concerns I have. I mean, I
5 think we have an alternate available and I think out of an
6 abundance of caution, that's probably the best. That will
7 be the best route to take is to seat the alternate. That
8 would be our ---

9 THE COURT: What do y'all say? You want to confer
10 some more for a minute?

11 MS. BOLEN: Yes, sir. (Ms. Bolen and Ms. Nelson
12 confer with Defendant)

13 THE COURT: We look like we have an energetic
14 alternate.

15 MS. NELSON: Your Honor, I think our position still is
16 that there isn't any reason to think at this point that she
17 can't be fair and impartial. We both picked her and we'd
18 still prefer to ---

19 THE COURT: You want her to stay on?

20 MS. NELSON: Yes, sir.

21 THE COURT: All right. Well, I'm going to make a
22 little inquiry with her then, and all. Go back there --
23 let me go back there -- (addressing the bailiff) Well, you
24 go back there and get her. It's Denita Burdette. Have her
25 to come out. Denita Burdette.

1 THE BAILIFF: Yes, sir.

2 THE COURT: Denita Burdette.

3 MS. NELSON: And, Your Honor, we understand what you
4 said, too, about drawing attention to her, but if she's
5 instructed not to discuss it with the other jurors, then
6 they can just leave it at that.

7 (Whereupon, juror #17, Denita Burdette enters the
8 courtroom.)

9 THE COURT: Come on around here, Ms. Burdette. Do you
10 want to sit down or do you want to stand up? I want to ask
11 you some questions.

12 THE JUROR: It doesn't matter.

13 THE COURT: Okay. Raise your right hand, if you don't
14 mind.

15 (The Clerk of Court administers the oath to Denita
16 Burdette)

17 THE COURT: Now, the Clerk, Ms. McMahon, told me that
18 you left her a note yesterday and asked her to call and she
19 did and you informed her at that time that after you were
20 picked as a juror in this case, you did then recognize Mr.
21 Starks, the Defendant in this case, as having been the
22 Defendant in a previous criminal jury trial, maybe in 2009,
23 and the clerk has pulled the file and confirmed that you
24 were on that jury and all and Mr. Starks was the Defendant
25 and that that jury found him not guilty of a shoplifting

1 charge and you wanted us to be aware of that. And so I
2 appreciate very much your bringing that to our attention.
3 And I've conferred with the lawyers about it and all and I
4 just wanted to ask you some further -- I mean, I've
5 informed them about that fact and so I wanted to ask you
6 some questions now at this time. And what I've said, is
7 that the truth?

8 MS. BURDETTE: Yes.

9 THE COURT: Okay. And, of course, the question is at
10 this point -- well, let me ask you this. Have you told
11 anybody else? Have you told any of the other members of
12 the jury of this?

13 MS. BURDETTE: No. No, sir.

14 THE COURT: You haven't said anything to anybody about
15 it?

16 MS. BURDETTE: No, sir.

17 THE COURT: So Nobody else knows anything about it on
18 the jury or anything?

19 MS. BURDETTE: No, sir.

20 THE COURT: All right. And then the other question,
21 really the other question is, how would that affect you as
22 far as this case is concerned or will it?

23 MS. BURDETTE: I honestly do not know how to answer
24 that question. I honestly don't know. I mean, because I
25 don't know, you know, any of the evidence or what, you

1 know, they could have ---

2 THE COURT: Of course, he's not charged with
3 shoplifting here or anything. But nevertheless, do you
4 think that the fact that you were on that jury would have
5 any influence on you in this case? You can say, yes, no,
6 or I don't know.

7 MS. BURDETTE: I don't know. You know, as far as me
8 seeing it that, you know, because he was here before that I
9 would assume he's automatically guilty, I would not. But
10 for the fact, too, that, you know, after we had talked with
11 the Judge after that trial, you know, the Judge did make us
12 aware that there were other charges against him.

13 THE COURT: Well, I didn't know that. I'm glad you
14 told me that.

15 MS. BURDETTE: And so, I mean, I don't know.

16 THE COURT: I think the best thing to do, the safest
17 thing to do under the circumstances, Ms. Burdette, then, is
18 since we have an alternate is to excuse you and all. I
19 think that would be the ticket. Based on the fact that you
20 said that you just don't know, and then you also just told
21 me about learning about other charges and so forth, I think
22 it would be virtually impossible for me, if I was in your
23 situation, and I imagine, you couldn't---

24 MS. BURDETTE: Yes, sir.

25 THE COURT: --- completely just block that out.

1 MS. BURDETTE: Well, I couldn't sleep last night and I
2 prayed a lot about it and, you know.

3 THE COURT: Well, thank you very much for doing that.

4 MS. BURDETTE: Okay.

5 THE COURT: You did exactly what you should do.

6 MS. BURDETTE: Okay.

7 THE COURT: Thank you very much. Have you made any
8 notes?

9 MS. BURDETTE: No, sir. I just have my name and my
10 doodling.

11 THE COURT: Well, then give it back to the clerk
12 there.

13 MS. BURDETTE: All right.

14 THE COURT: And I thank you very much for doing that.
15 And call in this evening after 6:00 to receive a message.
16 Now, have you got the number still that they gave you or
17 whatever, have you got one?

18 THE CLERK: It's a card back there. Tell John to give
19 you one of the call-back numbers.

20 MS. BURDETTE: Okay.

21 THE COURT: Call them back this afternoon or go visit
22 your next door neighbor to find out whether you need to
23 come back. Okay?

24 MS. BURDETTE: Okay. Thank you, sir.

25 THE COURT: Thank you so much.

CONTINUED NEIL V. BIGGARS HEARING

83

1 MS. BURDETTE: Sorry, y'all.

2 THE COURT: No, thank you very much.

3 MR. STUMBO: Thank you, ma'am.

4 THE COURT: You didn't do anything wrong.

5 (Whereupon, Juror #17, Denita L. Burdette, is excused
6 from the trial of this case and exits the open courtroom.)

7 THE COURT: All right. So we'll move the alternate up
8 and we'll go ahead then. Anything before we bring the jury
9 in? Anything from the State?

10 MR. STUMBO: Well, Your Honor, we do need to finish up
11 our ---

12 THE COURT: Oh, yeah. That's right. Okay. I forgot
13 where we were yesterday and everything. (Addressing the
14 bailiff) Go back and tell the jury that I'll be with them
15 in just a few minutes. Have you got Ms. Williams here?

16 MR. STUMBO: Yes, sir.

17 THE COURT: Okay. Go back and tell the jury fifteen
18 to twenty minutes and just sit tight. Okay?

19 THE BAILIFF: Yes, sir.

20 THE COURT: Come on up.

21 CONTINUE NEIL V. BIGGARS HEARING

22 (After being first duly sworn, **NAKELIA WILLIAMS**,
23 testified as follows:)

24 PROFFERED DIRECT EXAMINATION

25 BY MR. STUMBO:

CONTINUED NEIL V. BIGGARS HEARING

84

1 Q Good morning, Ms. Williams.

2 A Good morning.

3 Q For the purpose of this little hearing, we're going to
4 jump ahead. Tell me where you work.

5 A Greenwood Petroleum on 810 West Greenwood Street.

6 Q Okay. And last year, February 27th, 2012, where were
7 you working?

8 A At 810 West Greenwood Street.

9 THE COURT: You've got to talk louder.

10 THE WITNESS: Okay.

11 Q Is that the Shell Gas Station?

12 A Yes, sir.

13 Q Okay. What was your shift that night?

14 A Third. It's from 6:00 to 1:30 AM.

15 Q Okay. And what took place that night when you were
16 working there?

17 A Well, I had been at work since 6:00 and around about
18 11:30, 11:40, I was in the back in the cooler and I
19 was stocking my cooler. I came out and I noticed
20 someone standing at the register with a hood on. It
21 was a green coat, long green coat and black pants.
22 And so I asked him to remove -- I said, "How you
23 doing?" And I said, "Can you please take that hood
24 off," and they didn't say anything. So I asked them
25 again. I said, "Can you please take that hood off or

CONTINUED NEIL V. BIGGARS HEARING

85

1. you've got to leave the store." Because that's our
2. policy; no hoods, nothing in there, in the store. And
3. so as I looked, I noticed that he was wearing a gray
4. mask and he said, "Come on around here and give me
5. this money out of this register." And I said, "Excuse
6. me?" He said, "You heard what I said. Come on around
7. here and get this money out of the register." Then I
8. noticed, I heard his voice and I recognized it and so
9. then I walked -- he walked up and approached me with a
10. gun and I walked around the register and we proceeded
11. to the register and he followed me. He pushed me
12. around. And then I opened the register, got all the
13. money out. He got a bag or something just to put it
14. in and the next thing you know, he asked me to come
15. with him. And I said, "Go with you where?" And he
16. said, "Just come with me." And I was like, "Where do
17. you want me to go?" And so he came from behind the
18. counter and walked, followed me with the gun and then
19. he ---

20. THE COURT: What? He did what with the gun?

21. MS. WILLIAMS: He followed me with the gun from behind
22. the counter.

23. THE COURT: I hadn't heard you say anything about a
24. gun before that, that I remember. Did you say anything
25. about a gun? Did you see a gun before that?

CONTINUED NEIL V. BIGGARS HEARING

86

1 MS. WILLIAMS: Yes, sir, I did.

2 THE COURT: When did you first see the gun?

3 MS. WILLIAMS: I first seen the gun after I asked him
4 twice to take the hood off or he had to leave the store.
5 That's when he walked up and told me, come around here and
6 give me the money out of the register. I'm sorry if I
7 didn't say nothing about the gun.

8 THE COURT: What did he do with that gun before y'all
9 walked behind the counter?

10 MS. WILLIAMS: He pointed it at me.

11 THE COURT: And then you walked behind the counter?

12 MS. WILLIAMS: Yes, sir.

13 Q And at that point you opened up the cash register and
14 gave him the money as he instructed?

15 A Yes, sir.

16 Q And after you gave him the money, what did he do?
17 What did he instruct you to do?

18 A He told me to come with him. Well, we had like an
19 extra register that sits beside it. He ask me to open
20 it but I told him that I had no way of opening this at
21 all. And I just told him -- he said, well just come
22 -- he followed -- he pushed me. He told me to come on
23 around the register with the gun.

24 Q And where did y'all go?

25 A Walked right to the front door. I was standing right

CONTINUED NEIL V. BIGGARS HEARING

87

1 there.

2 Q What did he do after you got to that front door at the
3 lobby area of your store?

4 A He said, "You all right. You just stand right there."

5 Q And what did he do after that?

6 A He just walked out.

7 Q During this incident, were you able to identify him?
8 Did you know who it was?

9 A Yes, sir.

10 Q And how did you do that?

11 A Well, when I first heard his voice that's when I knew
12 who he was, because he always comes in the store. He
13 done been in the store like regularly, all the time.
14 He always comes in.

15 Q Okay. So you're familiar with him?

16 A Yes.

17 Q After he left the store, what did you do?

18 A I called 9-1-1. I ran behind the register to get my
19 phone to call 9-1-1.

20 Q Okay. For purposes of this hearing, later on, did law
21 enforcement, Lieutenant Wilkie, come back up to your
22 store?

23 A Yes, sir.

24 Q And what did he say when he came back to the store?

25 A Well, he just asked me questions about just who I

CONTINUED NEIL V. BIGGARS HEARING

88

1 thought he might have been and everything about what
2 happened, just the whole story and everything and I
3 just went over it with him.

4 Q Did you ever see Mr. Starks again that night?

5 A Yes.

6 Q When was that?

7 THE COURT: Back up just a minute.

8 MS. WILLIAMS: Okay.

9 THE COURT: You said Lieutenant Wilkie came by and
10 talked with you. This is before you saw him the car later
11 on. Right?

12 MS. WILLIAMS: Yes, sir.

13 THE COURT: Okay. What did you tell -- tell me what
14 you told Lieutenant Wilkie at that time about whether or
15 not you recognized the person, who you thought it was or
16 anything along those lines.

17 MS. WILLIAMS: Okay. Yes. I told him that I thought
18 it was Dwayne Starks or D'won Starks. I'm not sure how to
19 pronounce it. And ---

20 THE COURT: And that was because you'd recognized his
21 voice?

22 THE WITNESS: His voice and the body build.

23 THE COURT: Body build, his size?

24 THE WITNESS: Yes, sir.

25 THE COURT: Okay. All right. Go ahead.

CONTINUED NEIL V. BIGGARS HEARING

89

1 Q And once you got, once Lieutenant Wilkie was there,
2 did they bring him, bring Mr. Starks to the gas
3 station?

4 A Yes.

5 Q In what form did they do that?

6 A They brought him in the car. He was in the back.

7 Q In the back of what car?

8 A In the police car. I'm sorry.

9 Q What did they do when -- I know this was at night.
10 How could you see him in the back of the car if it was
11 at night?

12 A They turned the light on just to make sure I could see
13 him.

14 Q The light on where?

15 A In the car. I'm sorry.

16 Q Were you able to get a good view of the person in the
17 back seat?

18 A Yes, sir.

19 Q And who did you see in the back seat?

20 A Dwayne Starks.

21 Q Is that the same person that came in the gas station
22 and robbed you at gunpoint?

23 A Yes, sir.

24 Q And is Mr. Starks in the courtroom today?

25 A Yes, sir.

CONTINUED NEIL V. BIGGARS HEARING

90

1 Q Where is he?

2 A He's right over there. (Indicating)

3 Q What's he wearing?

4 A The blue shirt.

5 Q Is that the last time you've seen Mr. Starks until
6 this trial started?

7 A Yes, sir.

8 MR. STUMBO: No further questions.

9 MS. BOLEN: Thank you, Your Honor.

10 PROFFERED CROSS EXAMINATION

11 BY MS. BOLEN:

12 Q Ms. Williams, I just have a couple of questions for
13 you. You said you recognized my client by his voice?

14 A Yes, ma'am.

15 Q Okay. And he was wearing a mask?

16 A Yes, ma'am.

17 Q The person in the store was wearing a mask? Okay.
18 And when you saw him in the back of the police car,
19 was he handcuffed?

20 A Yes.

21 THE COURT: Could you see?

22 A I couldn't really. I could see his head and him just
23 sitting in the car and they shined the light and I
24 seen his face.

25 Q Okay. So, he was sitting in the car.

CONTINUED NEIL V. BIGGARS HEARING

91

1 A Yes, ma'am.

2 Q They didn't take him out? They didn't take him out of
3 the car?

4 A No, they didn't take him out.

5 Q Okay. And what was ---

6 A Because I asked them not to, because they asked me
7 first could they bring him back up there and I could
8 fully identify him. I told them that I didn't want
9 to, as far as him coming in the store. But they said,
10 well, I'll leave him in the car and have him seated
11 and they will shine the light and ---

12 Q And he was wearing a red shirt in the car. Right?

13 A No, ma'am.

14 Q What was he wearing?

15 A He had that, a green jacket on, if I'm not mistaken.

16 Q In the car?

17 A Yes, ma'am, I think so. I really just couldn't tell.
18 I seen his face.

19 Q In the car?

20 A Yes, ma'am.

21 Q So, you didn't really notice what he was wearing in
22 the car?

23 A No.

24 Q I don't have anything further. Thank you, Ms.
25 Williams.

CONTINUED NEIL V. BIGGARS HEARING

92

1 A Thank you.

2 THE COURT: Anything else?

3 MR. STUMBO: Not from the State, Your Honor.

4 THE COURT: Let me ask you something.

5 MS. WILLIAMS: Yes, sir.

6 THE COURT: I want to make sure I understand. You
7 said that you recognized him from his voice and, as I
8 understand it, from his general size, shape and so forth,
9 even though he had a hood over his head, as I understand
10 it, like a sweatshirt hood. Is that what you're talking
11 about?

12 MS. WILLIAMS: Yes, sir.

13 THE COURT: And then also some sort of mask?

14 MS. WILLIAMS: Yes, sir.

15 THE COURT: A ski mask?

16 MS. WILLIAMS: Yes, sir.

17 THE COURT: All right. And what color was the ski
18 mask? Do you remember?

19 MS. WILLIAMS: It was gray.

20 THE COURT: Gray? Okay. But you say you recognized
21 him and that was because he was a regular customer in the
22 store?

23 MS. WILLIAMS: Yes, sir.

24 THE COURT: How often would you say he came in the
25 store?

CONTINUED NEIL V. BIGGARS HEARING

93

1 MS. WILLIAMS: At least once or twice a week.

2 THE COURT: Once or twice a week. Did he buy ---

3 MS. WILLIAMS: Maybe three times.

4 THE COURT: Did he buy anything in particular when he

5 would come in or do you ---

6 MS. WILLIAMS: Yes, sir.

7 THE COURT: What?

8 MS. WILLIAMS: Beer.

9 THE COURT: Buy beer?

10 MS. WILLIAMS: Maybe King Cobra or Steel Reserve, that

11 kind.

12 THE COURT: Okay. And did you know him in any other

13 way?

14 MS. WILLIAMS: No, sir.

15 THE COURT: How did you know his name?

16 MS. WILLIAMS: Well, as far as -- well, his being from

17 Abbeville, I had heard, I know like people that he's

18 related to, the Starks like.

19 THE COURT: The Stark family?

20 MS. WILLIAMS: Yes.

21 THE COURT: You know the family members here in

22 Abbeville?

23 MS. WILLIAMS: Yes. Well, not personally. I just

24 know that, like -- I think I went to school with Dexter

25 Starks that may be related to him.

CONTINUED NEIL V. BIGGARS HEARING

94

1 THE COURT: Would he ever carry on any conversation
2 with you that much or anything? Ask you anything, other
3 than just come in and buy beer?

4 MS. WILLIAMS: No, I think he -- I recall he told me
5 he knew my mother-in-law once before.

6 THE COURT: He did?

7 MS. WILLIAMS: Uh-huh.

8 THE COURT: Okay. Do you have any idea how many
9 times, altogether, maybe you would have seen him in the
10 store before this?

11 MS. WILLIAMS: It was a lot. Maybe -- I know over
12 twenty, thirty times.

13 THE COURT: How long did you work with the store?

14 MS. WILLIAMS: I've been there for three-and-a-half
15 years.

16 THE COURT: Okay. But at the time that this occurred,
17 how ---

18 MS. WILLIAMS: It was like two years.

19 THE COURT: And you say that he would come in several
20 times, sometimes several times a week?

21 MS. WILLIAMS: Yes, sir.

22 THE COURT: And the time that you saw him in the back
23 of the car, when they brought him back in the back of the
24 car, how long would you say you looked at him the back of
25 the car?

CONTINUED NEIL V. BIGGARS HEARING

95

1 MS. WILLIAMS: Just maybe, about ten seconds maybe.

2 THE COURT: Just a short ---

3 MS. WILLIAMS: Yes, sir. It was very short.

4 THE COURT: Just a few seconds, would that right?

5 MS. WILLIAMS: Yes, sir.

6 THE COURT: Let me ask you this question. If you had
7 not seen him in the back of the car that night, after all
8 this happened, would you still say it was Mr. Starks that
9 robbed the store?

10 MS. WILLIAMS: Yes, sir.

11 THE COURT: You have an independent recollection of it
12 being him that robbed you in the store?

13 MS. WILLIAMS: Yes, sir.

14 THE COURT: All right. Any other questions either
15 side wants to ask her?

16 MR. BROWN: I think we've established that.

17 MS. BOLEN: No, sir, Your Honor.

18 THE COURT: All right. Thank you very much. You can
19 step down and return to your place in the courtroom.

20 THE WITNESS: Thank you.

21 THE COURT: All right. State your position, from the
22 Defendant.

23 MS. BOLEN: Thank you, Your Honor. Your Honor, our
24 position is that this show-up is unduly suggestive and not
25 reliable and should be excluded under Neil v. Biggars.

CONTINUED NEIL V. BIGGARS HEARING

96

1 Your Honor, there are five factors that the courts look at
2 in determining whether show-ups are reliable. The Supreme
3 Court, as well as South Carolina Courts, have recognized
4 that show-ups are inherently suggestive because of the fact
5 that it's only one person, but beyond the suggestive prong
6 there's also the reliability prong and we'd argue that on
7 both prongs the State doesn't meet its burden.

8 In terms of suggestibility, Your Honor, my client was
9 handcuffed in the back of the police car with at least two
10 officers there. There was no one else in the car, no one
11 else presented to Ms. Williams. There was no lineup.
12 There was just a single person show-up with him in the back
13 of the car and cuffed, which clearly shows him as the
14 person that the police think it is. And I think that this
15 passes a judgment to the identifier that, you know, this is
16 who the police say it is, so this must be who it is and I
17 think there's some clear suggestibility in that.

18 Regarding reliability, Your Honor. Some of the
19 factors the courts looked at are the time in between the
20 incident and the identification, but more importantly, they
21 look at whether the identifier, what kind of observation
22 period the identifier had with the suspect. And in this
23 case, Your Honor, I think this is where the identification
24 is simply not reliable, because based on Ms. Williams'
25 testimony, the robber in the store was wearing a ski mask

CONTINUED NEIL V. BIGGARS HEARING

97

1 and a hood. She said she recognized him by his voice, not
2 really by any other way. I think she said body build, but
3 by voice and that he was wearing a green jacket. With my
4 client in the back of the police car, her testimony was
5 actually that she thought he might be wearing a green
6 jacket. The testimony from the officers, as well as the
7 video we saw earlier, shows that he's wearing a red shirt.
8 He's not wearing any kind of ski mask, not wearing any kind
9 of hood, and the courts point to whether there's been any
10 change in appearance and that goes to unreliability. And
11 here, there's been -- there's -- the presentation of my
12 client in the car is drastically different from the
13 presentation of the robber in the store, which goes to
14 unreliability.

15 And more than that, Your Honor, she stated that she
16 identified him by his voice. Here, they do only a physical
17 show up. They don't ask him to speak. They don't ask him
18 to do anything. And that's how she identified him was by
19 voice, not by his face, and her testimony was that she only
20 saw his face in the car. So, we'd argue that it's an
21 unreliable identification. The show-up itself is unduly
22 suggestive because of his presence in the car and his
23 presence as the clear suspect by law enforcement and that
24 the ID is unreliable and should be excluded.

25 THE COURT: All right. The State's position.

CONTINUED NEIL V. BIGGARS HEARING

98

1 MR. STUMBO: Your Honor, under Neil v. Biggars and its
2 progeny here in this state, we would cite just a couple of
3 cases to you: State v. Stewart, that's 272 S.E.2d 628,
4 that's 1980. South Carolina Supreme Court decision also,
5 State v. Gambrell. It's 2 ---

6 THE COURT: You don't need to give the cite. Just
7 tell me what the cases, you think they say.

8 MR. STUMBO: Well, Your Honor, the cases basically
9 outline the factors of reliability, if there's sufficient
10 indicia of reliability in the identification, and they cite
11 several factors here. Your Honor, primarily I'm going to
12 focus on a couple. In the State v. Stewart case, there was
13 two weeks between the time of the crime and the time of the
14 confrontation. Here, we have the same night. So in State
15 v. Stewart, two weeks was not too long of a time period.
16 The Supreme Court upheld the admission of that.

17 Other factors at play here are likelihood of
18 misidentification, including opportunity of the witness to
19 view the criminal at the time of the crime. Your Honor, I
20 think the testimony of Ms. Williams was that there was a
21 pretty long period of time where they go around the
22 counter, come back. She was able to hear his voice several
23 times. This is a man she saw on a weekly basis. And she
24 was able to identify him as Dwayne or D'won Starks by name,
25 even to the 9-1-1 in a dispatch, which will come out here

CONTINUED NEIL V. BIGGARS HEARING

99

1 in the evidence in trial, Your Honor, before she even had
2 the showing. So, before there was even the show-up
3 identification where they pulled the car through, she'd
4 already identified him by name based on his voice and by
5 his body build. So, she was very, seemed to be very
6 certain of who it was. You know, and that's one of the
7 factors, Your Honor. It says level of certainty
8 demonstrated at the confrontation. She was fairly certain
9 this was Dwayne Starks and she called him by name when she
10 reported the crime. And there again, reiterated that to
11 Lieutenant Wilkie before they pulled Mr. Starks through in
12 a police car. So, Your Honor, the factors at play, that
13 are a play from Neil v. Biggars and State v. Stewart, State
14 V. Gambrell, Your Honor, we believe that under the totality
15 of the circumstances, based on the testimony of Ms.
16 Williams here today and her level of certainty, that the
17 man who robbed her in the store was Dwayne Starks who she'd
18 seen on a weekly basis prior to this time. And it bears an
19 extraordinary indicia of reliability here that, we believe
20 under Neil v. Biggars, is admissible.

21 THE COURT: Anything you want to say in response?

22 MS. BOLEN: Your Honor, just briefly in response.

23 Some other cases are State v. Mansfield.

24 THE COURT: Tell me what you think they say and how
25 they're important to this decision.

CONTINUED NEIL V. BIGGARS HEARING

100

1 MS. BOLEN: Okay. In terms of the certainty that
2 Solicitor Stumbo referenced, even her testimony today
3 concerning the 9-1-1 tape, she's not certain that it's my
4 client. She's ---

5 THE COURT: I haven't heard anything on the 9-1-1
6 tape. If you want me to consider that, I have to hear it.

7 MS. BOLEN: Well, I think that there is some
8 uncertainty in her identification of him and we just argue
9 again that it's unduly suggestive and not reliable.

10 THE COURT: All right. I appreciate that, but I find
11 that there's nothing unduly suggestive in the way that the
12 show-up was done, given the short period of time, as I
13 understand it, really less than an hour or so involved from
14 when the time the robbery occurred or thereabouts, an hour
15 or so and him being presented to her in the backseat of a
16 patrol car for a brief few seconds with the light on. I
17 don't think that that was unduly suggestive, particularly
18 since she identified him, as I understand it from out the
19 outset, as being the person that robbed her. She
20 recognized him at the time in the store, told the police
21 that's who that was, and then was presented with him and
22 she confirmed, that's him. So, I don't see where it was
23 unduly suggestive under all the circumstances and I think
24 that it is a reliable identification based on her prior
25 knowledge of Mr. Starks and identifying him that night.

CONTINUED NEIL V. BIGGARS HEARING

101

1 So, I don't think it's, that it is an impermissible show-up
2 identification and I'll allow it to be presented to the
3 jury here in court. All right. Anything else before we
4 bring the jury in?

5 MS. BOLEN: One just very, very brief matter, Your
6 Honor. I've already spoken with the Solicitor about this,
7 but yesterday when the officers were testifying, several of
8 them made reference to knowing my client through previous
9 interactions with him. I didn't object yesterday because
10 it was outside the presence of the jury. I spoke with the
11 Solicitor and he tells me he does not intend to elicit ---

12 THE COURT: Well, I don't think it's impermissible for
13 them to say that they know him.

14 MS. BOLEN: Right. Well, I don't think so either, but
15 just no reference how they know him.

16 THE COURT: But, you know, they know him. They know
17 him. They've had interaction with him and they can testify
18 to that. Just don't say he's been charged with any crimes
19 or anything of that sort. But I don't think -- I think
20 that they certainly would be allowed to testify that they
21 know him, how many times they've encountered him, if
22 necessary, if they want to go into that and over what
23 period of time, how long they've known him, so forth and so
24 on, but not as it relates to any charged crimes.

25 MS. BOLEN: Okay.

CONTINUED NEIL V. BIGGARS HEARING

102

1 THE COURT: That's the best I can do.

2 MR. STUMBO: Your Honor, just for the record, we've
3 discussed that in detail with all the law enforcement
4 witnesses, just exactly what Your Honor just said.

5 THE COURT: Okay. All right. Well, good.

6 MS. BOLEN: Thank you, Your Honor.

7 THE COURT: But, I mean, they can tell, they can say
8 that they know him and, you know, how much interaction
9 they've had with him in the past as far as knowing him is
10 concerned, so when they saw him that night, they knew who
11 he was. All right. Anything else?

12 MS. NELSON: Your Honor, I apologize. Mr. Starks is
13 asking if it's possible for him to have a bathroom break?

14 THE COURT: Sure.

15 MS. NELSON: Thank you so much, Your Honor.

16 THE COURT: Accommodate that need, somebody.

17 MS. NELSON: Thank you very much.

18 (Whereupon, Court stood at recess for a short break.)

19 (Jury in at 10:16 a.m.)

20 THE COURT: Go ahead and be seated. Actually, Ms.
21 McMurtury, you're going to have to be in the jury box and
22 all. You are now a member of the jury. Come on in and
23 take that second seat right there. Save this last one down
24 here for the foreman. You had to give up that nice
25 comfortable chair. Y'all be seated.

INTRODUCTORY REMARKS TO THE JURY

103

INTRODUCTORY REMARKS TO THE JURY

1 All right. We have the jury back with us and the
2 Defendant is present, along with his attorneys. Ms.
3 McMurtury, as I said, you are now a full member of the
4 jury. You're one of the twelve. Ms. Burdette, something
5 happened over the evening that interfered with her being
6 able to serve on the jury, so I've had to excuse her and
7 that's why we pick an alternate, in case something like
8 that happens. So, nobody else get sick or have anything
9 happen, because we don't have another alternate, so you're
10 the twelve that we've got now. So, you are a full member
11 of the jury, as I said. So, we'll now get started with the
12 trial.
13

14 Let me mention a few other things to you before we
15 hear from the attorneys and the witnesses. As I said, the
16 State has charged Mr. Starks, Dwayne Eddie Starks, who I
17 introduced to you yesterday, with having violated two of
18 the laws of this state; armed robbery and possession of a
19 firearm or a knife during the commission of a crime, the
20 crime of armed robbery. And as I said, Mr. Starks has
21 entered a plea of not guilty to those charges and that
22 places the burden of proving him guilty on the State. A
23 person who's charged is never required to prove themselves
24 innocent. The burden of proof is always on the State to
25 convince you by the testimony and the evidence presented in

INTRODUCTORY REMARKS TO THE JURY

104

1 court, that he is guilty of the charge beyond a reasonable
2 doubt. If the State doesn't do that, then he's entitled to
3 a verdict of not guilty.

4 Really, the question that you'll answer when you go
5 back into the jury room to deliberate at the end of this
6 case is exactly that; has the State met the burden of proof
7 in this case. That's what you're going to decide at the
8 conclusion of the case.

9 You are the sole judges of the facts of this case. I
10 don't have anything to do with the facts. My job is to
11 make sure that the parties follow the rules when they're
12 presenting the facts to you. That's what I do. I make
13 sure that they follow the rules. They have rules of
14 evidence and rules of procedure that they're suppose to
15 follow during the presentation of the testimony and
16 evidence to you.

17 Perhaps during the course of the trial one or more of
18 the lawyers will get up and say something like, Your Honor,
19 I object, and hopefully have some reason as to why he or
20 she objects to a question that's been asked or an answer
21 that's been given. When the lawyers do that they're
22 talking to me, they're not talking to you. They're talking
23 to me. They're calling a possible violation of one of the
24 rules of evidence or rules of procedure to my attention.
25 Don't you concern yourselves with those objections or how I

INTRODUCTORY REMARKS TO THE JURY

105

1 may rule on those objections, whether I overrule it or
2 sustain it, whatever, because it has absolutely nothing to
3 do with your job in the case, which as I said, is to be the
4 finders or the judges of the facts of this case. Perhaps if
5 one of those objections comes, I'll ask you to leave the
6 courtroom and go to the jury room. I'm not trying to hide
7 anything from you by doing that. It's just that we've
8 found over the years that that's the easiest and the best
9 way and the most expeditious way for me and the lawyers to
10 deal with those questions of procedures, rules and so
11 forth. Let me hear what they have to say about it, let me
12 make a decision about it, bring you back in and go on with
13 the trial. So again, I'm not trying to hide anything from
14 you by doing that. It's just that we found that that's the
15 easiest and the best way for me and the lawyers to be able
16 to discuss the rule, let me make a decision, bring you back
17 in, go on with the trial.

18 Now, how are we going to go about learning about this
19 case? First of all, I'm going to allow each attorney, or
20 an attorney from each side, to make an opening statement to
21 you. These are not arguments. The arguments will come at
22 the conclusion of the case. But I do allow each side,
23 through the attorney, to make a brief introductory
24 statement to you, tell you a little bit more about the
25 claim, the charge that the State has made against Mr.

INTRODUCTORY REMARKS TO THE JURY

106

1 Starks and any response to that statement, to that claim or
2 that charge by Mr. Starks. That's what we'll hear from the
3 lawyers, an outline or position in regard to the charges
4 and any response to those charges.

5 After that, we will have witnesses, people who will
6 come up here and sit in this witness chair right here
7 between me and you. And they'll tell you, they'll be asked
8 questions by the lawyers and they'll talk to you and
9 they'll tell you what they know insofar as these charges
10 are concerned, the facts of the case that the State makes
11 against Mr. Starks. After everybody's had a full and fair
12 chance to present all of the evidence, the physical
13 evidence, maybe some pictures, photographs, I don't know
14 what else, what may come in, papers, whatever, but after
15 everybody's had a chance to present their witnesses, then
16 we'll hear from the attorneys with summations and
17 arguments. And after that, I'll discuss with you more
18 fully what your duties and responsibilities are as the jury
19 in this case and the law that you will apply in the case
20 and then you go to the jury room and you'll deliberate and
21 you'll decide that question, has the State met the burden
22 of proof in this case. Keep in mind what your job is going
23 to be at the conclusion of the case.

24 Mr. Brown, would you like to make an opening
25 statement?

OPENING STATEMENT - YATES BROWN

107

1 MR. BROWN: Yes, Your Honor.

2 THE COURT: Excuse me. I need to swear the jury.
3 Thank you Emily. If you would, the Clerk needs to
4 administer your oath.

5 (The Clerk of Court administers the oath to the jury)

6 THE COURT: Good. Thank you. The jury has been
7 sworn. All right. Mr. Brown, opening statement.

8 MR. BROWN: Thank you, Your Honor. May it please the
9 Court.

10 OPENING STATEMENT - MR. BROWN

11 Good morning. A little over a year ago, February
12 27th, 2012 to be exact, Ms. Nakelia Williams was working at
13 a Shell Station here in Abbeville, the Shell Station
14 located at 810 West Greenwood Street, which is up the road
15 from the Cherokee Trail BP Gas Station, across the road
16 from Bi-Lo. She was working the third shift, which is from
17 6:00 in the afternoon until 1:30 in the morning. She had
18 worked there several hours and around 11:40, she was back
19 in the cooler there in the business and she heard somebody
20 come in through the front door. When she walked out to see
21 who it was, she sees a tall figure in a green jacket with a
22 hood over his head. She asked him to take that hood off.
23 She didn't realize that he's got a gray ski mask on. She
24 thinks he's joking at first. He comes over there to her
25 and points a gun at her and says, "Get the cash out the

OPENING STATEMENT - YATES BROWN

108

1 cash register". He follows her around behind the counter.
2 She opens up the cash register. He takes the money from
3 the cash register. He makes her go back around the counter
4 and then he leaves the store, all the while pointing the
5 gun at her and putting her in fear and getting the cash.

6 She runs back around the counter. She calls 9-1-1.
7 She describes him and says, "I've been robbed and I know
8 who it is, Dwayne Starks." Law enforcement is summoned.
9 They come really quickly. Within a few minutes, Mr. Starks
10 is placed into custody behind the Sawmill Acres Trailer
11 Park, which is behind Cherokee Trail. Law enforcement
12 comes out and they investigate. They find black pants on
13 the ground located a short distance from Mr. Starks. They
14 locate a gray ski mask. They locate change and money.
15 They locate money in his pocket. They find a green jacket.
16 They aren't able to find the gun. However, they package
17 these clothes up and send them down to SLED. The DNA
18 matches.

19 Now folks, that's just a brief overview of the facts
20 in this case. What Mr. Starks is charged with, as the
21 Judge has already indicated, he's charged with armed
22 robbery and he's charged with possession of a weapon during
23 the commission of a violate crime.

24 What's armed robbery? Armed robbery is the taking and
25 carrying away of the property of another, goods or money,

OPENING STATEMENT - YATES BROWN

109

1 with the intent to steal it, permanently deprive that
2 person of those goods while armed with a deadly weapon. It
3 could be a knife, it could be a gun, a dirk or a sling.

4 Possession of a weapon during the commission of a
5 violent crime pretty much sounds as the charge indicates.
6 The person is either armed or displays what the victim
7 would believe would be a gun at that time, during this
8 armed robbery.

9 Now ladies and gentlemen, the State, we have the
10 burden of proof in this case, to prove beyond a reasonable
11 doubt that Mr. Starks committed the crimes that he's
12 charged with and that burden is to prove beyond a
13 reasonable doubt. Proof beyond a reasonable doubt is the
14 proof that leaves you firmly convinced of the Defendant's
15 guilt. It's not all doubt, it's not every doubt and it's
16 not just any doubt. It's the doubt that leaves you firmly
17 convinced. It's proof that leaves you firmly convinced of
18 his guilt.

19 Now ladies and gentlemen, we intend to call witnesses
20 in this case. We intend to present evidence in this case.
21 And each witness and each piece of evidence that we intend
22 to introduce is like a piece of a puzzle. We're confident
23 that at the end of this trial, after we bring in each piece
24 of that puzzle, that you'll have a clear picture that will
25 leave you firmly convinced and until the time we come back

OPENING STATEMENT - JANNA NELSON

110

1 up and argue at the end of the trial, we ask that you sit
2 patiently, watch carefully each witness, each piece of
3 evidence that's introduced, and just wait for that big
4 picture and at the end of the trial we'll come back and ask
5 that you find Mr. Starks guilty as charged. Thank you.

6 THE COURT: Ms. Bolen or Ms. Nelson, which one?

7 MS. NELSON: I'm going to do it, Your Honor.

8 THE COURT: All right. Go ahead, please ma'am.

9 MS. NELSON: Thank you very much. May it please the
10 Court.

11 OPENING STATEMENT - MS. NELSON

12 This case kind of reminds me of years ago when my son
13 was little, of me walking in the kitchen and seeing him
14 standing next to the empty cookie jar with crumbs all over
15 his fingers after I'd told him not to snack on anything
16 before dinner. And it would be easy to stop right there
17 and look at those crumbs and that empty cookie jar and go
18 ahead and put him in timeout and punish him and say, you
19 know, I know you ate that last cookie, without considering
20 any other possibilities, that maybe he fed that last cookie
21 to the dog or maybe his sister ate that last cookie and he
22 was just trying to clean up the mess and that's how he's
23 got the crumbs on his hands. This case, of course, is a
24 whole lot more serious than who ate the last cookie. It's
25 more serious to everybody here in the courtroom, including

OPENING STATEMENT - JANNA NELSON

111

1 Dwayne Starks.

2 Now, if I stop right there with my son and put him in
3 timeout and I get it wrong, it's pretty easy for me to go
4 back later and fix that, apologize to him, you know, tell
5 him I messed up, buy him a PlayStation game or something.
6 It's not that easy if we get it wrong here. The
7 consequences are a lot more serious. So, what I'm asking
8 you to do in this case is, the Solicitor, Mr. Brown, has
9 already gotten up here and told you about these crumbs on
10 Dwayne's hands and I'm asking you to look at other
11 possibilities, other reasonable possibilities, and that's
12 part of your job as jurors in this case. You've got to be
13 firmly convinced beyond a reasonable doubt that Dwayne's
14 the right person and that they got it right when they
15 arrested him. And what we're asking you to do is look at
16 the evidence in this case and scrutinize some of those
17 things that are going to lead you to that other reasonable
18 possibility and that is, that Dwayne is innocent.

19 And at the beginning of this case, any defendant in
20 any criminal case, a defendant charged with a crime, they
21 sit before you innocent. Dwayne is sitting right there at
22 that table an innocent man. It doesn't matter if he's been
23 arrested or that Ms. Williams feels certain that he's the
24 guy who was there that night, he is innocent and he stays
25 that way until the time that the Solicitor's office, if

OPENING STATEMENT - JANNA NELSON

112

1 they give you enough evidence to convince you, firmly
2 convince you, that he's not innocent anymore.

3 So, the things, as the evidence comes out, such as the
4 witnesses that testify, and when you see the evidence in
5 this case, here are some things that we're asking you to
6 look at that will point you to that other reasonable
7 possibility.

8 First of all, when the police see Dwayne, it's less
9 than a block from the Shell Station where the incident
10 occurred. He's at this trailer park and he's walking
11 through the trailer park wearing a bright red shirt. If it
12 wasn't late at night, it would be hard to miss and he's
13 just walking. And when the police approach him, they ask
14 him to stop and he does. He stops. They ask him, Corporal
15 Thomason asks him to come over and he does. He comes over.
16 He doesn't -- he's not running away like a man who has just
17 robbed somebody at gun point would do when they see the
18 police. He stops and walks over.

19 Another thing we're going to ask you to consider is
20 Ms. Williams' identification of Mr. Starks as the person
21 she believes came in the store that night. One of the
22 things you'll hear is that Dwayne came in this store a lot.
23 He came in this store several times a week. He's tall, a
24 tall guy, a tall black guy. The robber who came into the
25 store was a tall black guy. And he, the robber who came in

OPENING STATEMENT - JANNA NELSON

113

1 the store, was covered from head to toe in clothes; a hood,
2 a ski mask, a jacket, long pants. Completely covered.
3 Face obscured. And we're asking that you consider that
4 that identification of Mr. Starks as the tall black man who
5 robbed Ms. Williams is just a mistake based on the fact
6 that Ms. Williams sees this fellow in the store a lot. In
7 fact, I believe the evidence is going to show you he'd just
8 been in the store maybe an hour, a couple of hours before,
9 that same day. So, we're asking you to really scrutinize
10 that identification and decide if you think that you can
11 really trust in that given that she couldn't even see this
12 guys face.

13 Another thing we're asking you to look at, as the
14 evidence comes out, is the investigation that was done.
15 The things that were done, the things that weren't done. I
16 talked about how I could stop at those crumbs on my son's
17 hands and not do anything else. There are other things
18 that could have been done in this case.

19 But when the police got there, she had identified
20 Dwayne, or D'won, I believe is the name she gave to 9-1-1,
21 something like D'won Starks. She identified him. There
22 were some clothes there that looked like the clothes the
23 robber was wearing and the police stopped at that point and
24 decided that it had to be Dwayne Starks. And we're asking
25 you to consider the other things that could have been done

OPENING STATEMENT - JANNA NELSON

114

1 to maybe show that they got that wrong.

2 And finally, the first thing that Corporal Thomason
3 did when he asked Dwayne to come over to him was pat him
4 down. It's called a Terry Frisk. They pat people down to
5 see if they have a weapon. You'll be able to, I believe,
6 clearly see on the video, the surveillance video from the
7 store, that the person in the store had a black handgun.
8 And what did they not find on Dwayne when they do this pat
9 down within minutes, just a very short time after the
10 robbery has been reported and he's maybe a block away from
11 the store? They don't find that gun. They find these
12 other things; money, clothes, some money in his pocket.
13 They don't find the gun. He's suppose to be an armed
14 robber and not only did they did not find the gun on
15 Dwayne, they don't find it anywhere around the trailers
16 where this other stuff is. They don't find it anywhere
17 between the trailers and the store, where the robbery is
18 suppose to have happened. No gun.

19 So, we'd ask that you take a look at all of those
20 things when the evidence comes out. Consider the other
21 possibilities. That gun, the biggest crumb that ought to
22 be on his fingers, isn't there. And we'll ask you at the
23 end of this case, to find that Dwayne is just as innocent
24 at the end of this as he sits before you right now at that
25 table and to speak that in this courtroom with a verdict of

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 115

1 not guilty.

2 THE COURT: Call your first witness.

3 MR. BROWN: The State calls Nakelia Williams.

4 (After being first duly sworn, **NAKELIA WILLIAMS**,
5 testified as follows:

6 DIRECT EXAMINATION

7 BY MR. BROWN:

8 Q Good morning, Ms. Williams.

9 A Good morning.

10 Q Ms. Williams, where did you grow up?

11 A Here in Abbeville, South Carolina.

12 Q You were born here?

13 A Yes, sir.

14 Q Raised here?

15 A Yes, sir.

16 Q Do you have family here?

17 A Yes, sir.

18 Q Do you have any children?

19 A Yes, sir.

20 Q How many children do you have?

21 A Two.

22 Q And where do you work?

23 A I work for Greenwood Petroleum on 810 West Greenwood
24 Street.

25 Q And how long have you worked for Greenwood Petroleum?

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 116

1 A Three-and-a-half years.

2 Q Now, have you only worked in that one location?

3 A No, sir. We have companies here in Abbeville and
4 Greenwood and Ninety-Six. If, like, someone calls in
5 or anything, we would go over there sometimes.

6 Q But the main store that you work at is here in
7 Abbeville?

8 A Yes, sir.

9 Q And that's -- what station is that?

10 A One ten.

11 Q One ten?

12 A 810 West Greenwood Street.

13 Q Okay.

14 A It's location 110.

15 Q All right.

16 A We have numbers.

17 Q Now, Ms. Williams, you said, how long have you worked
18 with Greenwood Petroleum?

19 A Three-and-a-half years.

20 Q And last year, February 27, 2012 to be exact, were you
21 working?

22 A Yes, sir.

23 Q And what store were you working at?

24 A On 810 West Greenwood Street, Number 110.

25 Q And that's the Shell Gas Station?

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 117

1 A Yes, sir.

2 Q What shift were you working that night?

3 A Third. It's from 6:00 to 1:30 a.m.

4 Q Is there anybody else in the store with you when you
5 work?

6 A No, sir.

7 Q And what do you -- how -- what happened that night?

8 A Okay. I had already been working for a couple of
9 hours. I was stocking my cooler, because I try to get
10 everything done before the night so I won't have to be
11 in there too long. So, I was in back stocking my
12 cooler. As I came from in my cooler, I noticed
13 someone standing at the register with a hood on in a
14 green jacket.

15 Q What time of night was this?

16 A It was around 11:30, 11:40, somewhere around in there.

17 Q And this was at what location?

18 A One ten, on 810 West Greenwood Street at the Shell
19 Station.

20 Q In what county and state is that in?

21 A Abbeville. South Carolina.

22 Q All right. And so you came out of the cooler and what
23 did you notice?

24 A A guy standing at the register with a hood on. It's a
25 green coat. He had a hood on and I asked him to take

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 118

1 the hood off. Well, I said, how you doing, because I
2 always greet my customers. And so, I asked him to
3 take the hood off and he didn't say anything. And I
4 asked him again. I said, "You have to take that hood
5 off or you've got to leave the store."

6 Q What did he do after that?

7 A He said, "Come on and give me the money out this
8 register." And I was like, "Excuse me"? And then
9 that's when I noticed that he had a gun and he said,
10 "You think I'm playing with you? Come on and give me
11 the money out of this register."

12 Q Was he still over in front of the register? Where
13 were you standing and where was he standing at that
14 point?

15 A I was walking, approaching, fixing to walk back behind
16 the register, but I stopped because I was really kind
17 of shocked at what he said and that's when I noticed
18 the gun and everything. He pointed it at me and told
19 me, "You think I'm playing? Come take this money out
20 this register."

21 Q What type of gun was it?

22 A It was a black, small gun.

23 Q Was it a handgun?

24 A Yes.

25 Q And what did he do? Did he ever approach you?

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 119

1 A Yes.

2 Q How did that happen?

3 A He pushed me around to the register because I had
4 stopped because I really just couldn't believe, like,
5 you know, that it was happening. And he pushed me
6 around the register and I walked back and he told me
7 to open the register. He followed me behind the
8 counter with me, standing right beside me, and I
9 opened the register and I gave him the money. He got
10 a bag to put it in and I took the register completely
11 out because he ask me to take the drawer out. I guess
12 because he thought money was under the register, and I
13 sat it on the floor.

14 Q And at any point did he ever point the gun at you?

15 A Yes, when we was walking -- well, when I first was
16 walking to go behind the counter, he was pointing it
17 at me when he told me to come on and give me the money
18 out of the register and he guided me around the
19 register as he pushed, he pushed me, like.

20 Q Now, you said that he made you open up the cash
21 register and he did get cash out of the cash register.

22 A Yes, sir.

23 Q Do you have any idea how, what kind of cash was in
24 that register?

25 A I know it was some tens and fives and ones because the

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 120

1 majority of the time we drop twenties, we drop every
2 two hundred. We try to drop just ---

3 Q You mean drop as -- when you say drop every two
4 hundred ---

5 A In the safe. Every two hundred dollars, the twenties.
6 Yes, sir.

7 Q So, you don't like to keep a lot of cash in the cash
8 register?

9 A Yes, sir.

10 Q All right. At that point, what did he do after he got
11 the cash?

12 A He asked me, come on and go with him and I said, "Go
13 with you where?" And he said, "Come on and go with
14 me." I guess he just wanted me to come out from
15 behind the register so I wouldn't hit a buzzer or
16 anything. And so I walked -- he guided me from behind
17 the register and I walked right there and I stopped.
18 And he said, "You stay right there."

19 Q All right. At any time, did you recognize this
20 individual?

21 A Yes.

22 Q When did you do that?

23 A I recognized him after I asked him to remove that hood
24 the second time and he said, "You think I'm playing
25 with you? Come on, give me some money out that

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 121

1 register."

2 Q And how were you able to recognize him if he had a
3 hood and a mask on?

4 A I recognized his voice and his body build, being that
5 I have seen him so much and he comes to the store like
6 two or three times a week, every week.

7 Q And how long have you been working at that store?

8 A At the time of the robbery?

9 Q Yes?

10 A Two years.

11 Q And he had been coming into the store regularly over
12 that two years?

13 A Yes, sir.

14 Q Did you know him by name?

15 A Yes.

16 Q Did you know his name?

17 A Yes.

18 Q And how did you know his name?

19 A Well, I knew his last name because I know I went to
20 school with his nephew, Dexter Starks. And, I think I
21 recall maybe someone saying his name in the store
22 before, just maybe speaking to him or something,
23 because of being in the store.

24 Q Have you ever heard him speak before while he was in
25 the store?

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 122

1 A Yes.

2 Q And was there any occasion that pops out that would
3 make you recognize his voice?

4 A I mean, he would -- he would talk, I mean, all the
5 time when he'd come in and I recall times he told me
6 who my mother was and stuff like that.

7 MR. BROWN: Your Honor, may I approach the witness?

8 THE COURT: Sure.

9 Q Ms. Williams, I'm going to show you what's been
10 previously marked as State's Exhibits. Look through
11 those and tell me what those are. (Hands documents to
12 witness.)

13 MS. BOLEN: Could we see those, Your Honor?

14 THE COURT: Let her finish looking at them.

15 MS. BOLEN: Yes, sir.

16 MS. WILLIAMS: Yes, this is the robbery from that
17 night ---

18 THE COURT: I'm sorry I couldn't understand you.

19 MS. WILLIAMS: This is the robbery -- pictures of the
20 robbery from that night.

21 (Mr. Brown hands exhibits to Ms. Bolen and Ms. Nelson and
22 then exhibits are returned to Mr. Brown)

23 MS. BOLEN: Thank you.

24 Q Nakelia, I'm going to ---

25 THE COURT: Have those been marked?

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 123

1 MR. BROWN: They have, Your Honor.

2 THE COURT: Okay.

3 MR. BROWN: These, what I am showing the witness at
4 this time are State's Exhibits #2, #3, #4, #5, #6, #7, #8,
5 #9, #10 and #11. These are all State's Exhibits.

6 THE COURT: Two through eleven?

7 MR. BROWN: Two through eleven, yes, sir.

8 Q Now, Ms. Williams, you said that this man -- and you
9 identified, what are these pictures of?

10 A The night of the robbery.

11 Q I'm going to place these on the overhead projector.

12 THE COURT: Any objection? He hasn't offered them.
13 Are you going to offer those into evidence, assuming they
14 are properly identified completely, are there any
15 objections?

16 MS. BOLEN: No, sir, as long as a proper foundation is
17 laid.

18 THE COURT: All right go ahead. So, those are in
19 evidence, without objection.

20 MR. BROWN: Yes, Your Honor, the State would just
21 formerly move these into evidence at this time.

22 THE COURT: In evidence, without objection, now.

23 (Whereupon, State's Exhibits #2, #3, #4, #5, #6, #7,
24 #8, #9, #10, and #11, are admitted into evidence.)

25 (Mr. Brown projects photos on a large screen)

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 124

1 Q All right. Ms. Williams, what is this picture of?

2 A Him entering the store.

3 Q And who is "him?"

4 A Dwayne Starks.

5 THE COURT: Speak up. Keep your voice up.

6 THE WITNESS: Okay.

7 A Dwayne Starks.

8 Q And just for this matter, is Mr. Starks here in the
9 courtroom?

10 A Yes, sir.

11 Q Where is he?

12 A Right over there in the blue shirt.

13 Q And can you tell what he's wearing in that picture?

14 A It looks like that green jacket and that gray mask he
15 had on.

16 Q What is this a picture of?

17 THE COURT: I might tell the jury -- let me interrupt
18 you a minute. I might tell the jury, anything that's
19 physical evidence such as these photographs that are
20 introduced into evidence, this is not the only chance
21 you'll get to look at them. You'll have them with you in
22 the jury room at the end of the case when you consider your
23 verdict. So, you might bear that in mind. Just wanted to
24 let you know this is not your only chance to look at what
25 you're being shown. Go ahead.

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 125

1 MR. BROWN: And for the record this is State's #3.

2 Q Ms. Williams, will you identify or tell me what that
3 picture shows?

4 A Dwayne Starks pointing the gun at me.

5 Q And where is the gun? Which hand is the gun in?

6 A It's in the right hand.

7 Q Okay. In that picture, what's he wearing?

8 A The green coat and the ski mask.

9 Q I'm showing you what's State's Exhibit #4 at this time
10 and can you tell me what that picture shows.

11 A Me holding my hands up. That's when he was at the
12 register. He was getting the money.

13 THE COURT: Can you -- maybe you ought to go down and
14 point out. I can't -- where are you in that picture? I
15 can't see you.

16 MS. WILLIAMS: Right. Over to the far left.

17 THE COURT: Why don't you go down there and point out
18 where you are.

19 (Witness complies)

20 THE COURT: Remember anything you say, keep your voice
21 up, shout it back over here towards me.

22 MS. WILLIAMS: Okay.

23 A This is me here and this is him here. (Indicating)

24 Q What's he doing?

25 A I know he's standing here -- I think that's when he's

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 126

- 1 getting the money, pointing the gun. I'm not sure.
2 But this is me standing here with my arms like this,
3 (demonstrating) up.
- 4 Q Is that where the cash register is located?
- 5 A Yes, it's right here. Right here. (Indicating)
- 6 Q All right.
- 7 A And this is me.
- 8 Q I'm going to show you what's been marked State's
9 Exhibit #5. What is that? Is that the same location?
- 10 A Yes. I just see me here, just because my shirt is
11 bright. (Indicating)
- 12 Q I know it's dark putting it up on the screen. Is he
13 standing there with you?
- 14 A It's like I see a dark figure here, but I can't see
15 clearly. (Indicating)
- 16 Q Okay. I'm going to show you now what's been marked as
17 State's Exhibit #7.
- 18 A Okay. This is me here, him here, pointing the gun at
19 me. (Indicating)
- 20 Q And tell me what he's wearing in that picture.
- 21 A That green jacket with his hood and a gray ski mask.
- 22 Q What kind of pants does he have on?
- 23 A Black. They were black.
- 24 Q And what's that he's holding up in his arm?
- 25 A The gun.

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 127

1 Q Is that a black pistol?

2 A Yes, sir. It was a small one.

3 Q I'm going to show you what's been marked as State's
4 Exhibit #9.

5 A Okay. All I see is him here. (Indicating)

6 Q Is that you at the bottom of the picture?

7 A Yeah, here. (Indicating).

8 Q And where is that location in the store?

9 A Okay. This one was when he was asking me -- we have
10 another register just in case. This one goes out
11 sometimes, it gets jammed. And he ask me to open it
12 and I told him that I had no access to open it.
13 That's what I told him, I can't open it. He thought
14 that was another register to get more money out of.

15 Q I'm going to show you now what's been marked as
16 State's Exhibit #8. Tell me what that picture shows.

17 A Okay. That's when he asked me to come out from behind
18 the register. And I said, "Where do you want me to
19 go?" And he said, "You just come on and walk." And
20 so, I walked. I think I came up just a little bit
21 more, and he said, "You can stay right there." I
22 guess he just wanted me from behind the counter so I
23 wouldn't hit a buzzer or anything or go ahead and
24 alarm somebody that I had been robbed.

25 Q So, at this point he's about to leave the store?

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 128

1 A Yes, sir.

2 Q What does that picture show he's wearing?

3 A A green coat and a hood. I can't really see the mask,
4 but I know he had it on.

5 Q What color mask was that again?

6 A Gray.

7 Q Do you remember what kind of shoes he had on?

8 A They was some white tennis shoes.

9 Q I know that's a little fuzzy there. (Showing another
10 photograph on large screen)

11 A Uh-huh.

12 Q Can you tell ---

13 A Yes. I think that's when he first grabbed me and
14 pushed me, because I was just standing, I just
15 stopped.

16 Q What's he doing right there?

17 A He had the gun in my face and he was pushing me
18 around. He's trying to get me to come around the
19 register to get the money.

20 Q All right. You can step back now.

21 (The witness returns to the witness stand)

22 Q Now, after he left the store, what did you do once he
23 left the building?

24 A I ran behind the counter and got my cell phone and
25 called 9-1-1.

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 129

1 Q Did you call 9-1-1?

2 A Yes, sir.

3 Q Were you able to reach them?

4 A Yes, sir.

5 Q Well, what did you tell 9-1-1?

6 A I just told them that I had been robbed and that I
7 knew who it was.

8 Q You told them who it was?

9 A Yes.

10 Q Who did you say it was?

11 A Dwayne Starks.

12 Q And did you give a description of what he was wearing?

13 A Yes. I know I told them that he had a jacket on with
14 a hood. I don't know if I told them, specifically,
15 what color at the time, but I know it was green and a
16 gray ski mask.

17 Q Did you tell them if he was armed or not?

18 A Yes.

19 Q And what color -- did you tell them what color pants
20 he had on?

21 A I'm not sure. I don't know if they asked me that at
22 the time.

23 Q But after you called 9-1-1, do you know how long,
24 roughly, you were on the phone with 9-1-1?

25 A Maybe around about five minutes, ten minutes or so.

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 130

- 1 It wasn't long.
- 2 Q But when you were on the phone with 9-1-1, were you
- 3 sure of who did this?
- 4 A Yes.
- 5 Q You were sure of who the person was that robbed you?
- 6 A Yes.
- 7 Q Did you call him out by name?
- 8 A Yes, sir.
- 9 Q Did you tell which direction to 9-1-1 where the person
- 10 who robbed you, which way he went?
- 11 A Yes, sir.
- 12 Q Which way did he leave the store?
- 13 A He went to the left towards Cherokee Trail.
- 14 Q So, if I'm looking out the Shell Gas Station, he went
- 15 down towards Abbeville?
- 16 A Yes, sir.
- 17 Q Okay. And did you, throughout the night, did law
- 18 enforcement ever come talk to you?
- 19 A Yes, sir.
- 20 Q Did you ever, did you speak with Lieutenant Wilkie?
- 21 A Yes, sir.
- 22 Q When did you speak with Lieutenant Wilkie?
- 23 A I think it was right after the 9-1-1 call. He came in
- 24 and we talked.
- 25 Q Did he ever leave?

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 131

1 A Yes, he left.

2 Q Now, did any law enforcement ever show back up to the
3 Shell Station later on?

4 A Yes.

5 Q Who came back?

6 A He did and another officer in a car. Well, they asked
7 me would I be comfortable with identifying him in the
8 car.

9 Q Identifying who?

10 A Dwayne Starks.

11 Q And did this take place. Did you identify him?

12 A Yes.

13 Q And how did you identify him?

14 A I identified him from in the store, because they asked
15 me did I want him to get out and everything and I told
16 them no. And at first I told them I didn't want to
17 identify him as far as bringing him back to the store.

18 Q Let's clear that up.

19 A Okay.

20 Q Did they bring Mr. Starks back to the store?

21 A Yes, sir.

22 Q In what way did they bring him back?

23 A In the police car in the back.

24 Q So, where was he seated?

25 MS. NELSON: Your Honor, we renew our objection to

DIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 132

1 this testimony for the record.

2 THE COURT: All right. I appreciate your position. It
3 is brought forward fully. Go ahead.

4 MS. NELSON: Thank you.

5 Q Where was he sitting in the police car?

6 A In the back.

7 Q And where were you standing when he pulled up?

8 A In the store behind the register.

9 Q Where did they pull the car up to?

10 A They pulled, like, right there at the window so I
11 could see. They just pulled right there and flashed a
12 light in the back on him.

13 Q The light inside the car?

14 A Yes, sir, I'm sorry.

15 Q And who was in the back seat?

16 A Dwayne Starks.

17 Q Could you get a good look at him?

18 A Yes, sir.

19 Q Is it the same person sitting here in the courtroom?

20 A Yes, sir.

21 Q And, again, how are you familiar with him?

22 A Just being -- he done been in my store over thirty
23 times. He talks. I know his body build. And I just,
24 I just know it was him.

25 Q So, you're positive Dwayne Starks is the man that

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN 133

1 robbed you that night by gunpoint?

2 A Yes, sir.

3 Q Ms. Williams, during this incident, how did this make
4 you feel?

5 MS. BOLEN: Objection as to relevance and speculation.

6 THE COURT: I don't know what that has to do with it.
7 You want to be heard?

8 MR. BROWN: Judge, I think it just goes to what her
9 impression, what her feelings were during this armed
10 robbery.

11 THE COURT: I appreciate that. I sustain the
12 objection.

13 MS. BOLEN: Thank you, Your Honor.

14 THE COURT: Ask another question.

15 MR. BROWN: I beg the Court's indulgence.

16 Q Ms. Williams, did you feel threatened that night?

17 A Yes, sir, I did.

18 Q Why would you feel threatened?

19 A Because I had a gun pointed at me.

20 MR. BROWN: No further questions, Your Honor.

21 THE COURT: All right. Cross-examination.

22 MS. BOLEN: Thank you, Your Honor.

23 CROSS-EXAMINATION

24 BY MS. BOLEN:

25 Q Ms. Williams, I've just a couple of follow-up

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN 134

1 questions I'd like to ask you. When you were just
2 talking about my client being driven up in a police
3 car. Were you in the store when that happened?

4 A Yes, ma'am.

5 Q You were behind the register. Correct?

6 A Yes, ma'am.

7 Q So, the setup of the store, as we've partially seen
8 from the pictures, is that there's a good amount of
9 area in the store before the counter and the register.
10 Correct?

11 A Yes, ma'am.

12 Q Okay. So, you're behind the counter, behind the
13 register, then there's the front of the store, and
14 then there's the doors. Right?

15 A Yes, ma'am.

16 Q And you said the police car was pulled up in the
17 parking lot. Is that correct?

18 A Yes, ma'am.

19 Q Okay. And you didn't leave the store. Is that right?

20 A No, ma'am.

21 Q Okay. So you said ---

22 MR. STUMBO: Your Honor, could we get the witness some
23 tissue.

24 THE COURT: Sure. Here's some right here.

25 MR. STUMBO: Thank you, Judge.

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN 135

1 THE COURT: How far away from you was he in the police
2 car?

3 MS. WILLIAMS: Well, our window -- we have a big
4 window, and like, they just briefly just pulled up and they
5 just sat there for a minute and I told them who it was.

6 THE COURT: Well, get down and show us here in the
7 courtroom ---

8 THE WITNESS: How far you think?

9 THE COURT: --- about how far from you to where? Go
10 down -- if you want to walk out there and say where he was.

11 MS. WILLIAMS: Okay.. I'll say from ---

12 THE COURT: Well, you be right here in the chair or in
13 the store, so tell us how far -- walk out there and show us
14 how far away you were.

15 MS. WILLIAMS: Okay. Maybe from here to where ---

16 THE COURT: Just walk out there and show us.

17 MS. WILLIAMS: Okay. Maybe from here ---

18 (The witness leaves the witness stand and walks out
19 into the courtroom)

20 MS. WILLIAMS: --- to about here.

21 THE COURT: Where you are now, that's how far away he
22 was in the car when you saw him from inside the store in
23 the police car. Is that right?

24 THE WITNESS: Yes, sir.

25 THE COURT: Okay. Come on back up.

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN 136

1 (The witness returns to the witness stand.)

2 Q So, you were in the store and my client was outside in
3 the parking lot. Correct?

4 A Yes, ma'am.

5 Q And the police did not remove him from the car.
6 Right?

7 A No, ma'am.

8 Q So, he was sitting in the police car?

9 A Yes, ma'am.

10 Q And you were a good distance away from him as you've
11 just shown the jury?

12 A Yes, ma'am.

13 Q And it was dark because it was about 11:30, midnight,
14 or so?

15 A Yes, ma'am.

16 Q Okay. And yet, you were -- and there -- he was not
17 removed from the car. Correct?

18 A No, ma'am.

19 Q Okay. When the police car pulled up, there were
20 lights on, presumably, police car lights. The blue
21 lights?

22 A No. They didn't have the blue lights on, but they
23 shined a light in the car so I could see who he was
24 and identify him.

25 Q And you stated previously that part of how you

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN

137

1 identified him was body build. Right?

2 A Yes, ma'am, and his voice.

3 Q Okay. But he didn't get out of the car, he didn't
4 stand up for identification?

5 A No, he didn't.

6 Q Okay. Was the car door opened?

7 A No.

8 Q Okay. So really, it was through the whole store,
9 through the glass doors, and then through the car
10 door. Right?

11 A Uh-huh.

12 Q Okay. Let's talk a little bit about your 9-1-1 tape.
13 You stated on your testimony that when you called
14 9-1-1 that you knew who it was. Right? That's what
15 you said on your direct?

16 A Yes.

17 Q Okay. Do you remember telling 9-1-1 that you weren't
18 sure of the name of the robber?

19 A I said I think I know who it was. And I said, have an
20 officer come here, and I'll tell him exactly who it
21 was.

22 Q Okay. So, what you told them initially is, you
23 thought you knew, but you needed an officer there?

24 A And then I told them his name.

25 Q Okay. And do you remember telling 9-1-1 that you

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN 138

- 1 weren't sure of the first name?
- 2 A Yes. I wasn't sure how to pronounce it.
- 3 Q And as we've seen from the pictures and in your
- 4 testimony, the person who robbed you was wearing a ski
- 5 mask. Right?
- 6 A Yes, ma'am.
- 7 Q And, in fact, it was the kind of ski mask where only
- 8 the eyes were visible?
- 9 A Yes, ma'am.
- 10 Q And the robber didn't take that off at any time.
- 11 Correct?
- 12 A No.
- 13 Q So, you never got a look at the robber's face.
- 14 Correct?
- 15 A No, ma'am.
- 16 Q Okay. And you said he'd been in your store a number
- 17 of times?
- 18 A Yes.
- 19 Q And he'd been in your store, previously, that night.
- 20 Right?
- 21 A Yes, ma'am.
- 22 Q And when he was in your store previously -- my client
- 23 was in your store, previously, that night. Correct?
- 24 A Yes.
- 25 Q Okay. And you stated that you recognized him when the

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN

139

1 robber spoke to you. Right?

2 A Yes.

3 Q So, you recognized his voice?

4 A Yes, I did.

5 Q Do you remember telling law enforcement that it
6 sounded like the robber was trying to disguise his
7 voice?

8 A Yes, ma'am, he did.

9 Q So, is it safe to say that you didn't really recognize
10 the voice because it didn't sound quite ---

11 A I recognized it, and he tried to disguise it, like he
12 knew that he was talking directly to me to where I
13 would recognize his voice.

14 Q And do you remember having previously said that you've
15 never really had any conversations with my client when
16 he came into the store?

17 A Not really. Just him recalling, saying that he knew
18 my mother and my family.

19 Q So, it's fair to say that you never had a full
20 conversation with him, just a few sentences maybe, at
21 most?

22 A Yes.

23 Q Is that correct?

24 A Maybe a little more. I mean, I would say hey, how you
25 doing, but that's it, because like I said, I greeted

CROSS EXAMINATION OF NAKELIA WILLIAMS BY MS. BOLEN

140

1 my customers.

2 Q And a lot of people come in your store. Right?

3 A Yes.

4 Q And, in fact, there were other people in there that
5 night. Correct?

6 A Yes.

7 Q Okay. Regarding the money, you said that you, you
8 thought it was mostly ten dollar, five dollar, one
9 dollar bills. Correct?

10 A Uh-huh.

11 Q But you don't know how much money was in your
12 register. Right?

13 A No, ma'am.

14 Q You don't keep any records of what would have been in
15 there?

16 A No, not exactly. No.

17 Q Not exactly?

18 A After we do paperwork and everything, that's how we
19 know how much we made that night, what all we got.

20 MS. BOLEN: Just one moment, Your Honor.

21 Q Just a few more questions Ms. Williams. When the
22 police brought my client in the police car to the
23 parking lot of your store, was my client wearing a
24 mask?

25 A No, he wasn't.

REDIRECT EXAMINATION OF NAKELIA WILLIAMS BY MR. BROWN 141

1 Q Was my client wearing a hood?

2 A No, he wasn't.

3 Q Do you recall what he was wearing?

4 A No, ma'am, not exactly. No. I just remember his
5 face. That's all I was looking for. They just wanted
6 me to identify him. That's what I did.

7 Q And my client didn't say anything ---

8 A No.

9 Q --- when he was brought up. Correct?

10 A You said when I was robbed?

11 Q No, no. When he was brought in the police car to you,
12 he did not not say anything ---

13 A No.

14 Q --- to you?

15 A He didn't.

16 MS. BOLEN: Nothing further. Thank you.

17 THE COURT: Any questions? Any redirect?

18 MR. BROWN: Yes, Your Honor, just a couple.

19 REDIRECT EXAMINATION

20 BY MR. BROWN:

21 Q Ms. Williams, you said that the distance that you were
22 able to observe Mr. Starks when they brought him back
23 up to the store, was from where you were right around
24 in this area? (Demonstrating on photograph)

25 A Yes, sir.

DIRECT EXAMINATION OF TEALEE KEENO BY MR. BROWN

142

1 Q And was the building lit up pretty well? The gas
2 station lit up?

3 A Yes. Yes, sir. We had the lights on.

4 Q And they lit a dome light ---

5 A Yes, sir.

6 Q --- in the car?

7 A Yes, sir.

8 Q Was the distance about the same distance you are at
9 the stand to where he's sitting right now?

10 A Yes.

11 Q Even you can -- and you can see him clearly?

12 A Yes, sir.

13 Q Even with the microphone and that light?

14 A Yes, sir.

15 Q Who is that?

16 A Dwayne Starks.

17 MR. BROWN: No further questions.

18 THE COURT: Thank you very much. You can return to
19 your place in the courtroom. Call your next witness.

20 MR. STUMBO: The State calls Tealee Keeno.

21 (After being duly sworn by the Clerk of Court,

22 **TEALEE KEENO**, testified as follows:)

23 DIRECT EXAMINATION

24 BY MR. BROWN:

25 Q Good morning, Ms. Keeno.

DIRECT EXAMINATION OF TEALEE KEENO BY MR. BROWN

143

1 A Good morning.

2 Q Ms. Keeno, where are you employed?

3 A Greenwood Petroleum.

4 Q And how long have you been employed there?

5 A Eighteen years.

6 Q And what does Shell -- does Greenwood Petroleum own
7 Shell Gas Stations?

8 A Yes.

9 Q In what counties?

10 A Greenwood, Ninety-Six, and Abbeville.

11 Q Okay. And does Greenwood Petroleum own the gas
12 station located at 810 West Greenwood Street here in
13 Abbeville?

14 A Yes.

15 Q And what is your job title?

16 A I oversee the stores.

17 Q Do you oversee the store here in Abbeville?

18 A Yes..

19 Q And what is it exactly -- what would they -- what's
20 your title?

21 A Management and recaps.

22 Q Okay.

23 THE COURT: Management and what?

24 MS. KEENO: Management and recaps. Recaps is the
25 recounting of monies and stuff.

DIRECT EXAMINATION OF TEALEE KEENO BY MR. BROWN

144

1 THE COURT: Okay.

2 Q And, Ms. Keeno, in that position, do you retrieve or
3 maintain video surveillance and recordings from the
4 stores that you manage?

5 A Yes.

6 Q And what is the process of downloading or copying a
7 video from one of these stores? Like for example, the
8 Shell Station here at 810 West Greenwood Street?

9 A We go to the store and we get the disk, it's on a
10 disk. We pull it, take it to the main office in
11 Greenwood. We put it on a VCR tape.

12 Q Okay. Now, is the Shell Station here at 810 West
13 Greenwood Street here in Abbeville, is that station
14 equipped with video recording?

15 A Yes.

16 Q Is it equipped with cameras?

17 A Yes, sir.

18 Q And on the date of February 27, 2012, were the cameras
19 working?

20 A Yes, sir.

21 Q Was the recording system working?

22 A Yes, sir.

23 Q And more specifically, between the times of 11:30,
24 lets say, to 12:30 on the 28th, was the recording
25 system and the cameras working?

DIRECT EXAMINATION OF TEALEE KEENO BY MR. BROWN

145

- 1 A Yes, sir.
- 2 Q And how do you know that?
- 3 A I took -- I went over there that morning at eight.
- 4 Q You went over the morning when?
- 5 A The 28th. I went over there and got the disk that
- 6 day.
- 7 Q So, you went over February 28, 2012 and retrieved this
- 8 disk?
- 9 A Yes.
- 10 Q Okay. What did you do with the disk at that point?
- 11 A Viewed it at the main office, put it on VCR tape.
- 12 Q Now, is this done in the normal and ordinary course of
- 13 business?
- 14 A Yes.
- 15 Q And once you viewed it there -- let me step back.
- 16 What type of recording device is that video captured
- 17 on?
- 18 A It's on a DRV, like?
- 19 Q It's on a disk?
- 20 A Yes.
- 21 Q Okay. And once you took it back to the Greenwood
- 22 office, what did you do?
- 23 A I made my tape for the detective.
- 24 Q Okay. And did you make -- after reviewing that
- 25 footage and making that tape, were you able to view it

DIRECT EXAMINATION OF TEALEE KEENO BY MR. BROWN 146

1 and make sure that an accurate recording is on that
2 disk?

3 A Yes, sir.

4 Q And was that done in the normal and ordinary course of
5 business?

6 A Yes.

7 (Mr. Brown shows disk to Ms. Bolen)

8 MR. BROWN: Judge, may I approach the witness?

9 THE COURT: Sure.

10 Q Ms. Keeno, I'm gonna show you what's been marked for
11 I.D. as States Exhibit #27. (Hands disk to witness)
12 Take a look at that and you can take the disk out, as
13 well, and take a look and see what that is.

14 A Yes, sir.

15 Q What is that?

16 A That's the DVD.

17 Q The DVD of what?

18 A Of the armed robbery at that Shell Station on 72.

19 Q And what's the address of that Shell Station?

20 A 810 West Greenwood Street, Abbeville.

21 Q All right. And that disk would contain what?

22 A The armed robbery of Nakelia.

23 Q On what date?

24 A On the 27th.

25 Q All right. And how do you know that disk would

CROSS EXAMINATION OF TEALEE KEENO BY MS. BOLEN 147

1 contain that?

2 A I initialed the disk.

3 Q And when did you initial the disk?

4 A Today.

5 Q Well, after -- were you able to see the video?

6 A Yes.

7 Q Does that accurately reflect the incident that took
8 place on the 27th?

9 A Yes.

10 Q And that came directly from the recording that was
11 taken from the store that night?

12 A Yes, sir.

13 MR. BROWN: Judge, at this time we'd move State's
14 Exhibit #27 into evidence.

15 THE COURT: Any objection?

16 MS. BOLEN: No, sir.

17 THE COURT: All right.

18 (Whereupon, a DVD is entered into evidence as State's
19 Exhibit #27, without objection)

20 MR. BROWN: No further questions.

21 MS. BOLEN: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MS. BOLEN:

24 Q Ms. Keeno, I just have a very few questions to
25 follow-up. Was the, the video machine in the store,

CROSS EXAMINATION OF TEALEE KEENO BY MS. BOLEN

148

1 was it also working earlier that night?

2 A Yes.

3 Q Okay. So, it was working all night long?

4 A Yes, ma'am.

5 Q Is that fair to say?

6 A Yes, ma'am.

7 Q Okay. How long do they keep these videos? How long
8 do you keep them?

9 A It's on a gigabyte. We keep our videos up at least
10 about two months.

11 Q Okay. So, you gave this video to police the next
12 morning, but for several months after, they could have
13 gotten more video from you. Is that correct?

14 A Yeah, but I didn't send that disk back.

15 Q Okay. And you also said that you were, your title is
16 manager and, was it, recounting?

17 A Recap.

18 Q Recap. Okay.

19 A Yes.

20 Q So, does that refer to ---

21 A Going into the store to count money, give out
22 cigarettes, open my lottery tickets.

23 Q Do you oversee how much money is processed in a store
24 on any given night or no?

25 A Yes.

DIRECT EXAMINATION OF KIMBERLY WELLS BY MR. BROWN 149

1 Q You do? Okay. Is that something that the store keeps
2 records of?

3 A Yes.

4 Q I don't have anything further. Thank you.

5 THE COURT: Thank you very much you can step down.

6 MR. STUMBO: Your Honor, may Ms. Keeno be excused?

7 THE COURT: Sure. Thanks for coming. You're free to
8 go. Without objection, right?

9 MS. BOLEN: No objection.

10 THE COURT: All right. Thank you for coming. You're
11 free to go.

12 MS. KEENO: Thank you.

13 THE COURT: Call your next witness.

14 MR. STUMBO: The State calls Kimberly Wells.

15 (After being duly sworn by the Clerk of Court,

16 **KIMBERLY WELLS**, testified as follows:)

17 DIRECT EXAMINATION

18 BY MR. BROWN:

19 Q Good morning, Ms. Wells.

20 A Good morning.

21 Q Will you tell me who you're employed with.

22 A Abbeville County 9-1-1.

23 Q How long have you been with Abbeville County 9-1-1?

24 A Since 2001.

25 Q And what are your -- what do you do there? What's

DIRECT EXAMINATION OF KIMBERLY WELLS BY MR. BROWN 150

1 your job?

2 A Now, I'm the officer manager, address and data, data
3 information.

4 Q Okay. And how long have you been in that role?

5 A Since August of last year.

6 Q August of last year. What was your role on February
7 27, 2012?

8 A I was a 9-1-1 supervisor.

9 Q Okay. What kind of -- what does that mean?

10 A I'm actually on the floor. I'd take 9-1-1 calls,
11 admin. calls, dispatch out, monitor the radio traffic,
12 handle some of the office business-type stuff, some of
13 the clerical stuff.

14 Q And some of the office business or clerical part of
15 your job, do those duties consist of maintaining 9-1-1
16 recordings?

17 A Yes.

18 Q Here in Abbeville, all the recordings that come into
19 Abbeville County dispatch?

20 A Yes.

21 Q And how are these 9-1-1 recordings -- or when somebody
22 makes a call, how are these recordings recorded?

23 A Once the telephone system actually picks up the 9-1-1
24 call, the recordings actually start recording before
25 the dispatcher picks up. So, I mean, it's -- it

DIRECT EXAMINATION OF KIMBERLY WELLS BY MR. BROWN 151

1 records the call for the entire length of the call.

2 Q And can a copy of a 9-1-1 call, can it be copied or
3 made on a disk where other people can hear it?

4 A Yes.

5 Q And how do you do that?

6 A It's on the actual recorder. So, if it's within the
7 time frame before the disk has to be changed out, you
8 can go ahead and get it off of the equipment that we
9 use to record it. But if it's over the time frame,
10 you may have to change out a disk. They are stored on
11 a DVD disk.

12 Q Okay. How long do y'all usually store DVD disks?

13 A At least a year, sometimes more.

14 Q All right. And is this all part of the normal and
15 ordinary course of business that y'all do this?

16 A Yes.

17 Q And to your knowledge, was a copy of the 9-1-1 call
18 made by Nakelia Williams at the Shell Station, that
19 call that came from the Shell Gas Station that night
20 or actually on her cell phone to 9-1-1 dispatch on
21 February 27, 2012, was that call recorded?

22 A Yes.

23 Q I want to show you ---

24 (Mr. Brown shows item to Ms. Bolen)

25 MR. BROWN: Judge, may I approach?

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 153

1 MS. BOLEN: No, sir. No objection.

2 THE COURT: All right.

3 (Whereupon, a CD of the 9-1-1 call is entered into
4 evidence as State's Exhibit #24, without objection)

5 MR. BROWN: The State has no more questions of this
6 witness.

7 MS. BOLEN: Your Honor, I don't have any questions for
8 this witness.

9 THE COURT: Thank you very much. You can step down.
10 Do you want to excuse her?

11 MR. BROWN: Yes, sir.

12 THE COURT: Thank you for coming. You're free to go.

13 MS. WELLS: Thank you.

14 THE COURT: Call your next witness.

15 MR. STUMBO: Your Honor, the State would call Corporal
16 Thomas Thomason to the stand.

17 (After being duly sworn by the Clerk of Court, **THOMAS**
18 **THOMASON**, testified as follows:)

19 DIRECT EXAMINATION

20 BY MR. STUMBO:

21 Q Good morning, Corporal Thomason.

22 A Good morning.

23 Q I can see by your uniform and badge there you work for
24 the Abbeville Police Department.

25 A Yes, sir.

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 154

1 Q And what is your rank and role there at the police
2 department?

3 A I'm a corporal and a road officer.

4 Q Okay. And what kind of shifts do you work there?

5 A I work twelve hour shifts that rotate from day and
6 night shift.

7 Q I guess a twelve hour, seven to seven ---

8 A Yes, sir.

9 Q --- six to six?

10 A 7:00 a.m. to 7:00 p.m. and the night shift is 7:00
11 p.m. to 7:00 a.m.

12 Q And how long have you been with the police department
13 in Abbeville?

14 A Five years.

15 Q Where are you from?

16 A Here in Abbeville.

17 Q Did you grow up here?

18 A Yes, sir. Born and raised.

19 Q Did you go to high school here?

20 A Yes, sir.

21 Q Now, let me take you back to February 27, 2012, were
22 you working a shift that night?

23 A Yes, sir, I was.

24 Q Were you working the late 7:00 p.m. to 7:00 a.m.
25 shift?

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 155

1 A Yes, sir. I worked the night shift.

2 Q And did you have occasion to work a call related to an
3 alleged armed robbery at the Shell Station on 72?

4 A Yes, sir, I did.

5 Q Okay. And is that 810 West Greenwood Street?

6 A Yes, sir.

7 Q All right.

8 MR. STUMBO: If I may approach the witness, Your
9 Honor.

10 Q I'm going to show you what's been marked for I.D. at
11 this point as State's #25. Have you seen this poster
12 board before?

13 A Yes, sir.

14 (Mr. Stumbo shows item to Ms. Bolen)

15 Q Now, is what's in State's #25, are you familiar with
16 the contents of this map of the area?

17 A Yes, sir.

18 Q Okay. And where is this area?

19 A That's Highway 72 West.

20 Q Okay. Is it a fair and accurate representation of the
21 area on 72 West in Abbeville?

22 A Yes, sir, it is.

23 MR. STUMBO: Your Honor, at this time, the State would
24 offer State's #25 into evidence.

25 THE COURT: Any objection?

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 156

1 MS. BOLEN: No, objection, Your Honor.

2 THE COURT: All right.

3 (Whereupon, a large aerial map is entered into
4 evidence as State's Exhibit #25, without objection)

5 MR. STUMBO: Your Honor, if I may put this on this
6 easel for reference purposes?

7 THE COURT: Go ahead.

8 (Mr. Stumbo places easel in front of the jury and the
9 witness)

10 Q Corporal Thomason, can you see that?

11 A Yes, sir.

12 Q Now on State's 25, as you said, there was an incident
13 that occurred at 810 West Greenwood Street. Is that
14 on this map?

15 A Yes, sir, it is.

16 Q Where is it?

17 A This is 810 West Greenwood Street, right here.

18 (Indicating)

19 Q Okay. Is that the Shell Gas Station?

20 A Yes, sir, it is.

21 Q All right. Now, is there another convenience store
22 or gas station here in this area?

23 A Yes, sir.

24 Q Okay. And where is that?

25 A That would be right here. (Indicating)

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 157

1 Q All right. What is that one called?

2 A That is the Cherokee Trail BP Station.

3 Q And behind the Cherokee Trail BP Station, what is this
4 area here?

5 A This is the Sawmill Acres Trailer Park.

6 Q Now, on the night of February 27th -- what happens
7 when you get a call, where does that call come from
8 for you to go to respond to a call?

9 A It comes from 9-1-1 dispatch.

10 Q Okay. And dispatch that night alleged what? Was it
11 an armed robbery at one of these locations?

12 A Yes, sir. They stated that there was an armed robbery
13 that had just occurred at 810 West Greenwood Street at
14 the Shell Station.

15 Q Okay. And, were you able to respond down to that
16 area?

17 A Yes, sir.

18 Q How quickly were you able to get down there?

19 A I'd say within a couple of minutes or so. Somewhere
20 in there.

21 Q From the time that the dispatch call came into your
22 car?

23 A Yes, sir.

24 Q Were you in a patrol car with lights?

25 A Yes, sir, I was.

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 158

1 Q And marked?

2 A A marked patrol unit.

3 Q All right. From the information you were given on the
4 dispatch, where did you go first?

5 A I actually come in off of Carwellyn Road on to 72
6 West, headed towards the center of town on 72 West. I
7 went by -- the call said, stated that the subject was
8 running on foot down 72 West, towards the Cherokee
9 Trail Gas Station. So when I come by -- I was
10 scanning the area as soon as I come by 810 West
11 Greenwood Street, scanned all the area all the way to
12 here, turned in and come in to Sawmill Acres.

13 Q Okay. You said you came in from Carwellyn. Is that
14 down, off the bottom of the map here? (Indicating)

15 A Yes, sir.

16 Q All right. So, you were traveling, as the map's
17 positioned here, up 72?

18 A That's correct.

19 Q Now, when you pulled into the Sawmill Acres Trailer
20 Park up here, (Indicating) what did you observe?

21 A When I got between the third and the fourth trailer
22 here, (Indicating) that's where I observed the subject
23 that the clerk had stated was the person that robbed
24 her.

25 Q Okay. Did you have a name at that point?

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 159

1 A Yes, sir.

2 Q Okay. What was the name?

3 A It come across from 9-1-1 dispatch as a D'won Starks.

4 Q Okay. Do you know a D'won Starks in Abbeville?

5 A Yes, sir. I know Dwayne Starks.

6 Q A Dwayne Starks. Is this from your experience in the
7 community?

8 A Yes, sir.

9 Q You had knowledge of Dwayne Starks?

10 A Yes, sir.

11 Q Okay. Now, when you see Mr. Starks -- and is he in
12 the courtroom? Is Dwayne Starks here today?

13 A Yes, sir.

14 Q And where is he?

15 A He's sitting right there in a blue polo shirt.

16 Q Okay.

17 MR. STUMBO: Your Honor, just for the record let the
18 record reflect the witness pointed out the Defendant.

19 THE COURT: All right.

20 Q Corporal Thomason, when you see the Defendant, Dwayne
21 Starks, you say between trailers three and four, is
22 that here? (Indicating)

23 A That's correct. Right here. (Indicating)

24 Q And at that point, what is he wearing?

25 A At that point he had on a red in color shirt, a pair

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 160

1 of, like a pair of khaki slacks, and a pair of white
2 in color Nike shoes.

3 Q Okay. Did you ask him to stop?

4 A Yes, sir, I did.

5 Q Was he walking? What was he doing when you first see
6 him?

7 A He was walking away from me. Myself and my patrol
8 unit were here. He was walking through the trailers
9 back this way and he stopped about half-way in between
10 both houses right there. (Indicating)

11 Q Okay. And you were able to speak with him at that
12 time?

13 A Yes, sir. I asked him to stop and to come back and
14 speak to me and he turned around and put his hands up
15 and, you know, made the statements, "I didn't do
16 anything. I don't know what's going on. I didn't do
17 anything wrong. What's going on?"

18 Q Okay. Before you even say anything to him, he says, I
19 wasn't doing anything".

20 A Yes, sir. He said, "I was just walking. I didn't do
21 anything."

22 Q Okay. At that time, did you put him in, what's
23 called, investigative detention?

24 A Yes, sir. First, I did a Terry Frisk on him to make
25 sure he did not have any weapons, because when the

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 161

1 call came in ---

2 THE COURT: Don't say Terry Frisk, just tell us what
3 you did.

4 OFFICER THOMASON: Okay. Excuse me.

5 A I did a weapon's frisk.

6 Q Okay. Explain that for the jury.

7 A It's a light pat down on the outer clothing area to
8 make sure if you feel of any guns, weapons, anything
9 that's gonna hurt me or himself by me taking him into
10 custody. It's for mine and his own safety.

11 Q And did you have information at that time that the
12 suspect had a weapon?

13 A Yes, sir. It was supposedly a small handgun used to
14 hold her at gunpoint.

15 Q All right. At that time, did you find any weapons on
16 Mr. Starks' person?

17 A No, sir. No weapons.

18 Q Okay. Was there any kind of ---

19 THE COURT: What did you find?

20 OFFICER THOMASON: Okay. During my pat-down, Mr.
21 Starks had a large bulge in one of his pockets. I asked
22 Mr. Starks, you know, what was inside of his pocket, you
23 know, what was the bulge and everything else and Mr. Starks
24 stated that he did not know what was in his pocket. So,
25 for my safety and his I had to find out what was in his

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 162

1 pocket to make sure it wasn't anything that could harm me
2 or himself while he was being taken into custody and once I
3 removed it from his pocket, it was a large wad of cash
4 monies; twenties, tens, fives and one dollar bills.

5 THE COURT: Did you count it?

6 OFFICER THOMASON: No, sir, not at that time. I had
7 not placed him in restraints yet.

8 THE COURT: Did you ever count it?

9 OFFICER THOMASON: Excuse me?

10 THE COURT: Did you ever count it?

11 OFFICER THOMASON: No, sir. I didn't ever count it.

12 Q Who did you hand that money to?

13 A That money was set on the rear of my patrol car and my
14 sergeant stayed with that monies and him until more
15 officers arrived. I mean, this all happened ---

16 Q Your sergeant, what's his name?

17 A Sergeant McAllister.

18 Q Okay. Was he the next one on the scene?

19 A Yes, sir.

20 Q All right. What did he do when he got there?

21 A When he got there, I was placing restraints on Mr.
22 Starks, trying to get Mr. Starks in the vehicle. Mr.
23 Starks kept asking what was he being arrested for. I
24 let Mr. Starks know that he was not under arrest at
25 this time. He was being put in investigative

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 163

1 detention and he refused to go into the vehicle for a
2 short period of time. And once Sergeant McAllister
3 got there with me, we got him to comply and he got
4 into the patrol vehicle.

5 Q Okay. Was he read his Miranda Rights or his
6 Constitutional Rights?

7 A Not right at that time. No, sir.

8 Q Okay. Well, at that time when you get Mr. Starks in
9 the back of the vehicle, what do you do next?

10 A At that time, once we set him in the vehicle, I
11 started looking around for other items related to the
12 crime, you know, possible evidence for the crime.

13 Q Okay. How about Sergeant McAllister?

14 A He did the same thing, but he basically stayed with
15 the vehicle, you know, with Mr. Starks in my vehicle,
16 so he wasn't unattended at any time.

17 Q Okay. Were you able to locate any items of interest?

18 A Absolutely.

19 Q Okay. What did you find?

20 A We found -- you mean right then or throughout the
21 whole...

22 Q Well, right then, at this point.

23 A Okay. Right then I, you know, we took ten or fifteen
24 steps from my patrol unit at the same area where Mr.
25 Starks was found, and there was a green in color

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 164

1 stocking cap on the ground. There was cash money,
2 there was rolled change, there were busted rolls of
3 change, well, loose change should I say, and that was
4 maybe ten foot from where I discovered Mr. Starks.
5 And on the other side there was another, I want to say
6 it was the gray in color ski mask that was found. It
7 was found in a trash can also about ten foot from
8 where Mr. Starks was found. And there was also a pair
9 of black, like, windbreaker pants.

10 Q Okay. Well let's back up a little bit. You say you
11 found some rolls of change and loose change and a five
12 dollar bill. Can you point on the map and tell us
13 where they ---

14 A Okay. The first stocking cap that was on the ground
15 was found right at the rear of this trailer. There
16 was actually a five dollar bill folded almost in half
17 like that, (Indicating) that was actually, I want to
18 say it was touching the ski mask. And then right
19 beside it were a couple of rolls of plastic rolled
20 change, like shrinkwrap, rolls of change.

21 Q What kind of change? Nickels, quarters, dimes?

22 A Yeah, I want to say the main ones I seen right there
23 was either nickels or quarters. It was silver change.
24 It was not pennies or dimes. I mean, it was larger
25 silver change.

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 165

1 Q Now, you talked about the gray mask that you found in
2 a trash can. Where was that trash can here on this
3 map?

4 A That trash can was right here at the rear of this
5 trailer. (Indicating)

6 Q And how far away was that from where you found Mr.
7 Starks when he walked up?

8 A Approximately, ten foot.

9 Q Was there anybody else in between the trailer,
10 trailers three and four, at that time?

11 A No, sir. As a matter of fact, there was nobody out
12 anywhere in that neighborhood. Like I said, this
13 happened right about midnight and it was pouring rain
14 at the same time, so no one was out.

15 Q Okay. And lastly, you said you found a pair of black
16 windbreaker pants. Where did you find those on this
17 map?

18 A I want to say they were right here beside this
19 trailer. I cannot really remember exactly, but I want
20 to say they were right here, just inside of these two
21 trailers. (Indicating)

22 Q How far from the gray ski mask in the trash can?

23 A Same distance, maybe, ten foot. They were just, I
24 mean, the gray ski mask was in a trash can right here,
25 and the pants were right here, and the stocking cap

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 166

1 was here, and the rolls of change was right beside it.
2 It was all basically at the rear of these two
3 trailers. (Indicating)

4 Q After you see these items, did you collect them?

5 A No, sir, I did not.

6 Q Okay. Did you touch them or alter them?

7 A No, sir, I did not.

8 Q Did you move them around anywhere?

9 A No, sir, I did not.

10 Q Where did you go after you found these items?

11 A After we starting finding these items, we started
12 scanning the area trying to find more items, then
13 right after that I went back and at that time, once we
14 started finding incriminating evidence, that's when
15 we, Sergeant McAllister actually, read Mr. Starks his
16 rights. And after that, we contacted Lieutenant
17 Wilkie, our detective, to come out and photograph
18 everything and collect the items of, you know, items
19 of the potential evidence.

20 Q Okay. Were any of these items of clothing that you
21 found -- were you looking for items of clothing of
22 that color?

23 A Yes, sir.

24 Q And why is that?

25 A Yes, sir. Dispatch came over and said that the victim

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 167

1 that was actually robbed at 810 West Greenwood Street
2 stated that he had on a green jacket, a green face
3 mask, and black pants and we found the black pants,
4 the green stocking cap, and later we actually found
5 the green jacket.

6 Q Okay. And there were two masks. Is that correct?

7 A Yes, sir. There was a gray one and a green one.

8 Q Okay. Where was the green one found? You said the
9 gray was in the trash can.

10 A That right.

11 Q Where was the green one?

12 A The green one was found right here at the back of that
13 trailer. (Indicating) While we were walking around
14 looking for possible evidence, they came back --
15 dispatch came back over the radio and notified us that
16 it could've possibly been a gray stocking cap also.
17 And so we kept looking and found the gray stocking cap
18 in the trash can.

19 Q Okay. So they were two colored masks that you got
20 coming through dispatch?

21 A Yes, sir.

22 Q Okay. After you found these items did you -- what did
23 do after that?

24 A After I found those items?

25 Q Right.

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 168

1 A Like I said, we had Sergeant McAllister read him his
2 rights, his Miranda Rights, and then after that, after
3 he understood those, we shut the door and did not
4 speak with him anymore. We continued to check the
5 area. As I said, I contacted Lieutenant Wilkie, our
6 detective, and he came out. We started backtracking
7 because there was a firearm used in it, and he did not
8 have a firearm at the time. We backtracked all the
9 way, the path that we thought he went, and actually
10 found a green jacket right there in that, in that dirt
11 path right beside the roadway, right there.

12 (Indicating)

13 Q Okay. So, the green jacket was found here in this
14 dirt path?

15 A Yes, sir. You can see where the path goes right
16 through here. That's the path we believe was followed
17 and, so that's the path we walked and found the actual
18 green jacket right there in that same area.

19 Q Now, this area between where you found the green
20 jacket and the trailers, describe this area here for
21 the jury.

22 A It's just a blank wooded lot. The front of it's like
23 a grassy area. You know, a lot of people from this
24 community use that path to cut through, you know, to
25 the sidewalk instead of traveling all the way out here

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 169

1 and then coming down. (Indicating).

2 Q So, it's a cut-through back behind Cherokee Trail?

3 A Yes, sir. You can actually see the beginning of the
4 path right there, that cuts in through the woods. It
5 goes right up behind Cherokee Trail, comes around, and
6 then it comes right through there. You can see where
7 the beaten path is there. It comes down and the tree
8 covers it at the back of Cherokee Trail. There's a
9 path that comes in and out through the trees into the
10 trailer park.

11 Q All right. And this wooded area, is there any brush
12 in there?

13 A Oh, absolutely.

14 Q Is it thick?

15 A It's almost impassible, pretty much.

16 Q Did you look for a weapon at all?

17 A Yes, sir.

18 Q Okay. Were you able to locate one in this area?

19 A No, sir. We searched everywhere from around all of
20 these trailers. We actually looked under all of these
21 trailers. We spoke with residents on this side of the
22 road. We checked all the trash cans here. We checked
23 in the -- there were a couple of vehicles, trucks,
24 here. We checked in the bed of those. We checked all
25 the trash cans outside of there. All the trash cans

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 170

1 there and all the trash cans in that parking lot. We
2 tried to check the sewer drainages. You know, every
3 place that we thought a gun could have been stashed.
4 We checked and could not find one.

5 Q Was Dwayne Starks in the back of your patrol car at
6 this point?

7 A Yes, sir.

8 Q Did you transport him back to the police station?

9 A Yes, sir.

10 Q All right. Between where you found him and the police
11 station or the jail -- did you take him to the jail or
12 the city police department?

13 A I took him to the city police department.

14 Q Okay. Now, where did you go -- did you go anywhere
15 between those two spots?

16 A Yes, sir. I was advised to leave this area right
17 here, where I had Mr. Starks in the rear of my
18 vehicle, leave that area and transport him back to the
19 parking lot of 810 West Greenwood Street.

20 Q Okay.

21 MS. NELSON: Your Honor, we renew our objection to
22 this line of questioning throughout.

23 THE COURT: All right. Your position is maintained
24 and I'll allow the testimony. Go ahead.

25 MR. STUMBO: Thank you, Your Honor.

DIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 171

1 Q When you pulled into the gas station, what was the
2 lighting situation like at the gas station at night?

3 A I mean, they had lights on, but it's still, you know,
4 it's illuminated, but it's not as bright as if it was
5 daytime.

6 Q Okay. When you pulled into the parking lot there,
7 were you instructed to do anything as far as the
8 lighting inside the car?

9 A Yes, sir. I was advised by Sergeant McAllister to
10 turn my interior light on.

11 Q Okay. Did you do that?

12 A Yes, sir, I did.

13 Q All right. How long did you stay there with the
14 light on?

15 A It was just a few seconds.

16 Q Okay. And did you receive any command to leave at
17 that point?

18 A Yes, sir. I was advised to go 10-8. So, at that time
19 I went ahead and called in over the radio to dispatch
20 and advised them that I was headed to my police
21 department with the subject.

22 Q Just for the jury's edification, what does 10-8 mean?

23 A 10-8 means "in service". That's technically what it
24 means, but basically, it means go ahead on with what
25 you were doing, continue on, you know. You're done

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 172

1 with this situation, go ahead and continue on.

2 Q Okay. Now, as far as all the items that were found,
3 the clothing, was it your job to collect those at that
4 time?

5 A No, sir.

6 Q Whose job was it to collect those?

7 A As I said, we had contacted our detective, Lieutenant
8 Wilkie. He handled collecting all the evidence.

9 Q Okay. Lieutenant Wilkie did the crime scene
10 collection?

11 A That's correct. He did all the photographing and
12 collecting and everything.

13 MR. STUMBO: Beg the Court's indulgence, Your Honor.

14 No further questions at this time, Your Honor.

15 MR. STUMBO: Please, Corporal Thomason, answer any
16 questions Ms. Bolen may have.

17 OFFICER THOMASON: Okay.

18 MS. BOLEN: Thank you, Your Honor.

19 CROSS EXAMINATION

20 BY MS. BOLEN:

21 Q Good morning, Corporal Thomason. I just have a few
22 follow-up questions for you. And actually, I'm going
23 to come over here and look at this map. So, you
24 testified that when you found my client, he was right
25 around in here? (Indicating)

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 173

- 1 A Yes, ma'am.
- 2 Q Okay. And you said he was walking back. Right?
- 3 A Yes, ma'am.
- 4 Q So, he's really walking towards 72. Is that correct?
- 5 A Yes, ma'am. Right here, there's a patch of woods.
- 6 There's nothing there. The path is over here, but
- 7 yes, ma'am, he was walking in that direction.
- 8 (Indicating on map)
- 9 Q Okay. So, he's not headed in this direction at all.
- 10 Correct? (Indicating)
- 11 A In which direction?
- 12 Q Towards this big patch of woods here. Right?
- 13 A No, ma'am, not at that time.
- 14 Q Okay. And you testified that you got the 9-1-1 call
- 15 and responded right away.
- 16 A Yes, ma'am.
- 17 Q How far away were you?
- 18 A I was out on Carwellyn Road.
- 19 Q A mile?
- 20 A A mile, mile-and-a-half, something like that.
- 21 Q Okay. And the call came in with reference to a
- 22 robbery that happened all the way down here. Correct?
- 23 A That's correct.
- 24 Q Okay. And when you saw my client, you said he was
- 25 just walking, right? Not running?

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 174

1 A Correct.

2 Q And he was corporative with you. Right?

3 A Correct.

4 Q When you wanted him to talk to you, he did?

5 A Correct.

6 Q Okay. And you said that, you know, he said something
7 about that he hadn't done anything before you even
8 asked him anything. Correct?

9 A That's correct.

10 Q But you were in a police car with the lights and siren
11 on. Correct?

12 A No, ma'am. They were not on at that time.

13 Q But you had had them on, on 72, is what you testified.
14 Right?

15 A That's correct.

16 Q But you're in a police car and it's pretty late at
17 night, around midnight?

18 A That's correct.

19 Q Okay. So, is it safe to say that anyone can be
20 intimidated by that?

21 A If you've done something wrong, you'd be intimidated.
22 Most people that haven't done anything wrong aren't
23 intimidated. We get out and speak to people all the
24 time and nobody ever says, "I haven't done anything."
25 Usually, it's, "Hey, how are you doing."

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 175

1 Q But this was around midnight. Right?

2 A Yes, ma'am.

3 Q Okay. And you said you did a weapons frisk on my
4 client?

5 A That's correct.

6 Q And did not find any weapons on him. Right?

7 A No, ma'am.

8 Q Okay. And he was wearing clothes that you say were a
9 red shirt, tan pants. Right?

10 A That's correct.

11 Q And that did not match the description you'd been
12 given from 9-1-1. Right?

13 A No, ma'am. The clothing description did not match.

14 Q And he was not wearing a mask. Right?

15 A No, ma'am.

16 Q Okay. And you wrote a report, right? A police report
17 of the incident?

18 A Yes, ma'am.

19 Q It's about a three-page report?

20 A That's correct.

21 Q And you write this fairly soon after the incident
22 happens. Is that correct?

23 A Well, yeah. It was probably an hour or so after. We
24 had to clear the scene.

25 Q Okay. And in your report, you would include anything

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 176

1 that's important. Right?

2 A Absolutely.

3 Q Okay. And when you testified on direct, you said that
4 my client couldn't tell you what he had in his pocket.

5 A That's correct.

6 Q Okay.

7 A He said he didn't know what was in his pocket.

8 Q All right. But that's not what you wrote in your
9 report. Right?

10 A What?

11 Q Do you ---

12 A Would you enlighten me on what I did write, then?

13 Q In your report you wrote that he didn't know how much
14 money he had.

15 A Okay.

16 Q Okay. So, since you wrote that down right after, is
17 that a more fair depiction?

18 A I mean, it's still the same thing. I mean, he still
19 told me he didn't know what was in his pockets. Once
20 I pulled the money out, he stated he didn't know how
21 much money he had.

22 Q He did know how much it was?

23 A He stated that he had been gambling and drinking all
24 night, so he didn't know how much he had.

25 Q And he told you he'd been gambling. Right?

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 177

- 1 A Yes, ma'am.
- 2 Q That night?
- 3 A He told me he'd been gambling and didn't know where he
4 had been gambling.
- 5 Q And you said that you saw twenty dollar bills in the
6 roll of money?
- 7 A Yes, ma'am. Twenties, tens, fives and ones.
- 8 Q Okay. And you put him, you cuffed him and put him in
9 the police car. Right?
- 10 A Yes, ma'am. I cuffed him and double-locked him and
11 then tried to get him in the patrol car. I was not
12 successful by myself. Sergeant McAllister had to help
13 me coerce him in the vehicle.
- 14 Q Okay. Now, let's talk a little bit about the items
15 that you found and where you found them. After my
16 client was in the car, that's when you start looking
17 around?
- 18 A (Nods head)
- 19 Q Okay. And you said you found -- in your testimony
20 here, you said you found a green ski mask on the
21 ground.
- 22 A That's correct.
- 23 Q Okay. And some coins and money on the ground?
- 24 A There was cash monies on the ground and rolled coins
25 and loose change.

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 178

1 Q How close was the greenish ski mask or stocking cap to
2 the money?

3 A To the money?

4 Q Uh-huh.

5 A There was actually a five dollar bill touching it or,
6 you know, very, very close to it.

7 Q And it was kind of muddy out that night. Right?

8 A Excuse me?

9 Q It was kind of muddy out that night?

10 A That's correct.

11 Q Okay. And were there any sort of skid marks where it
12 looked like the coins could have been thrown, that you
13 noticed?

14 A I didn't analyze the ground that was up under the
15 stuff. I didn't touch anything.

16 Q Okay. And you said in your testimony that you found a
17 pair of black, you said, windbreaker-type pants?

18 A Yes, ma'am.

19 Q But yet, you didn't mention that in your report.
20 Right?

21 A I'm not sure.

22 Q Okay. Do you want to refresh your ---

23 THE COURT: What do you mean by black windbreaker-type
24 pants? I don't understand that.

25 OFFICER THOMASON: Kind of like a -- like a sports

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 179

1 pants kind of thing. Kind of like the break-away pants
2 that you wear. I don't think they wear the break-away ---

3 THE COURT: Like working out or ---

4 OFFICER THOMASON: Yes, sir.

5 THE COURT: --- something like that?

6 OFFICER THOMASON: Yes, sir.

7 THE COURT: Athletic kind of thing?

8 OFFICER THOMASON: Yes, sir.

9 Q And again your report would be an accurate, timely,
10 depiction of what you did that night. Right?

11 A Absolutely.

12 Q Okay. But you didn't mention that in your report?
13 You didn't mentioned that?

14 A I may not have.

15 Q Do you want to review your report ---

16 A No, ma'am.

17 Q --- to refresh your memory?

18 A I don't need it. I wrote it. I don't need to review
19 it.

20 Q Okay. Then you said you weapon-frisked my client,
21 didn't find a gun on him, and you said you looked
22 around. Right?

23 A Yes, ma'am. I searched around.

24 Q Okay. And I think you said you talked to some people
25 in the houses across. Is that correct?

CROSS EXAMINATION OF THOMAS THOMASON BY MS. BOLEN 180

- 1 A Yes, ma'am.
- 2 Q Like over here? (Indicating)
- 3 A Across Highway 72 West. That's correct.
- 4 Q So, over here? (Indicating)
- 5 A That's correct.
- 6 Q But you never talked to anyone in the trailer park
- 7 where my client was found. Right?
- 8 A Yes, ma'am. I didn't. I want to say either
- 9 Lieutenant Wilkie or Sergeant McAllister spoke to a
- 10 lady that was an inhabitant of one these, one of these
- 11 trailers. (Indicating)
- 12 Q Okay. But you didn't talk to anyone?
- 13 A No. Absolutely not.
- 14 Q And when you talked to people across the street, was
- 15 that that night or did you go back the next day or a
- 16 couple of days later?
- 17 A No. That was that night.
- 18 Q Okay.
- 19 A They were outside.
- 20 Q Okay. You never found a plastic bag. Right?
- 21 A A plastic bag?
- 22 Q Right. That wasn't in your list of things that you
- 23 had found.
- 24 A I didn't find a plastic bag that I know of.
- 25 Q And you said when you drove my client in the car back

REDIRECT EXAMINATION OF THOMAS THOMASON BY MR. STUMBO 181

1 to the Shell Station, you stopped for just a few
2 seconds?

3 A That's correct.

4 Q And, again, this was around midnight?

5 A Actually, it was closer to 1:00 in the morning at the
6 time that I went back towards the gas station.

7 Q Just a few more questions Corporal Thomason. When you
8 were responding to this call, you knew it was in
9 reference to an armed robbery. Right?

10 A That's correct.

11 Q And you testified that part of the reason you did a
12 weapons frisk on my client was that the report was
13 that the robber had a gun?

14 A That's correct.

15 Q Okay. So, since you were looking for someone who is
16 armed, did you have your gun drawn when you pulled up?

17 A No, ma'am. When I seen Mr. Starks, I could clearly
18 see his hands. He did not have a firearm in his hands
19 at the time. There was no need for me to draw my
20 weapon. I did not feel threatened.

21 MS. BOLEN: Nothing further, Your Honor.

22 THE COURT: Thank you very much.

23 MR. STUMBO: Just briefly, Your Honor.

24 THE COURT: All right.

25

REDIRECT EXAMINATION

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 182

1 BY MR. STUMBO:

2 Q Just to follow-up on His Honor's questions. The
3 black, the break-away pants, you say the kind of pants
4 that you can pull on over other pants?

5 A Absolutely.

6 Q Okay. Like you would see in basketball game or
7 something?

8 A Yes, sir. Like elastic waistband and I want to say
9 the bottoms were elastic also.

10 Q Okay. And when you found them, they were around the
11 trailer. What appearance were they in? Were they
12 folded up neatly?

13 A No, sir. They looked like they had just been laid out
14 on the ground.

15 Q Were they inside out or anything like that?

16 A I don't remember, to be a hundred percent sure.

17 MR. STUMBO: No further questions.

18 THE COURT: Thank you very much. You can step down.
19 You're excused or you're free to stay or whatever. Call
20 your next witness.

21 MR. STUMBO: Thank you, Your Honor. The State would
22 call Sergeant Jonathan McAllister to the stand.

23 (After being duly sworn by the Clerk of Court,

24 **JONATHAN MCALLISTER**, testified as follows:)

25 DIRECT EXAMINATION

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 183

1 BY MR. STUMBO:

2 Q Good morning, Sergeant McAllister.

3 A Good morning.

4 Q I can tell by the uniform you're wearing you're in law
5 enforcement.

6 A Yes, sir.

7 Q And what agency do you work for?

8 A I'm employed by the Abbeville City Police Department.

9 Q How long have you worked at the police department in
10 Abbeville?

11 A Since July of 2006.

12 Q Where did you grow up? Where are you from?

13 A I'm originally from Marion County. Grew up between
14 Marion and Horry County.

15 Q Okay. What brought you to Abbeville?

16 A I came up in 2002 to attend Lander University.

17 Q Okay. Have you lived in this area since you attended
18 Lander?

19 A Yes, sir.

20 Q Now, what's your rank there at the department?

21 A Sergeant.

22 Q Okay. Do you supervise anyone?

23 A Yes, sir.

24 Q And describe your job to me as far as your supervisory
25 role.

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 184

1 A As far as the supervisory role goes, we're responsible
2 for making sure that the shift smoothly ran, checking
3 reports, checking citations, checking warrants, and
4 things like that that are issued throughout the shift
5 and just making sure that everything is functioning
6 and operating smoothly.

7 Q Do you have to patrol, yourself, as well?

8 A Yes, sir.

9 Q How many people work on your shift any given night?

10 A Usually three to four people, full-time officers. We
11 also have reserves that come in.

12 Q I'm going to take you back to February the 27th of
13 last year, 2012. Were you working that night?

14 A Yes, sir.

15 Q Okay. Who worked on your shift that night?

16 A On the 27th, it was Corporal Thomason, Corporal
17 Caldwell, and myself.

18 Q Okay. So, there were three of you, including you.

19 A Yes, sir.

20 Q Now, did you receive any calls? Did you have the
21 occasion to respond to a call related to this
22 Defendant, Dwayne Starks?

23 A Yes, sir.

24 Q Okay. What was that call in regards to?

25 A On the night in question, the call came in as the

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 185

1 Shell Station, the One Stop Shell Station on 72 West
2 beside the Pizza Hut, had been robbed.

3 Q Okay. Robbed at gunpoint?

4 A Yes, sir.

5 Q All right.

6 MR. STUMBO: If I may approach, Your Honor?

7 Q I'm going to refer you to what's in evidence as
8 State's #25. Have you seen this map before?

9 A Yes, sir.

10 Q Okay. And are you familiar with this area?

11 A Yes, sir.

12 Q Okay. Show me where, on this map, the Shell Station
13 is.

14 A This would be the Shell station here. (Indicating)

15 Q Okay. And that's 810 West Greenwood Street?

16 A Yes, sir.

17 Q Now, Sergeant McAllister, is that in the city limits
18 of Abbeville?

19 A Yes, sir.

20 Q Is it in Abbeville County?

21 A Yes, sir.

22 Q And the call that came in, did you receive any
23 information of who the suspect might be?

24 A We were advised by the caller, or by 9-1-1, that the
25 caller identified the male subject as a D'won Starks,

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 186

1 that he had come in and robbed her at gunpoint.

2 Q Okay. And are you familiar with Mr. Starks just from
3 your work in the community?

4 A Yes, sir.

5 Q Okay. Now, by the time you get down here to this
6 area, did anyone on your shift already have someone in
7 detention? (Indicating)

8 A Yes, sir. By the time I arrived on the scene,
9 Corporal Thomason had Mr. Dwayne Starks, here,
10 (Indicating) in investigative detention.

11 Q Okay. Dwayne Starks, is he in the courtroom today?

12 A Yes, sir.

13 Q Can you point him out for the record?

14 A In the blue shirt (Indicating) sitting there.

15 Q Sitting by his attorney at the table?

16 A Yes, sir.

17 Q Now, at that point, did Mr. Starks have any kind of
18 restraints on?

19 A Yes, sir. He was restrained and we were trying to --
20 Corporal Thomason was trying to place him in the rear
21 of the patrol car.

22 Q Did you assist Corporal Thomason in doing so?

23 A Yes, sir, I did.

24 Q And at that time, after he's put in the back of the
25 patrol car, what is done next?

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 187

1 A Once he was placed in the patrol car, we began to look
2 around the area to see if there was anything dropped,
3 any kind of evidence or anything that may lead us to
4 believe that Mr. Starks was involved in this, in the
5 robbery. Once the evidence had been, things had
6 started being seen around the area where he was
7 detained ---

8 Q Now, let's back up just for a second. Did anyone stay
9 at the car, also?

10 A Yes, sir. There was always someone at the patrol car.

11 Q Someone at the patrol car with him, Dwayne Starks?

12 A While Mr. Starks was in the rear.

13 Q And was it y'all's job that night to collect any kind
14 of items that were found?

15 A No, sir.

16 Q Okay. Whose job was that?

17 A Lieutenant Wilkie's. He was called to the scene once
18 we figured out what was going on, as far as the armed
19 robbery.

20 Q That's Lieutenant Wilkie here at the table?

21 (Indicating)

22 A Yes, sir, sitting at the table.

23 Q And is it also his job to photograph anything ---

24 A Yes, sir. He takes care of evidence collection,
25 photographing and documenting how it is obtained and

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 188

1 all.

2 Q Okay. Now, after you left this area, where did you go
3 directly from there, from the trailer park area?

4 A When we left the Sawmill Acres Trailer Park here, we
5 took -- well, Sergeant, Lieutenant Wilkie and myself
6 were at the Shell Station and Corporal Thomason
7 transported Mr. Starks from the trailer park to the
8 store to be identified by the caller, the store clerk.

9 Q Okay. And were you standing with Nakelia Williams,
10 the store clerk, during this time?

11 A Yes, sir.

12 Q Was she able to identify the person in the back of the
13 patrol car?

14 A Once Corporal Thomason pulled into the parking lot, he
15 was asked to turn on his interior light. When he
16 turned on the interior light, she stated that was the
17 subject and Corporal Thomason was told to go ahead and
18 transport him to the police department.

19 Q Did she indicate that this was the person who had
20 robbed her? Is that what you said?

21 A Yes, sir.

22 Q And before Corporal Thomason pulls in here to the
23 Shell Station, did you make any suggestion as to who
24 it was in the back of the patrol car?

25 A No, sir.

DIRECT EXAMINATION OF JONATHAN MCALLISTER BY MR. STUMBO 189

1 Q Okay.

2 MS. NELSON: Your Honor, I haven't objected, but we're
3 renewing our objection to this line of questioning for the
4 record.

5 THE COURT: Do you have some other objection or just
6 the objection that you made previously?

7 MS. NELSON: Just renewing the same one, Your Honor.

8 THE COURT: Okay. Thank you very much. It carries
9 forward.

10 MS. NELSON: Thank you.

11 Q Just by your observation, did Ms. Williams appear to
12 be confident in her identification of who robbed her?

13 A Yes, sir. Extremely.

14 Q Let me back up just a little bit. When Mr. Starks was
15 placed in the back of the patrol car, was that your
16 patrol car or Corporal Thomason's?

17 A It was Corporal Thomason's.

18 Q Was he read his Constitutional Rights?

19 A Once he was placed in the rear of the patrol car, he
20 was in investigative detention. A few moments after
21 that, I went back to the patrol car and opened the
22 driver side rear door and gave Mr. Starks his Miranda
23 warnings and then closed the door and proceeded with
24 the case.

25 Q Did he appear to understand his rights at that time?

CROSS EXAMINATION OF JONATHAN MCALLISTER BY MS. BOLEN 190

1 A To the best of my knowledge, yes, sir.

2 MR. STUMBO: I beg the Court's indulgence, Your Honor.

3 No further questions at this time, Your Honor.

4 Q Please answer any questions that Ms. Bolen may have.

5 A Yes, sir.

6 MS. BOLEN: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MS. BOLEN:

9 Q Just very, very briefly Sergeant McAllister. So, you
10 responded to the scene after Corporal Thomason had
11 already been there. Correct?

12 A Yes, ma'am.

13 Q Okay. And Sergeant Wilkie or Investigator Wilkie was
14 the one that actually collected the evidence?

15 A Yes, ma'am.

16 Q Okay. Did you do any follow-up investigative work?

17 A No, ma'am.

18 Q Okay. Didn't you go to my client's mother a couple of
19 days after this, and ask her about the clothes?

20 A About the case?

21 Q Asked her about whether my client had certain items of
22 clothing?

23 A I'm not exactly sure.

24 Q You don't remember going to my client's mother's?

25 A Was it at the store? Where did I meet her?

CROSS EXAMINATION OF JONATHAN MCALLISTER BY MS. BOLEN 191

1 Q At her house.

2 A I don't know his mother.

3 Q You don't know her? Okay.

4 A I don't remember. I'm sorry.

5 Q You didn't talk to anyone in the trailer park that
6 night. Right?

7 A Officers. I'm sure there were people around, but
8 nothing dealing with the case.

9 Q Okay. So, they were people around? You just said you
10 were sure there were people around?

11 A Other officers and all around, yes, ma'am.

12 Q Okay. But you didn't talk to anyone who lived in that
13 trailer park. Correct?

14 A Not to me.

15 Q Okay. And did you -- And you didn't find a gun.
16 Right?

17 A No, ma'am.

18 MS. BOLEN: Nothing further. Thank you, Your Honor.

19 THE COURT: Thank you very much. You may return to
20 your place.

21 MR. STUMBO: Nothing further, Your Honor.

22 THE COURT: Thank you very much.

23 MR. STUMBO: May Sergeant McAllister be excused?

24 THE COURT: Thank you very much for coming. You're
25 free to go. Call your next witness. Anybody on the jury

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 192

1 need a break at this point? If so, raise your hand.

2 (Juror indicated)

3 THE COURT: We'll take a short break then. We got one
4 signal. Anybody else need one? We'll let you all go to
5 the jury room, though. We'll take a short break, about a
6 five minute recess. Stretch your legs. Move around a
7 little bit.

8 (Jury out at 11:56 a.m.)

9 (BRIEF BREAK)

10 THE COURT: Go get them and bring them in.

11 (Jury in at 12:10 p.m.)

12 THE COURT: All right. We have the jury back with us
13 and Mr. Starks is present, along with his attorneys. All
14 right. Call you next witness.

15 MR. BROWN: The State calls Lieutenant Wilkie.

16 (After being duly sworn by the Clerk of Court, **CHRIS**
17 **WILKIE**, testified as follows:)

18 DIRECT EXAMINATION

19 BY MR. BROWN:

20 Q Good afternoon, Lieutenant Wilkie. Lieutenant Wilkie,
21 who do you work with?

22 A Abbeville Police Department.

23 Q And how long have you been with the Abbeville Police
24 Department?

25 A Since October of 2005.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

193

- 1 Q October of 2005?
- 2 A Yes, sir.
- 3 Q And what type of training have you had since you've
- 4 been at the police department?
- 5 A Extensive training in criminal investigation, evidence
- 6 collection, evidence preservation, taser instructor, a
- 7 lot of different trainings.
- 8 Q And you've already said what your rank is, but what
- 9 does a lieutenant do? What's your position in law
- 10 enforcement?
- 11 A My position entails, I'm over all the criminal
- 12 investigations for the Abbeville Police Department.
- 13 I'm also over records management, over all the
- 14 evidence. I have to control all those items.
- 15 Q All right. And how long have you been in that
- 16 capacity?
- 17 A Since September of 2011.
- 18 Q So, last year on this, when this incident occurred on
- 19 February 27, 2012, you were a lieutenant there?
- 20 A Yes, sir.
- 21 Q You're also a detective?
- 22 A Yes, sir.
- 23 Q Lieutenant Wilkie, where did this incident take place?
- 24 A At the 810 West Greenwood Street Shell Station.
- 25 Q And I want to get you to look at what's already been

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

194

1 entered into evidence as State's Exhibit #25. Take a
2 look at that map and tell me what you see and tell me
3 where 810 West Greenwood Street is.

4 A This is an overview of West Greenwood Street. This is
5 going to be 810 West Greenwood, the Shell Station
6 here. (Indicating)

7 Q All right. And, is there any other gas stations on
8 this road?

9 A Cherokee Trail convenience store is located here and
10 you have Bi-lo, O'Reilly's, and Sonny's Auto Parts.

11 Q So, you're very familiar with the area?

12 A Yes, sir.

13 Q Lieutenant Wilkie, when did you get called out on this
14 case?

15 A I got called our shortly after the officers had
16 arrived on the scene at Sawmill Acres where they had
17 located a subject possibly involved in the armed
18 robbery that occurred.

19 Q And what did you do when you were called out?

20 A I spoke with the Sergeant, Sergeant McAllister, when I
21 got on the scene. He advised me of the situation and
22 what they had been told, what they had found, at which
23 time he had stated to me that he had located some
24 items that I needed to photograph and possibly take in
25 as evidence. So, at which time I began looking, going

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 195

1 over the area with the Sergeant.

2 Q And what area is that?

3 A This area here actually located in between these two
4 trailers. When I pulled up, my vehicle was here.
5 There was a couple of other patrol units, marked
6 patrol units, here, and we found evidence, there.

7 (Indicating)

8 Q Was Mr. Starks still standing there or where was he?

9 A No, sir. He was the back seat of one of the patrol
10 units.

11 Q And did you ever speak with Mr. Starks?

12 A Not that night.

13 Q And so what did you do when you got out to that
14 location?

15 A Once I got out to this location, I put gloves on and
16 got my camera from inside my vehicle and began taking
17 photographs of the items that we had collected.

18 MR. BROWN: May I approach, Your Honor?

19 THE COURT: Sure.

20 Q Lieutenant Wilkie, I'm handing you a number of photos
21 that have been pre-marked State's Exhibits #12 through
22 State's Exhibits #23. I'd like for you to take a
23 moment and tell me what these pictures are. If you'll
24 just flip through them. (Hands exhibits to witness)

25 A (Officer Wilkie complies) These items are photographs

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

196

1 of items that I deemed as evidence for this case,
2 photographs that I had taken.

3 Q Are these photos of items of clothing that you
4 witnessed out there when you were called to that scene
5 in Sawmill Acres Trailer Park?

6 A Photos of clothing, photographs of money that was
7 found at the scene, and also a shoe impression.

8 THE COURT: Also a what?

9 MS. BOLEN: Your Honor, we have an objection, Your
10 Honor.

11 THE COURT: I didn't hear -- Well, I couldn't hear
12 what he said, but you have an objection to the answer?

13 MS. BOLEN: We have an objection to one of the photos
14 being admitted into evidence and he was just speaking about
15 it.

16 THE COURT: All right. I didn't hear what he said or
17 anything. Now, which one is it? The number.

18 MS. BOLEN: Number #23, Your Honor.

19 THE COURT: Twenty-three. Let me look at it.

20 MS. NELSON: We have a matter of law as to our
21 objection, Your Honor.

22 THE COURT: Ladies and gentlemen, I need for you to go
23 to the jury room for a few minutes please.

24 (Jury out at 12:17 p.m.)

25 PROFFERED TESTIMONY FROM OFFICER WILKIE

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 197

1 THE COURT: I didn't hear what he said, but anyway,
2 what is #23? What is that a photograph of?

3 OFFICER WILKIE: I said it was a photo of a shoe
4 impression.

5 THE COURT: A shoe impression?

6 OFFICER WILKIE: Yes, sir.

7 THE COURT: And where was that?

8 OFFICER WILKIE: That was located at the dirt area,
9 here, on the map near the Cherokee Trail Convenient Store.

10 THE COURT: Let me go down so I can see it.

11 (Judge Hughston leaves the bench and approaches the easel)

12 OFFICER WILKIE: This is the trailer park here,
13 Cherokee Trail Convenience Store, then this dirt area here.

14 THE COURT: Where's the store in question?

15 OFFICER WILKIE: The store in question is here.

16 THE COURT: Down here?

17 OFFICER WILKIE: Yes, sir.

18 THE COURT: And where was the photo -- where's the
19 footprint?

20 THE WITNESS: Right here in this dirt area.

21 THE COURT: Okay. Between the -- we'd say between the
22 store and where -- in the trailer park where he was found.
23 But anyway, okay. A shoe impression. Can you tell us
24 anything other than it being a shoe impression?

25 OFFICER WILKIE: Your Honor, it was located near the

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 198

1 green jacket that was found.

2 THE COURT: Near a green jacket. How far would you
3 say the two were apart?

4 OFFICER WILKIE: Within, approximately, a foot.

5 THE COURT: Okay. Any other questions you want to ask
6 about it, anybody, want to ask about it?

7 MR. BROWN: Judge. I think ---

8 THE COURT: The State, first of all.

9 MR. BROWN: Yes, sir. Judge, I was going to get to
10 where the shoe impression --

11 Q Where did you take that picture of that shoe
12 impression?

13 A That picture was taken in front of Cherokee Trail or
14 adjacent to the Cherokee Trail Convenience Store in a
15 vacant lot.

16 Q Was that located ---

17 THE COURT: Wait a minute. I thought you said the --
18 the shoe impression?

19 OFFICER WILKIE: Yes, sir.

20 THE COURT: I thought you said it was in the trailer
21 area over here.

22 OFFICER WILKIE: No, sir. This is the trailer park
23 where Mr. Starks was at. This is Cherokee Trail, and this
24 dirt area here ---

25 THE COURT: That's what I mean.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

199

1 OFFICER WILKIE: Yes, sir.

2 THE COURT: This is where you got the impression?

3 OFFICER WILKIE: Yes, sir. The impression and the
4 jacket were found there.

5 Q Did it appear to be a fresh shoe print?

6 A It did.

7 Q And where was it located?

8 A It was located in this dirt area here, right off of
9 72, on West Greenwood Street.

10 Q Were there any other items located next to it?

11 A There was a green colored jacket located next to it.

12 MR. BROWN: Judge, that's really all we're looking to
13 say ---

14 THE COURT: What's your -- what do you want to say?

15 MS. BOLEN: Your Honor, our position is that it's --
16 it's not probative of anything. This footprint was not
17 analyzed in any way. There's not even a ruler set by it.
18 This is a busy road with a lot of foot traffic. I mean,
19 there's already been testimony that they were a lot of
20 people around. It's a footprint with absolutely no
21 connection, no evidentiary connection to anything in this
22 case and we just object as being not relevant and not
23 probative.

24 THE COURT: Anything you want to say?

25 MR. BROWN: Judge, we submit that the clothing is

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

200

1 sitting right beside that footprint. It's a fresh
2 footprint. We're not asking them to analyze or make any
3 specific expert comparison. We do have the shoes and the
4 jury can draw whatever emphasis they wish to.

5 THE COURT: What shoes? You've got the shoes that the
6 Defendant was wearing that you're going to introduce?

7 MR. BROWN: That's correct.

8 THE COURT: But you don't have anything to connect
9 those shoes with this, other than just this photograph?

10 MR. BROWN: No, sir.

11 MS. BOLEN: And, Your Honor, ---

12 THE COURT: I'll -- I'll sustain the objection to
13 this, to the introduction of #23.

14 MS. BOLEN: Thank you, Your Honor.

15 THE COURT: So, you can give it to the court reporter,
16 but the objection is sustained. It's not in evidence. All
17 right. Bring the jury back in.

18 (Jury in at 12:21 p.m.)

19 THE COURT: All right. We have the jury back with us.
20 Mr. Starks is present, along with his attorneys. You may
21 continue to examine the witness.

22 CONTINUED DIRECT EXAMINATION OF OFFICER WILKIE

23 Q Lieutenant Wilkie, I showed pictures of State's
24 Exhibit #12, for ID purposes, through #22, and you'd
25 mentioned those were clothes that you photographed.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

201

1 Correct?

2 A Yes, sir.

3 Q During your investigation?

4 A Yes, sir.

5 MR. BROWN: Your Honor, State moves Exhibits #12
6 through #22 into evidence at this time.

7 MS. BOLEN: Without objection, Your Honor.

8 THE COURT: All right.

9 (Whereupon, eleven photographs are entered into evidence
10 as State's Exhibits #12 through #22, without objection)

11 Q Now, Lieutenant Wilkie, you were called out after he
12 was already in investigative detention. Right? Or in
13 custody?

14 A Yes, sir.

15 Q And you took pictures of items?

16 A Yes, sir.

17 Q I'm going to place some of these pictures on here.
18 This is for identification -- this is State's evidence
19 #12. (Photographs projected on large screen)

20 THE COURT: If you want to get down and go over there
21 and talk about the pictures, you can.

22 OFFICER WILKIE: Yes, sir.

23 (Officer Wilkie complies)

24 Q Lieutenant Wilkie, what is depicted in this photo?

25 A This photograph here is in between two modular homes,

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

202

1 one here and on that side. This item here is tagged
2 into evidence by me as a black pair of pants that was
3 located at the scene, here. (Indicating)

4 THE COURT: Show us where you're talking about. I
5 can't tell -- right there?

6 OFFICER WILKIE: Yes, sir. It's a black pair of
7 pants.

8 THE COURT: I can see a little white thing to the
9 right there. What is that or do you know?

10 OFFICER WILKIE: Right here? (Indicating)

11 THE COURT: No, right next to the pants.

12 OFFICER WILKIE: This is the elastic band inside the
13 pants. (Indicating).

14 THE COURT: You didn't put that there, that was ---

15 OFFICER WILKIE: That was there.

16 THE COURT: That was part of the pants?

17 OFFICER WILKIE: Yes, sir.

18 THE COURT: Okay. I just couldn't tell.

19 Q I'll put some others up that are a little closer.

20 Tell me what that is.

21 A Once again, it's a photograph of the pants that were
22 found near Mr. Starks and that's the elastic band.

23 Q And this would be State's evidence #13.

24 A This is the elastic band inside the pants. This here,
25 this curved white line is actually the white piping

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 203

1 down the pants leg.

2 Q Lieutenant Wilkie, when you took these photographs
3 where were the pants located? You said they were in
4 Sawmill Acres Trailer Park?

5 A Yes, sir.

6 Q Where is that? Where were those pants located?

7 A These are in between the two modular homes from the
8 previous, I think it was #12. According to the
9 officers when I got on scene, this was approximately
10 ten feet away from where Mr. Starks was located by
11 Corporal Thomason.

12 Q And where are your patrol units at that time, the
13 patrol cars?

14 A They're back behind there. (Indicating)

15 Q How far away is that?

16 A Maybe five or ten feet.

17 Q Again, I want to show you another photograph, which is
18 State's evidence #14, and that's got a number beside
19 it. What are those?

20 A This is a numerical documentation for me while taking
21 the photographs. This is item number one that I
22 submitted into evidence as the black pants with the
23 white elastic band and the white piping stripe down
24 the legs.

25 Q Now, Lieutenant Wilkie, is this the way you found

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

204

1 them?

2 A Yes, sir.

3 Q Did you touch these at any point before you took these
4 photographs?

5 A No, sir.. Not at all.

6 Q How are these pants -- how did these pants appear to
7 you? Were they right side out or inside out?

8 A Partially inside out.

9 Q They weren't perfectly folded or ---

10 A No, sir.

11 Q But they were partially inside out?

12 A Yes, sir.

13 Q I'm going to show you State's Exhibit #15 now. What
14 is that a picture of?

15 A This is the inside of a trash can. This is a gray in
16 color ski mask.

17 Q And where is that trash can located?

18 A In between the two modular homes. You can also see
19 the trash can in State's Exhibit #12 in between the
20 two modular homes. Inside that trash can is the gray
21 ski mask.

22 Q And how far away was that from the black pants?

23 A Maybe five or ten feet at the most.

24 Q I'm going to show you another photo, State's Exhibit
25 or State's Evidence #16. Tell me what that is.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

205

1 A I listed this gray ski mask item number two. It's
2 just another photograph of it, up close inside the
3 trash can.

4 Q Officer Wilkie, I'll just ask you to speak up a little
5 bit more so I can make sure I hear you and the jury
6 can hear you, as well.

7 A Yes, sir.

8 Q I want to show you State's evidence #17. Tell me what
9 that is.

10 A This is item number three. What was found, this here,
11 here, here, and here and here is money that was found
12 on the scene. These are rolls of coins. This is a
13 busted roll of nickels and a five dollar bill. It was
14 found in front of one of the modular homes. If you
15 look at where Mr. Starks was found, or the pants, it's
16 the modular home to the left, the very front on the
17 rear side.

18 Q Now, I want to show you State's Evidence #18 at this
19 time. It's a little closer.

20 A A little closer view of item number three, which again
21 is the change, the roll of change, the loose change
22 and the five dollar bill that was found close, very
23 close to the scene of Mr. Starks.

24 Q And how far away were these items that you've marked
25 as three, in relation to where the black pants and the

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

206

1 gray ski mask were in the trash can?

2 A I'd say approximately, these were approximately
3 fifteen feet away from that, from the pants.

4 Q I'm going to show you what's been marked as State's
5 evidence #20.

6 A This is a ---

7 Q I know that doesn't come up very well, but...

8 A This is another ski mask that was found in front of
9 that same mobile home, right next to the coins. It's
10 actually a green colored ski mask.

11 Q And tell me what this photo is.

12 A This is a photograph of a green cargo pocket-style
13 jacket that was found. This was actually found at
14 another location in between the incident location,
15 810 West Greenwood Street, the Shell Station, and the
16 trailer park. This was found in a vacant lot beside
17 Cherokee Trail Convenience Store. This was the jacket
18 we deem as possibly being worn by the suspect right
19 after the robbery had occurred.

20 Q And that was located between the Shell Gas Station
21 where the incident took place and the trailer park?

22 A That's correct.

23 THE COURT: Show us over here on that, then, where
24 you're talking about, where it was found.

25 OFFICER WILKIE: The green jacket was found in this lot

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

207

1 here. This is Cherokee Trail Convenience Store.

2 (Indicating on photograph on easel in front of jury)

3 THE COURT: And where is the Shell Station?

4 OFFICER WILKIE: The Shell Station is here. This is a
5 vacant lot in between this area. There was a green jacket
6 that was found here in this same area, in a dirt area.

7 Q Lieutenant Wilkie, and I'm going to show you the
8 State's evidence #22, the last photograph. And,
9 again, what is that?

10 A That, again, is another photograph of the green
11 jacket. I just numerically numbered it with number
12 five, it's item number five.

13 Q Now, Lieutenant Wilkie, after you photographed all of
14 these items, all of these pieces of clothing and
15 money, what was the next step in your investigation?

16 A Once they were photographed, I then, with gloves on,
17 picked up the items and placed them into an evidence
18 bag and sealed them all with evidence tape.

19 Q And tell me, did you do that in this case?

20 A I did.

21 Q Lieutenant Wilkie...

22 MR. BROWN: May I approach, Your Honor?

23 THE COURT: Sure.

24 Q Lieutenant Wilkie, I'm showing you what's been marked
25 as State's Exhibit #28, for I.D. purposes. Would you

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

208

1 take a look at that, and you can take that out of that
2 white wrapping paper and tell me what that is.

3 A This bag here is the bag that I placed the green
4 jacket into. The documentation on the front of it
5 just states that a green in color jacket was placed
6 into evidence on 2/28 at 00:15 which is fifteen
7 minutes after midnight and that's what time I
8 collected the evidence. There's also a chain of
9 custody at the bottom of this bag. It was placed into
10 evidence on 2/28. As soon as I got back to the police
11 department, I secured this item into the evidence room
12 and I removed it from the evidence room on 3/20/2012,
13 March the 20th, to take it to SLED and it was taken to
14 SLED on 3/22/2012 for DNA analysis. Inside this bag,
15 or this paper here, this is how it was received back
16 from SLED. (Witness unfolds jacket and holds it up)

17 Q And that appears to be the green jacket?

18 A Yes, sir.

19 Q With a hood?

20 A Yes.

21 Q Now, Lieutenant Wilkie.

22 A Yes, sir.

23 Q When you collected those items, did you have on gloves
24 or anything?

25 A Yes, sir.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

209

1 Q Are you very careful with the way you collect these
2 items?

3 A Yes, sir.

4 Q And why are you very careful?

5 A I don't want to contaminate the items, especially with
6 fingerprints or anything of that nature.

7 Q Did anyone else with the Abbeville Police Department
8 touch those items that night?

9 A No, sir. The officers know, according to our policy,
10 if they see something that they think may be evidence,
11 do not pick it up with bare hands. They can either
12 contact me or have gloves on and place it in an
13 evidence bag at the time of collection.

14 Q And on that night you had gloves on when you collected
15 that?

16 A Yes, sir.

17 Q And you placed it in what?

18 A Into this paper bag here.

19 Q And after you placed it into the, like a grocery bag,
20 what did you do with it?

21 A After it's placed in the grocery bag or an evidence
22 bag, it's sealed off and put into the evidence room
23 until I can take it to Columbia for, to SLED for an
24 analysis.

25 Q And who has access to that evidence room?

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

210

1 A I'm the only one.

2 Q You are the only one that has a key?

3 A Yes, sir.

4 Q You can place it back in the bag.

5 (Officer Wilkie returns item to evidence bag)

6 MR. BROWN: Your Honor, at this time the State moves
7 State's Exhibit #28 into evidence.

8 THE COURT: What number?

9 MR. BROWN: Twenty eight.

10 THE COURT: State's Exhibit, #28. All right. Any
11 objection?

12 MS. BOLEN: No, sir, Your Honor.

13 (Whereupon, a green jacket is entered into evidence as
14 State's Exhibit #28, without objection.)

15 THE COURT: What was that, the green jacket?

16 MR. BROWN: That was the green jacket, yes, sir.

17 Q Lieutenant Wilkie, I'm going to show you what's been
18 marked as State's Exhibits #29 and #30. Will you take
19 a look at those and tell me what they are.

20 A Number #29 is a gray in color ski mask.

21 Q And again, did you roll that last one in the white
22 paper?

23 A No, sir. These items were submitted to SLED for
24 analysis, DNA analysis, and that's how they're
25 packaged when they're brought back.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN. 211

- 1 Q What does that appear to be?
- 2 A This is a gray in color ski mask.
- 3 Q Now on the night of February 27, 2012, you collected
- 4 that?
- 5 A Yes, sir.
- 6 Q Where did you collect that?
- 7 A That was found in the trash can.
- 8 Q And how did you collect that?
- 9 A With gloves on, this item was placed into a paper
- 10 evidence bag and sealed off.
- 11 Q And then where did it go after?
- 12 A It then went to the evidence room at the police
- 13 department. And then a little while later it was
- 14 taken to SLED for DNA analysis.
- 15 Q And, again, you were the only person with a key at
- 16 that time to get in there?
- 17 A Yes, sir.
- 18 Q I'll show you States Exhibit #30.
- 19 A It is the green in color ski mask. (Removes item from
- 20 evidence bag.)
- 21 Q And that would appear to be a green colored ski mask?
- 22 A Yes, sir.
- 23 Q And where was that found?
- 24 A That was found in front of the trailer to the left of
- 25 the modular home.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

212

1 Q Okay. Again, you collected that?

2 A Yes, sir.

3 Q How did you collect that?

4 A With gloves on, this item was also collected and
5 placed into evidence, into a paper bag.

6 Q Now, after you collected these and you have the gloves
7 on, you said you took these back to the police
8 station. Did anybody else in your police department
9 ever have access to these items?

10 A No.

11 Q And did you personally take these items down to SLED
12 yourself?

13 A I did.

14 Q And in the meantime, nobody else could have
15 contaminated these items, whatsoever, with touching
16 them?

17 A No, sir.

18 Q All right. You can put that back in the bag there.

19 (Officer Wilkie complies)

20 Q And that also goes with the green jacket as well?

21 A Yes, sir.

22 MR. BROWN: Your Honor, at this time I'd moved State's
23 Exhibits #29 and #30 in as State's Evidence.

24 THE COURT: Any objection?

25 MS. BOLEN: No objection, Your Honor.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

213

1 THE COURT: All right.

2 (Whereupon, two ski masks are entered into evidence as
3 State's Exhibits #29 and #30, without objection)

4 MR. BROWN: May I approach, Your Honor?

5 THE COURT: Go ahead.

6 Q Lieutenant Wilkie, I'm showing you what's been marked
7 as State's Exhibit #31. Take a look at that and tell
8 me what that is.

9 A According to the bag, this is one pair of black cloth
10 pants, with white piping down the side, size extra
11 large, make Makaveli. Of course, these pants were
12 inside out at the time.

13 Q At the time you collected them?

14 A Yes, sir.

15 Q And what do these pants appear to be?

16 A Black cloth pants with white piping down the side of
17 the leg.

18 Q Are those the same pants that you collected the night
19 you collected these, or the pants on 2/27/12?

20 A Yes, sir.

21 Q And how did you collect these?

22 A With gloves on, these items were also placed into a
23 paper evidence bag, sealed off, and then taken to the
24 Abbeville Police Department and put in the evidence
25 room.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 214

1 Q And, again, you're the only person who had access to
2 those pants and the person who took them down to SLED?

3 A Yes, sir.

4 THE COURT: Are you going to offer those into
5 evidence? Any objection?

6 MS. BOLEN: No objection, Your Honor.

7 (Whereupon, a pair of black pants is entered into
8 evidence as State's Exhibit's #31, without objection)

9 Q Lieutenant Wilkie, I'm going to hand you up a couple
10 more items. Lieutenant Wilkie, let me show you what's
11 been marked as State's Exhibit #32 and State's Exhibit
12 #33. Tell me what these are. (Hands exhibits to
13 witness)

14 A This one here is the money that was found in the
15 suspect's pocket, Dwayne Starks. It was actually a
16 hundred and ---

17 THE COURT: Which one is that, 32 or 33?

18 THE COURT: Number 32, sir.

19 THE COURT: Thirty-two.

20 A It's \$146 cash that was found in his pocket at the
21 time that he was taken into custody.

22 THE COURT: How much?

23 OFFICER WILKIE: One hundred forty-six dollars.

24 A These items here in this evidence bag, as you seen in
25 the picture earlier, is the change and the five dollar

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 215

1 bill that was photographed. These items were taken
2 into evidence, also.

3 Q And Lieutenant Wilkie, are those the same coins that
4 are shown in this picture?

5 A Yes, sir.

6 COURT REPORTER: What's that number?

7 MR. BROWN: This number is State's Evidence #18.

8 Q Lieutenant Wilkie, you collected these exhibits, 32
9 and 33?

10 A Yes, sir.

11 Q And what type of bag or how did you collect these?

12 A The loose change, the coins was actually placed into a
13 paper bag until I could get it back to the police
14 department and count it and attempt to fingerprint it
15 and then once it was counted, it was then placed into
16 an evidence bag, a plastic evidence bag, and sealed
17 off.

18 Q And you mentioned you tried to fingerprint the change?

19 A The plastic around the change.

20 Q Were you able to do that?

21 A No, sir.

22 Q Why?

23 A The currency and the rolls exchange so many hands,
24 there's so many smears on it, it's very hard to get a
25 detailed fingerprint from them.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

216

1 Q So, you weren't able to lift one clear fingerprint on
2 that?

3 A No, sir.

4 Q Is there any way to fingerprint the money or cash?

5 A It's very possible, but it's kind of pointless to,
6 being that it changes so many people's hands.

7 Q And this cash in this State's Exhibit #32, where was
8 that taken from?

9 A That was taken from the suspect, Dwayne Starks'
10 pocket.

11 Q And the coins were found in Sawmill Acres Trailer
12 Park?

13 A Yes, sir.

14 MR. BROWN: Your Honor, at this time we move State's
15 Exhibits #32 and #33 into evidence.

16 THE COURT: Any objection?

17 MS. BOLEN: No, sir, Your Honor.

18 (Whereupon, paper money and coins, respectively, are
19 entered into evidence as States Exhibits #32 and #33,
20 without objection)

21 MS. BOLEN: Your Honor, we have a matter of law.

22 THE COURT: Members of the jury panel, you need you to
23 go to the jury room please. I'm about to take a lunch
24 break. I'll let you know in just a minute.

25 (Jury out at 12:35 p.m.)

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

217

1 THE COURT: All right. The jury's out. What?

2 MS. BOLEN: Thank you, Your Honor. This next proposed
3 exhibit is ---

4 THE COURT: What is it?

5 MS. BOLEN: It's the shoes that my client was wearing
6 when he was arrested.

7 THE COURT: Shoes?

8 MS. BOLEN: And along the same lines as the footprint
9 evidence, we're objecting on the basis of relevance and no
10 probative value. Nothing was analyzed from these shoes.

11 THE COURT: What do you want to put them in for?

12 MR. BROWN: Judge, I questioned Ms. Williams. I asked
13 her what his clothes were, that he had on. She said black
14 pants, green jacket, gray ski mask and white tennis shoes.

15 THE COURT: I assume those are white tennis shoes?

16 MR. BROWN: They are white tennis shoes.

17 THE COURT: All right. Any other objections?

18 MS. BOLEN: Your Honor, just that she wasn't able to
19 give a full description. I think she said that she thought
20 they were white shoes.

21 THE COURT: All right. I appreciate your position. I
22 overrule the objection.

23 MS. BOLEN: Thank you, Your Honor.

24 THE COURT: Bring them in. How many more you got?
25 Anything else from him?

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

218

1 MR. BROWN: Judge, I have three different topics and
2 that's one of them.

3 THE COURT: What?

4 MR. BROWN: Three topics. And that's one.

5 THE COURT: Okay. Are you going to be able to be
6 finished in seven minutes?

7 MR. BROWN: I'll try.

8 THE COURT: We're going to stop at five minutes to
9 one.

10 (Jury in at 12:46 p.m.)

11 THE COURT: All right. You may continue to examine
12 the witness.

13 MR. BROWN: Thank you, Your Honor. May I approach?

14 THE COURT: Sure. State's Exhibit what?

15 MR. BROWN: This is State's Exhibit #34.

16 THE COURT: Thirty-four.

17 Q Can you tell me what these are.

18 THE COURT: And your objection carries forward.

19 MS. BOLEN: Thank you, Your Honor.

20 A This bag contains a pair of Nike Air Force 1 tennis
21 shoes, size 12, white in color, which were taken off
22 the suspect at the time of his arrest.

23 Q Those were taken off of Mr. Starks feet?

24 A Yes, sir.

25 Q When he was placed under arrest?

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

219

1 A Yes, sir.

2 Q And did you package those and put those in that brown
3 paper bag?

4 A I did.

5 Q Did anybody else touch them or anything?

6 A No, sir.

7 Q And what did you do with them after you collected
8 them?

9 A They were placed into the evidence room.

10 Q All right.

11 MR. BROWN: Judge, at this time ---

12 THE COURT: They're in evidence, over objection.

13 (Whereupon, a pair of white tennis shoes are entered
14 into evidence as State's Exhibit's #34, admitted over
15 objection)

16 Q Now, Mr. Wilkie, these items we've introduced, you've
17 stated that a pair black pants, the gray mask, the
18 green colored ski mask, and green colored jacket, all
19 were packaged and sent to SLED. Right?

20 A Yes, sir.

21 Q And you took those to SLED.

22 A I did.

23 Q Once you took them to SLED, who did you give them to?

24 A I signed them over to an evidence technician by the
25 name of Amy Stephens.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

220

1 Q Does she work for SLED?

2 A She does.

3 Q And that's the only person that took control of those
4 items when you gave them to her?

5 A Yes, sir.

6 Q Now, Lieutenant Wilkie, on the night of this incident
7 on February 27, 2012, did you go back to the Shell
8 Station and talk with Ms. Williams?

9 A I did.

10 Q And what time was that?

11 A It was probably about 12:30, 12:45.

12 Q What did y'all's conversation consist of?

13 A I was asking her again what had happened. I wanted to
14 hear it from the victim herself. And she stated to me
15 that she, you know, of course, had been robbed at
16 gunpoint and she felt that the -- she told me that the
17 person that had robbed her was, who she called, D'won
18 Starks. And I ask her if she felt comfortable seeing
19 him to make a identification on him.

20 Q And what did she say?

21 A Initially, she wasn't.

22 MS. NELSON: Renew our previous objection to this
23 testimony, Your Honor.

24 THE COURT: Your position is maintained. Go ahead.

25 A Initially, she wasn't, didn't want to. But I advised

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 221

1 that, you know, we would keep him in the car. So, at
2 which point, she said she was fine with that.

3 Q And where were y'all standing when Mr. Starks came in
4 sight?

5 A We were actually behind the register, up close to the
6 window inside the store.

7 Q Can you see out of that window?

8 A Yes, sir.

9 Q And what direction can you see out -- what would that
10 show looking out that window?

11 A The entire parking lot.

12 Q And how was Mr. Starks brought to the Shell Station?

13 A He was brought in a marked patrol unit in the back
14 seat.

15 Q Whose marked patrol unit?

16 A Corporal Thomason's.

17 Q And was it dark?

18 A It was dark outside, but it was a very well-lit area
19 from the lights.

20 Q Was anything done to enhance his visibility in the
21 car?

22 A Sergeant McAllister asked officer Thomason to turn his
23 dome light on.

24 Q And what did Nakelia Williams say at that point?

25 A As soon as the light come on, Nakelia Williams stated

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

222

1 that that was him, that was Dwayne Starks, and the
2 officer was advised that he could go ahead and leave
3 the scene with Mr. Starks.

4 Q Lieutenant Wilkie, after you took these items, as
5 you've already stated you took to SLED, did SLED
6 request that you submit any other items for their
7 analysis?

8 A Yes, sir. SLED requested that I submit a suspect's or
9 subject's standard, which is a DNA sample of the
10 subject, Mr. Starks, Dwayne Starks.

11 Q And how do you go about -- what method do you do to
12 take a DNA sample?

13 A I do what's called a buccal swab. I place gloves on.
14 And we have a package that I ordered that has sterile
15 cotton swabs in it, two of them. At which time, we
16 place them inside the suspects mouth, rub the side of
17 his cheek with a Buccal Swab. After that. you place
18 them back into the paper, the sleeve they come out of,
19 put them in an evidence bag or envelope and seal them
20 all and take them back to SLED for analysis.

21 Q Now, you say once you swabbed his mouth, how do you
22 put them in ---

23 A Put them back inside the paper that they had come out
24 of and place them inside of the envelope.

25 Q And are these sealed up?

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

223

- 1 A They are.
- 2 Q Can anybody else get in there and tamper with it
- 3 without breaking the seal?
- 4 A No, sir.
- 5 Q And what did you do after you collected those samples?
- 6 How long did it take you to take them to SLED?
- 7 A It was, that was on January the 30th.
- 8 Q Of what year?
- 9 A This year, 2013. The suspect's standard was taken,
- 10 and it was taken to Columbia on February the 4th.
- 11 Q And during that four-day period, where was the DNA
- 12 sample, the buccal swab kept?
- 13 A Kept at the Abbeville Police Department.
- 14 Q In what?
- 15 A The evidence room.
- 16 Q And who has a key to that?
- 17 A I do.
- 18 Q Who else has a key that?
- 19 A Nobody.
- 20 Q And so during that, time nobody else could touch it?
- 21 A That's correct. Nobody else could touch it.
- 22 Q Did anyone contaminate it in any way?
- 23 A No, sir.
- 24 Q And who took it to SLED?
- 25 A I did.

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

224

1 Q And once you took it to SLED, who did you give this
2 buccal swab to?

3 A The buccal swab was given to another evidence
4 technician, Courtney Smith, which is a new employee
5 with SLED.

6 THE COURT: So that's State's Exhibit what?

7 MR. BROWN: This is State's Exhibit #35, it's a buccal
8 swab taken ---

9 THE COURT: Any objection to that?

10 MS. BOLEN: No, sir.

11 (Whereupon, a buccal swab is entered into evidence as
12 State's Exhibit's #35, without objection)

13 MR. BROWN Judge, just making it clear, it is in
14 evidence. Right?

15 THE COURT: Okay. Yeah, in evidence without
16 objection.

17 MS. BOLEN: Could we see that?

18 (Mr. Brown shows items to Ms. Bolen and Ms. Nelson.)

19 MR. BROWN: I beg the Court's indulgence.

20 Q And, lastly, Lieutenant Wilkie, during your
21 investigation -- there's, you know, been mention of a
22 gun used in this, in this armed robbery. Were you
23 able to find a gun?

24 A No, sir. We searched this area numerous times that
25 night. The next morning I come back in. Once it was

DIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN

225

1 daylight, me and several other officers, we tried and
2 tried and tried to find that gun.

3 Q But you couldn't find it?

4 A No, sir.

5 Q But it was not without any effort on your part?

6 A No, sir.

7 MR. BROWN: Judge, I have no further questions.

8 THE COURT: All right. Well, we'll reserve your cross
9 examination for after lunch and, also, we're going to stop
10 now for lunch. Take your note pads -- well, give them to
11 the bailiff. Is he back yet? Yeah. Give them to him as
12 you leave, and we'll be back at 2:15. Try to be back in
13 the jury room by 2:15. We'll get started just as soon as
14 we can after that. Have a nice lunch.

15 (Jury out at 12:56 p.m.)

16 THE COURT: You can step down.

17 THE WITNESS: Thank you, sir.

18 THE COURT: All right. We'll be back at 2:15 then.

19 (LUNCH BREAK)

20 THE COURT: Bring the jury in. Let's see. Come on
21 back up, the witness, last witness, Wilkie, come on back
22 up.

23 (Officer Wilkie complies)

24 AFTERNOON - APRIL 2, 2013

25 (Jury in at 2:16 p.m.)

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN 226

1 THE COURT: All right. We have the jury back with us
2 and Mr. Starks is present, along with his attorneys. All
3 right. I believe you had finished direct. We're about to
4 have cross-examination with Mr. Wilkie. You're still under
5 oath.

6 MS. BOLEN: Thank you, Your Honor.

7 CROSS-EXAMINATION

8 BY MS. BOLEN:

9 Q Good afternoon, Investigator Wilkie. I just have a
10 couple of follow-up questions for you from your
11 direct. So, you came to Sawmill Acres after Sergeant
12 McAllister and Corporal Thomason were there. Is that
13 right?

14 A Yes, ma'am.

15 Q Okay. And you saw some of the items that were -- that
16 you ended up collecting. Right?

17 A Yes, ma'am.

18 Q Okay. And the items that you saw were the black
19 pants?

20 A Yes, ma'am.

21 Q Okay. And those are common kinds of pants. Right?
22 You can buy those pretty much anywhere; Walmart,
23 Target, anywhere?

24 A I would suspect so, yes, ma'am.

25 Q And the jacket, likewise, was not a particular

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN

227

1 distinctive jacket. You could buy it at any number of
2 clothing stores?

3 A No, ma'am, not from what I could tell.

4 Q And the ski mask, isn't it true that the packing
5 plants in this area often have their employees wear
6 ski masks, because it's cold inside the packing
7 plants?

8 A Ma'am, I'm not aware of that, to be honest with you.

9 Q Okay. So, you photographed the items on the ground
10 and then also collected them. Right?

11 A Yes, ma'am.

12 Q Okay. And did you collect them as they were found on
13 the ground or did you move them in anyway to
14 photograph them or anything like that?

15 A They were not moved at all until the collection.

16 Q Okay.

17 MS. BOLEN: Your Honor, permission to approach the
18 witness?

19 THE COURT: Yes, ma'am.

20 Q Investigator Wilkie, I'm handing up State's #17. And
21 can you describe what's in that picture?

22 A In this picture is; the rolls of coins, the number
23 three on the yellow sign, and a five dollar bill.

24 Q And is there a hat of any kind of that picture?

25 A No, ma'am.

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN 228

1 Q Okay. But the rolls of coins, does one of them have a
2 paper wrapper on it?

3 A Yes, ma'am.

4 Q Okay.

5 MS. BOLEN: If I can have just a moment, Your Honor.

6 Q And Investigator Wilkie, I'm handing to you what's
7 State's Exhibit #33. Those are the same coins and the
8 five dollar bill?

9 A Yes, ma'am.

10 Q And is there a paper wrapper in there at all?

11 A No, ma'am, it's not.

12 Q Okay. But the paper wrapper was there when you
13 photographed and collected it. Right?

14 A Yes, ma'am.

15 Q But it's not in the evidence bag?

16 A No, ma'am, it's not.

17 Q And you don't have it anywhere else?

18 A It's sitting in the bottom of that box there.

19 Q And you stated that you tried to get some fingerprints
20 off of some of the coins, I believe?

21 A The plastic wrapper around the coins.

22 Q And I believe that there were some pictures of partial
23 prints. Is that correct?

24 A No, ma'am.

25 Q Did you find a partial print on the plastic wrapper?

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN 229

1 A Nothing that was legible that I was able to, you know,
2 look at to get a good fingerprint comparison.

3 Q Okay. Did you do anything further like send it to
4 SLED to see if maybe they could get a fingerprint off
5 of it?

6 A Not those items, not since I'd already used
7 fingerprint powder on them.

8 Q Okay. So, no one else tried to get any fingerprints
9 off. You didn't go to anyone else to try to get
10 prints off any of the coins?

11 A No, ma'am.

12 Q Did you try all of the plastic wrappers or just one?

13 A All of the plastic wrappers. Yes, ma'am.

14 Q There wasn't a single print you could lift?

15 A No, ma'am.

16 Q The five dollar bill you found lying on the ground,
17 did you try to send that to SLED for any kind of DNA
18 analysis?

19 A No, ma'am.

20 Q Or fingerprint analysis?

21 A No, ma'am.

22 Q Okay. You didn't send the coins down either. Right?

23 A No, ma'am.

24 Q Okay. And I believe you testified that you spoke with
25 Ms. Williams that night. Right?

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN 230

1 A I did.

2 Q And she told you that the robber in the store grabbed
3 a plastic bag off of a roll. Right?

4 A Yes, ma'am.

5 Q Did you try to get prints off of that plastic bag at
6 the store?

7 A We were unable to locate that plastic bag.

8 Q Okay.

9 A Or are you talking about the roll inside the store?

10 Q Well, we'll back up for a minute. The one inside the
11 store, the roll that she said the robber took
12 something, took a bag from.

13 A No, ma'am, because that's a item that is, can be
14 touched by anybody in the public. Where that roll of
15 bags sits on the counter, I did view that and did not
16 feel, deem it was necessary to fingerprint that
17 because so many people touch that bag or that roll of
18 bags.

19 Q But she told you that the robber had just touched it.
20 Right?

21 A Yes, ma'am.

22 Q Okay. And you didn't get any prints off of it?

23 A No, ma'am.

24 Q Okay. And you never found any plastic bag around
25 either my client or any of this other stuff that was

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN

231

1 found. Right?

2 A No, ma'am.

3 Q And the jacket was found a good distance away from my
4 client. Right?

5 A Approximately, 25 to 30 yards maybe, maybe a little
6 more.

7 Q Okay. And you didn't get any prints off of the door
8 of the store. Right?

9 A No, ma'am.

10 Q And you testified that you brought these items to
11 SLED. Right?

12 A Yes, ma'am, I did.

13 Q And you said that you brought the buccal swab, I think
14 you said in January of this year?

15 A The buccal swab that was taken from Mr. Starks was
16 taken February the 4th.

17 Q Okay. And the reason you needed to get another sample
18 was that SLED had done a run on the DNA and couldn't
19 get a hit. Right? So, they needed another sample?

20 A They needed the suspect -- a standard from the
21 suspect.

22 Q But they had already tried to run the DNA and couldn't
23 come up with any match. Right? Through CODIS?

24 A If I'm not mistaken, they did come up with a match
25 already on one of the items. They needed it to

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN

232

1 compare against.

2 Q And, Mr. Wilkie, also when you spoke with Ms. Williams
3 that night, she told you that my client had been in
4 the store about an hour, previously. Correct?

5 A Yes, ma'am.

6 Q All right. And I believe it was Ms. Keeno that
7 testified earlier that you got a video from her.
8 Correct?

9 A Yes, ma'am.

10 Q But you didn't ask for any kind of video from earlier
11 that night. Right?

12 A I did ask for it.

13 Q Was one produced?

14 A I never received it from TeaLee.

15 Q Let's talk a little bit about what you did to try to
16 find the gun. Can you just recap the steps you and
17 the officers working with you took to find this gun?

18 A Yes, ma'am. After I was called to the scene and
19 bagged the evidence that we had located, we
20 continuously searched for the firearm that was used.
21 We looked under the trailers, looked in trash cans,
22 looked around the convenience stores, looked in the
23 back of cars in parking lots, searched wooded areas
24 throughout the night. After we -- you know, for a
25 little while we did have to take a break to take him

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN 233

1 to the police department for processing. After that,
2 I come back the next morning during the daylight hours
3 and searched the wooded area. We tried several, you
4 know, looking as much as we possibly could for that
5 gun, and weren't able to locate it.

6 Q It's fair to say you spent, you and other officers,
7 spent several hours looking for this gun?

8 A Yes, ma'am.

9 Q Okay. And officers got the call about this armed
10 robbery and responded right away. Right?

11 A Yes, ma'am.

12 Q Okay. And my client was found within maybe five or
13 ten minutes after the call. Correct?

14 A Within probably less than five minutes. Yes, ma'am.

15 Q And he was found at Sawmill Acres. Right?

16 A Yes, ma'am.

17 Q Okay. And you said you searched under the trailers
18 and in the wooded area?

19 A Yes, ma'am. We were going back ---

20 Q You searched for a while?

21 A Yes, ma'am.

22 Q And then you came back, kept searching. It's safe to
23 say you searched that entire area. Correct?

24 A Yes, ma'am, as best we could.

25 Q Okay. And did not find a gun?

CROSS EXAMINATION OF CHRIS WILKIE BY MS. BOLEN

234

1 A No, ma'am.

2 Q Did you bring the dogs out?

3 A Not to try and locate a firearm. No, ma'am.

4 Q Okay. When you were out searching for this gun, you
5 didn't talk to anyone at Sawmill Acres. Right? You
6 didn't talk to anyone in the trailer park?

7 A Not that night. No, ma'am.

8 Q Did you talk to anyone later?

9 A I talked to several people that were out there. They
10 said they didn't know anything that was going on.

11 Q And did you put that in a supplemental report?

12 A No, ma'am.

13 Q No?

14 MS. BOLEN: If I may just have a moment, Your Honor.

15 Q Just few more questions, Investigator Wilkie. I asked
16 you a little bit about the wrappers on the coins and I
17 know you said you didn't submit them for fingerprint
18 analysis to SLED. Did you send them to SLED for any
19 DNA analysis?

20 A No, ma'am.

21 Q Okay. And you also said that when you were handling
22 these items found, you wore gloves the entire time?

23 A I did.

24 Q And that you would have instructed the officers, and
25 it would be your policy, that they were not to handle

REDIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 235

1 it and if they were, they were to wear gloves?

2 A Yes, ma'am.

3 Q Okay. And Ms. Williams didn't say anything to you
4 about the robber wearing any gloves. Right?

5 A No, ma'am.

6 Q Okay. And she did say that he had touched at least
7 one thing, the robber touched at least one thing in
8 the store. Correct?

9 A Yes, ma'am.

10 MS. BOLEN: I don't have anything further. Thank you,
11 Your Honor.

12 THE COURT: Anything else from the State?

13 MR. BROWN: Just a few things, Your Honor.

14 REDIRECT EXAMINATION

15 BY MR. BROWN:

16 Q Lieutenant Wilkie, Ms. Bolen was asking if you sent
17 coin wrappers and other items down to SLED, but in
18 fact, you did send items down to SLED for DNA testing.
19 Right?

20 A That is correct.

21 Q And what did you send down?

22 A I sent the green jacket, the pants that were, the
23 black pants that were found, the gray ski mask and a
24 green ski mask.

25 Q When SLED requested that you send a subject standard,

REDIRECT EXAMINATION OF CHRIS WILKIE BY MR. BROWN 236

1 did you do that?

2 A I did.

3 Q And with regards to the fingerprinting, you've already
4 explained why a number of the surfaces that she
5 questioned were not suitable for fingerprinting, for
6 there were so many fingers that touched it, smudges,
7 but why would you not fingerprint the door of the
8 Shell Gas Station?

9 A Unless that door is wiped down with some type of
10 cleaning material after every person touches it, there
11 could be hundreds of fingerprints on that door.

12 Q And lastly, Ms. Bolen asked about the jacket location,
13 where the green jacket was located and where you found
14 Mr. Starks that night. Again, where was the green
15 jacket located?

16 A In the vacant lot beside the Cherokee Trail
17 Convenience Store.

18 Q And the Cherokee Trail Convenience Store, where is
19 that located to the Shell Gas Station?

20 A Closer to Sawmill Acres.

21 Q And he was found where?

22 A In Sawmill Acres.

23 Q So, the jacket was found in between the two locations?

24 A Yes, sir.

25 MR. BROWN: No further questions, Your Honor.

DIRECT EXAMINATION OF AMY STEPHENS BY MR. BROWN 237

1 THE COURT: Thank you very much. You can step down
2 and return to your place or wherever they want you to go.
3 Call you next witness.

4 MR. BROWN: The State calls Amy Stephens.

5 (After being duly sworn by the Clerk of Court,

6 **AMY STEPHENS**, testified as follows:)

7 DIRECT EXAMINATION

8 BY MR. BROWN:

9 Q Good afternoon.

10 A Hello.

11 Q Ms. Stephens, you work with SLED, don't you?

12 A Yes, that's correct.

13 Q And what does SLED stand for?

14 A The South Carolina Law Enforcement Division.

15 Q And what is your job title there?

16 A I'm a forensic technician in the evidence control
17 department.

18 Q And what does that mean?

19 A Basically, our daily duties are to log in package
20 entries for evidence for forensic analysis.

21 Q So, your daily duty is to log in or take in evidence
22 brought by law enforcement officers around the state?

23 A That's correct.

24 Q And did you, on occasion, have a chance to receive
25 items from Abbeville Police Department on a Dwayne

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

DIRECT EXAMINATION OF AMY STEPHENS BY MR. BROWN 238

1 Starks?

2 A Yes, I did.

3 Q And what did those items come in?

4 A I placed them in a box whenever I received them. They
5 were originally in a paper bag.

6 Q Okay.

7 MR. BROWN: May I approach, Your Honor?

8 THE COURT: Sure.

9 Q Ms. Stephens, I'm going to show you what's been marked
10 State's Exhibit #36. Tell me what this is.

11 A State's Exhibit #36 corresponds with my chain of
12 custody based on the lab number that I have placed on
13 the outside of the box, which is L12-03527,
14 container "A".

15 Q Now is that -- when is that lab number generated?

16 A Once we receive the evidence at SLED, we use the
17 paperwork submitted by the law enforcement agency to
18 enter the case information into our computer system
19 and our computer system will generate a unique lab
20 number for each case.

21 Q Okay. And when you took in the items from Lieutenant
22 Wilkie, what items did he present you?

23 A I received SLED item #1, which was a pair of black
24 cloth pants with a stripe, size X-large. I received
25 SLED item #2, which was one gray in color ski mask.

DIRECT EXAMINATION OF AMY STEPHENS BY MR. BROWN 239

1 SLED item #3, which was one green colored ski mask
2 and SLED item #4, which was one green in color jacket.

3 Q And those were all submitted by Lieutenant Wilkie of
4 the Abbeville Police Department?

5 A That's correct.

6 Q And all of these items, items 1, 2, 3, and 4 were all
7 placed under the lab number of L12-03527?

8 A That's correct.

9 Q And the corresponding name of the defendant that that
10 lab number corresponds with is Dwayne Starks?

11 A That's correct.

12 MR. BROWN: And Judge at this time, we'd like to put
13 into evidence State's Exhibit #36.

14 THE COURT: Any objection?

15 MS. NELSON: No, sir, Your Honor.

16 THE COURT: All right.

17 (Whereupon, a large box containing four SLED exhibits
18 is entered into evidence as State's Exhibit #36, without
19 objection)

20 Q Now, Ms. Stephens, after you took in these items,
21 1,2,3,4, which are; the black pants, the gray ski
22 mask, the green ski mask, and the green coat or
23 jacket, what was your next step?

24 A Once I received the evidence from the submitting
25 agency, I packaged it in the box, placed SLED evidence

DIRECT EXAMINATION OF AMY STEPHENS BY MR. BROWN 240

1 tape on it and had the submitting officer initial and
2 date the tape. I then transferred that evidence to a
3 secure intake shelf in our evidence room.

4 Q Again, I'm going to...

5 MR. BROWN: Judge, may I approach?

6 THE COURT: Sure.

7 Q Again, I want to -- can you point out the SLED tape
8 and also the initials?

9 A The SLED tape is on all four sides and the submitting
10 officer's initials would be right here on each piece
11 of tape.

12 Q And what initials are those?

13 A It looks like C. W.

14 Q Which would be for Chris Wilkie?

15 A That's correct and the date 3/22/12.

16 Q Now, Ms. Stephens, what's the purpose of putting that
17 SLED tape there?

18 A It's to protect the integrity of the evidence and it's
19 also our policy and procedure to seal every piece of
20 evidence that comes into our door.

21 Q And again, once you did receive items 1,2,3, and 4,
22 where did you place them?

23 A I placed it on the intake shelf in our evidence room.

24 Q And based on the chain of custody that y'all, that
25 SLED generates, who would have been the next person in

DIRECT EXAMINATION OF AMY STEPHENS BY MR. BROWN 241

1 the chain to have taken items 1,2,3, and 4?

2 A Our forensic technician, Doris Yarborough.

3 Q All right. And I'm going to ask you, skipping ahead,
4 also. You also came in contact with items 1,2,3, and
5 4, which were the black pants, the gray ski mask, the
6 green ski mask, and green coat as well as subparts of
7 those items 1.1 and 1.2, 2.1, 2.2, 2.3, 3.1, 3.2 and
8 4.1, and I note that we'll get to that in a few
9 moments, but who did you receive those items from?
10 Those are all subparts of the original items. Correct?

11 A That's correct. I received the sub-items from Verona
12 Gibson, a forensic technician at our evidence
13 processing department.

14 Q And once you received those items, what did you do and
15 when you did receive those items, and in what form did
16 they come in?

17 A They were sealed in a SLED heat-sealed pouch and once
18 I received them, I placed them on an intake shelf in
19 our evidence room.

20 Q And what's the purpose of the heat-sealed pouch?

21 A To maintain the integrity of the evidence.

22 Q And after you stuck them on the intake shelf, or the
23 storage shelf, who came in contact with those, with
24 those pieces of, or those items, after you did that?

25 A Forensic technician Patricia Crooks.

DIRECT EXAMINATION OF DORIS YARBOROUGH BY MR. BROWN 242

1 MR. BROWN: No further questions from this witness.

2 THE COURT: Any cross examination?

3 MS. BOLEN: No cross, Your Honor.

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

5 MS. STEPHENS: Thank you.

6 THE COURT: You can step down. Call your next
7 witness.

8 MR. BROWN: The State calls Doris Yarborough.

9 (After being duly sworn by the Clerk of Court, **DORIS**
10 **YARBOROUGH** testified as follows:)

11 DIRECT EXAMINATION

12 BY MR. BROWN

13 Q Good afternoon, Ms. Yarborough.

14 A Good afternoon.

15 Q Ms. Yarborough, you work with the South Carolina Law
16 Enforcement Division. Correct?

17 A That's correct.

18 Q And that's also called SLED?

19 A Yes, sir.

20 Q How long have you been with SLED?

21 A Almost five years.

22 Q And what is your job description there?

23 A I'm a forensic technician in the evidence control
24 department.

25 Q And what does that mean?

DIRECT EXAMINATION OF DORIS YARBOROUGH BY MR. BROWN 243

1 A That means that the evidence that is submitted
2 throughout, from agencies throughout the State of
3 South Carolina, begins in our office, the login
4 department for SLED.

5 Q And did you become involved with the, just so you
6 know, lab #L12-03527, which corresponds with the
7 Defendant's name, Dwayne Starks, in this case.

8 A Yes, sir.

9 Q And when did you become in contact with these items
10 submitted by the Abbeville Police Department?

11 A I had a request from our evidence processing
12 technician to obtain a container of evidence that she
13 needed to look at.

14 Q And where did you come in contact with the evidence
15 container?

16 A In our secure evidence room.

17 Q And who had that container before you?

18 A Amy Stephens.

19 Q And what was in that container that you took
20 possession of?

21 A A sealed box containing clothing.

22 Q What were the clothes in that?

23 A According to my chain of custody it appeared to be a
24 pair of black cloth pants, clothing described as one
25 gray in color ski mask, clothing described as one

DIRECT EXAMINATION OF VERONA GIBSON BY MR. BROWN 244

1 green in color ski mask, and clothing described as one
2 green in color jacket.

3 Q Ms. Yarborough, after you became in contact with items
4 1,2,3 and 4, what did you do with the secured box?

5 A I took that box, also known as container "A", and
6 transferred it to the custody of Verona Gibson.

7 Q And did you do anything else with the box when it came
8 into your possession?

9 A No, sir.

10 MR. BROWN: No further questions for this witness.

11 THE COURT: Any questions?

12 MS. BOLEN: No, sir, Your Honor.

13 THE COURT: Thank you very much and you can step down
14 and -- do y'all want to excuse her?

15 MR. BROWN: Yes, Your Honor.

16 THE COURT: No objection?

17 MS. BOLEN: No.

18 THE COURT: Thank you for coming. You're free to go.

19 MR. BROWN: Verona Gibson.

20 (After being duly sworn by the Clerk of Court, **VERONA**
21 **GIBSON** testified as follows:)

DIRECT EXAMINATIONBY MR. BROWN

24 Q Good afternoon, Ms. Gibson.

25 A Fine. How are you?

DIRECT EXAMINATION OF VERONA GIBSON BY MR. BROWN 245

1 Q Ms. Gibson, do you work for the South Carolina Law
2 Enforcement Division?

3 A Yes, sir.

4 Q And it's also known as SLED?

5 A Yes, sir.

6 Q How long have you been with SLED?

7 A Approximately, five years.

8 Q And what is your job description ---

9 THE COURT: How long?

10 MS. GIBSON: Approximately, five years.

11 THE COURT: Five years. Okay.

12 A I'm a forensic technician in the DNA evidence
13 processing department.

14 Q And what do you do in that department?

15 A We usually get in larger pieces of evidence such as
16 clothing, car parts, just anything that is bigger
17 than, like, a sheet of, a piece of typing paper, and
18 we process that for body fluids or for touched DNA
19 ownership.

20 Q And once you get an item in, what do you do?

21 A We visually inspect the item if we're looking for body
22 fluids. If we're looking for ownership, we will
23 scrape the areas that most likely touched the skin or
24 if it's touch DNA, we will just swab the item.

25 Q Ms. Gibson, did you become involved in the case with

DIRECT EXAMINATION OF VERONA GIBSON BY MR. BROWN 246

1 lab #L12-03527, which also corresponds to a container
2 "A"?

3 A Yes, sir.

4 Q And is there a defendant's name that is associated
5 with that?

6 A Dwayne Starks.

7 Q Ms. Gibson, who did you receive the container "A"
8 containing items 1,2,3, and 4 from?

9 A Those were given to me by Doris Yarborough.

10 Q And what did you do with those items once you received
11 those in your custody?

12 A I opened the box and each individual item was
13 processed one at a time. They were scraped, the areas
14 that mostly likely impact skin, and those areas were
15 swabbed and any hair that was found was also
16 collected. And on the ski mask, it was requested that
17 we look for saliva. So, we used what's called an
18 alternate light source, it's just a different wave
19 length of light, to determine if there were any areas
20 that fluoresced and those areas were swabbed, as well,
21 on a different swab.

22 Q And you said that you scraped items of clothing or
23 cloth that mostly likely touched skin.

24 A Yes, sir.

25 Q What, for example on the black pants, what area would

DIRECT EXAMINATION OF VERONA GIBSON BY MR. BROWN 247

1 you have scraped?

2 A The waistband and the draw string.

3 Q Okay. And the gray mask, obviously, you said you use
4 black light or fluorescent light to find saliva?

5 A Yes, sir. If there were any areas that could possibly
6 be saliva.

7 Q That would be around the mouth, more than likely?

8 A We do the entire item.

9 Q And what would you scrape for the green coat?

10 A The coat was scraped in the neck area and the cuff
11 areas.

12 Q All right. And after you did your analysis or your
13 scrapings and taking the scrapings and the sampling of
14 the DNA that were more likely that the skin did touch
15 those areas, what did you do with items 1,2,3 and 4?

16 A Well, the items, the swabs or the possible hair that
17 was collected, it's sealed in an envelope with my
18 initials and the date on the back of the envelope on
19 the tape. Those are then sealed inside the heat-
20 sealed pouch with my initials and date on it and then
21 it is forwarded, and in this case, it went back to our
22 evidence control room.

23 Q With regard to item 1, which were the back pants, how
24 many subparts or how many different samples were
25 scraped for DNA samples did you take from those pants?

DIRECT EXAMINATION OF VERONA GIBSON BY MR. BROWN 248

- 1 A I took two sub-items, what we call, the swabs. The
2 other items that came off the item, one was a swab
3 from scraping the waistband and the draw string and
4 one was a possible hair.
- 5 Q And those subpart numbers are 1.1 and 1.2?
- 6 A Yes, sir.
- 7 Q And then for the gray ski mask, which is #2?
- 8 A There were three sub-items. One was the swabbing of
9 the areas of fluorescent. The second was swabbed from
10 scraping the entire item and three was possible hair.
- 11 Q And those subpart items are 2.1, 2.2 and 2.3?
- 12 A Yes, sir.
- 13 Q And then for the green ski mask which is #3?
- 14 A 3.1 is a swab from scraping the entire item and 3.2 is
15 the possible hair.
- 16 Q And those subparts would be 3.1 and 3.2?
- 17 A Yes, sir.
- 18 Q And lastly, the green jacket or coat?
- 19 A There was one swab taken from scraping the neck and
20 the cuff areas.
- 21 Q And that would be item 4.1?
- 22 A Yes, sir.
- 23 Q Now, at that point -- I want to show you what's been
24 marked as State's Exhibit #35.
- 25 MR. BROWN: May I approach, Your Honor?

DIRECT EXAMINATION OF VERONA GIBSON BY MR. BROWN 249

1 THE COURT: Yes.

2 Q I'll show you what's been marked as State's Exhibit
3 #35, take a look at that and tell me what that is.

4 A The larger item here is the heat-sealed pouch that the
5 smaller swab and possible hair envelopes were placed
6 in. It has my name, the date it was sealed, and then
7 my initials and the date it was sealed here, as well.
8 You can also see, such as this envelope where I taped
9 and then wrote my initials and the date, that they
10 were collected as well, and it appears as if these are
11 all the swabs and the possible hair collections that I
12 took.

13 Q So, that would be, just to cover it, it would be 1.1
14 and 1.2, which were the black pants and then three
15 different individual swabs of the gray mask ---

16 A Two swabs and one possible hair, yes.

17 Q That's right. 2.1, 2.2, 2.3. And for the green mask,
18 which would be 3.1 and 3.2, and lastly, the green
19 jacket would be 4.1?

20 A Yes, sir.

21 Q Is that in the same condition as you would have, as
22 when you last saw it sealed?

23 A It is not. It has been opened by the DNA analyst or
24 someone. It was being routed to the DNA department,
25 so it was sealed or resealed by someone.

DIRECT EXAMINATION OF VERONA GIBSON BY MR. BROWN 250

1 Q But after you separated -- now let me go back. You
2 first have contact with 1,2,3, and 4, and after you
3 make the subparts, what do you do with the regular
4 clothing?

5 A They were returned to our evidence control department
6 to go back to the agency that sent it.

7 Q Are they put in the same box as those items?

8 A No, sir. There is -- it's a totally separate
9 container. The other container was labeled container
10 "A". This one is labeled container "B", because the
11 clothing is going back to the agency. This is going
12 on for further processing and we separate those out.

13 Q Okay. And after...

14 MR. BROWN: Judge, at this time, State moves State's
15 Exhibit #35 into evidence.

16 THE COURT: Any objection?

17 MS. BOLEN: No objection, Your Honor.

18 THE COURT: All right.

19 (Whereupon, buccal swabs are entered into evidence as
20 State's Exhibit's #35, without objection)

21 Q Ms. Gibson, after you separate the clothes and put
22 those back in the box that you received them in, what
23 did you do or who did you give items 1,2,3 and 4 to?

24 A They've would have been returned to Amy Stephens in
25 evidence control.

CROSS EXAMINATION OF VERONA GIBSON BY MS. BOLEN 251

1 Q Okay. And then the other subparts?

2 A Those went to Amy Stephens as well.

3 Q Okay.

4 MR. BROWN: Okay. No further questions of this
5 witness.

6 CROSS EXAMINATION

7 BY MS. BOLEN:

8 Q Very, very briefly, Ms. Gibson. So, your job at SLED
9 is to, basically, obtain swabs from items that are
10 submitted to you?

11 A Swabs or cuttings, yes, ma'am.

12 Q Would it be possible for you to obtain a swab from a
13 roll of coins?

14 A It's possible.

15 MS. BOLEN: Nothing further, Your Honor.

16 THE COURT: Thank you very much. You can step down.
17 Call your next witness.

18 MR. BROWN: The State calls Pat Crooks. And, Your
19 Honor, obviously, we'd ask that Ms. Gibson be released from
20 her subpoena.

21 THE COURT: No objection. You're free to go. Thank you.

22 (After being duly sworn by the Clerk of Court, **PAT**

23 **CROOKS** testified as follows:)

24 DIRECT EXAMINATION

25 BY MR. BROWN

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN

252

1 Q Good afternoon, Ms. Crooks.

2 A Good afternoon.

3 Q Ms. Crooks, you work for the South Carolina Law
4 Enforcement Division, which is also known as SLED.
5 Right?

6 A That's correct.

7 Q Ms. Crooks, how long have you worked there?

8 A About thirty years.

9 Q And what is your position at SLED?

10 A I'm a forensic technician in evidence control.

11 Q Now, Ms. Crooks, did you become involved in the case
12 with the lab #L12-03527?

13 A Yes, I did.

14 Q And the name of the defendant who was associated with
15 that lab number is Dwayne Starks?

16 A Yes, that's correct.

17 Q Ms. Crooks, did you become in contact with item -- or
18 when did you come in contact with the items submitted
19 into evidence for this case?

20 A I came into contact first on 10/10/2012. I removed
21 one heat-sealed pouch containing the swabs described
22 as from pants, one pair of black cloth pants with
23 striped sides, XL. I took custody of that evidence
24 from the DNA intake shelf in the evidence room and, in
25 turn, transferred custody of that evidence to forensic

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN

253

1 scientist, Lily Gallman.

2 MS. NELSON: Your Honor, I believe we have a matter
3 of law at this time.

4 THE COURT: Members of the jury panel, I need for you
5 to go to the jury room for a moment please.

6 (Jury out at 2:51 p.m.)

7 THE COURT: What?

8 MS. NELSON: Thank you, Your Honor. I believe we've
9 got an admissibility issue at this point on the swabs
10 because they are -- my understanding of the testimony so
11 far is that those swabs were taken by the last witness,
12 what was her name?

13 MR. BROWN: Verona Gibson.

14 MS. NELSON: Were taken by Ms. Gibson and put on the
15 shelf and given to Amy Stephens. And Ms. Stephens, I
16 believe, has already testified, and I don't, I don't recall
17 any testimony from Ms. Stephens about receiving these swabs
18 into evidence. My recollection was that she just received
19 the box of clothing from Lieutenant Wilkie. So, we've got
20 now, a break in the chain of custody.

21 THE COURT: Well, I don't know. What, what about the
22 swabs? I don't know, is it -- what are you going to
23 testify about? I'm looking at you, Ms. Crooks.

24 MS. CROOKS: Oh, I'm sorry. About my participation in
25 the evidence and where I took the ---

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN

254

1 THE COURT: What did you do? Short hand version, what
2 did you take?

3 MS. CROOKS: I took ---

4 THE COURT: --- You took the swabs and compared them
5 to stuff on the clothing or ---

6 MS. CROOKS: No, sir. No, sir. I don't compare
7 evidence.

8 THE COURT: Okay.

9 MS. CROOKS: I work in the evidence room. I take
10 evidence that's being stored in the evidence room and take
11 custody of it and then transfer it to either a forensic
12 scientist or a forensic technician.

13 THE COURT: And who did you give it to in this case?

14 MS. CROOSK: In this case, I gave it to forensic
15 scientist, Lily Gallman.

16 THE COURT: Okay. What was it that you gave to her?

17 MS. CROOKS: Item 1.1, as one sealed heat-sealed pouch
18 containing swabs described as from pants. One pair ---

19 THE COURT: Described as what?

20 MS. CROOKS: As from pants.

21 THE COURT: From pants.

22 MS. CROOKS: Uh-huh. That's one pair of black cloth
23 pants with striped sides, XL.

24 THE COURT: Okay. Anything else?

25 MS. CROOKS: Yes, sir. I also, item 1.2, which is one

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN

255

1 sealed heat-sealed pouch containing debris from, as
2 described as from pants, the same pair of pants, one pair
3 of black cloth pants with striped sides, XL. I gave that
4 to Lilly Gallman.

5 MR. STUMBO: Judge, that -- may I interrupt? I think
6 the question was, she was -- we took -- when I first called
7 Amy Stephens, who was the first chain of custody witness.

8 THE COURT: Right.

9 MR. STUMBO: She indicated -- the first intake she did
10 was items 1,2,3, and 4. I think I jumped out of sequence
11 so we didn't have to call her back up and she did testify
12 to all the subparts 1.1, 1.2, which she would have gotten
13 after Verona Gibson and then put on the shelf and then Pat
14 Crooks who would have gotten it after Amy Stephens ---

15 THE COURT: What I'm -- all I've got on Amy Stephens,
16 my notes just say she got the things that were in the paper
17 bag and placed them in a box and sealed them up and that
18 was the essence of what she said and put them somewhere and
19 then Doris Yarborough got them and gave them to Verona
20 Gibson. She said she gave them back -- it's my
21 understanding she said she gave them back to Amy Stephens.
22 So, I don't know where that takes us except to Amy
23 Stephens.

24 MR. STUMBO: Well, Your Honor, my notes reflect, and
25 I've been taking them the whole time, Amy Stephens not only

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN

256

1 testified that she took these paper bags and got them to
2 Verona Gibson but when Ms. Gibson takes the swabs and seals
3 them up, that Amy Stephens testified she received those
4 back from Verona Gibson. She's already testified to that.
5 And that's ---

6 THE COURT: I agree that she got them back from -- she
7 got them back from Gibson.

8 MR. STUMBO: And then put them back up on the shelf
9 for Ms. Crooks.

10 THE COURT: I didn't hear that. She said she gave
11 them to Amy Stephens.

12 MS. NELSON: And, Your Honor, ---

13 THE COURT: But I don't know. I mean, if you -- my
14 notes, I just told you what my notes said, and all. If you
15 think your notes are better than mine.

16 MR. BROWN: I typically don't make a habit of making
17 stuff up in my notes, Your Honor, but I'm just saying as an
18 officer of the Court, that's what I heard. I mean, if we
19 can recall Ms. Stephens to testify to that again, but I
20 believe she's already testified to.

21 THE COURT: Well, I'm going to let her proceed. Bring
22 the jury in.

23 (Jury in at 2:57 p.m.)

24 THE COURT: All right. You may continue to examine
25 the witness.

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN

257

1 MR. BROWN: Thank you, Your Honor.

2 CONTINUED DIRECT EXAMINATION

3 BY MR. BROWN:

4 Q Ms. Crooks, now where did you receive items, all the
5 subparts of items 1,2,3, and 4 and also items 1,2,3,
6 and 4? Do you understand what I'm saying?

7 A Okay. Items 1.1 and 1.2, I took those from the DNA
8 intake shelf 81.

9 Q And who -- who had custody of those before they went
10 to the DNA self?

11 THE COURT: Do you know?

12 MS. CROOKS: Yes, sir. Amy Stephens.

13 Q Okay. And with regards to items 2.1, 2.2 and 2.3,
14 where did you become, when did you become in control
15 of those items?

16 A That was on 10/10/2012. I took custody of those items
17 from DNA intake shelf 81 and I transferred those items
18 to forensic scientist, Lily Gallman.

19 Q And you also transferred 1.1 and 1.2 to Lily Gallman.
20 Is that correct?

21 A Yes, sir.

22 Q And who would have had control over those items before
23 they went to shelf, I believe, 81, before you came in
24 contact with them?

25 A Forensic technician, Amy Stephens.

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN 258

1 Q And now, moving to sub-items #3.1 and 3.2, when did
2 you become in contact with those and who had it before
3 you became in contact with them?

4 A Items 3.1, on 10/10/2012, I removed that evidence from
5 DNA intake shelf 81 and I transferred that evidence to
6 forensic scientist Lily Gallman.

7 Q And who would have had those items before they were on
8 the DNA shelf 81?

9 A Forensic technician, Amy Stephens.

10 Q And lastly, item 4.1. When did you come in contact
11 with that item and who -- and where did you get it?

12 A On item 4.1, I took custody of that evidence also from
13 DNA intake shelf 81 and transferred that evidence to
14 forensic scientist, Lily Gallman.

15 Q And who put those items on intake shelf 81?

16 A Forensic technician, Amy Stephens, put the items on
17 that shelf.

18 Q Now, Ms. Crooks, you also came in contact with a
19 number of items marked as #1, #2, #3 and #4. Correct?

20 A On item #1, I did not have contact with that evidence
21 until after it had been examined and I came in contact
22 with it to return it to the agency, in person, and
23 that would have been James. M. Reepe with The
24 Abbeville P.D.

25 Q And did you do the same with #2, #3 and #4? Are those

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN 259

1 all in the same box?

2 A That was in item, container "A"?

3 Q Yes, ma'am.

4 A Yes, I did.

5 Q And where did you get container "A" from?

6 A I took container "A" from bin 16, shelf "F" in the
7 evidence room and returned it to the agency in person.

8 Q And can you tell who had -- who was in control of
9 container "A" before it was placed on that bin shelf?

10 A Forensic technician, Amy Stephens.

11 Q So, let me just get all this straight so we're all
12 clear. All the subparts, 1.1, 1.2, 2.1, 2.2, 2.3,
13 3.1, 3.2 and 4.1, after you came in contact with all
14 of the swabs, you then gave those to Lily Gallman.

15 A Correct.

16 Q And #1, #2, #3, and #4, which were in container "A",
17 all were delivered back to or given to James Reepe
18 with the Abbeville P.D.

19 A That's correct.

20 MR. BROWN: No further questions.

21 THE COURT: Any cross examination?

22 MS. BOLEN: No, sir.

23 THE COURT: All right. Thank you very much. You're
24 excused.

25 MR. BROWN: Judge, actually, before I let her down ---

DIRECT EXAMINATION OF PAT CROOKS BY MR. BROWN 260

1 THE COURT: Okay. You've got something else?

2 MR. BROWN: I do.

3 Q Ms. Crooks, and I'm taking you out of the order
4 process. When this item came into SLED custody, did
5 you become in custody of item #5?

6 A Yes, I did.

7 Q And what was item #5?

8 A Item #5 is described as one sealed, heat-sealed pouch
9 containing a buccal swab described as subject buckle
10 swab, collection kept for DNA, for DNA testing.

11 Q And Ms. Crooks, who did you receive that buckle swab
12 from for item #5?

13 A I took item #5 from DNA intake shelf 36.

14 Q And who had that item before it was placed on the
15 intake shelf?

16 A Forensic technician, Courtney Smith.

17 Q And Ms. Crooks, after you came in contact with it,
18 after you took it off the intake shelf, who did you
19 give it to?

20 A I gave that to forensic scientist, Lily Gallman.

21 Q Just so we're all clear, item #5, which was the buccal
22 swab, you say whose buccal swab is that?

23 A It's described as subject buckle swab.

24 Q And who would be the subject on your report?

25 A That would be the Defendant.

DIRECT EXAMINATION OF COURTNEY SMITH BY MR. BROWN 261

1 Q Dwayne Starks?

2 A Yes, sir.

3 MR. BROWN: No further questions.

4 THE COURT: Now, any other questions from you?

5 MS. BOLEN: No, sir.

6 THE COURT: Thank you very much then. I'll let you
7 step down and call your next witness.

8 MR. BROWN: The State calls Courtney Smith.

9 (After being duly sworn by the Clerk of Court,
10 **COURTNEY SMITH** testified as follows:)

11 DIRECT EXAMINATION

12 BY MR. BROWN:

13 Q Good afternoon, Ms. Smith.

14 A Good afternoon.

15 Q Ms. Smith, you work with the South Carolina Law
16 Enforcement Division. Correct?

17 A Yes.

18 Q That's also known as SLED?

19 A Yes.

20 Q And what is your title there?

21 A I'm a forensic technician in the evidence control
22 department.

23 Q And what are your duties there?

24 A My duties are to log in, package, and transfer the
25 evidence for forensic analysis.

DIRECT EXAMINATION OF COURTNEY SMITH BY MR. BROWN 262

1 Q Okay. And Ms. Smith, did you come in contact, or did
2 you become involved in case L12-03527?

3 A Yes, according to my chain of custody.

4 Q And did you come in contact with item #5?

5 A Yes. SLED item #5.

6 Q And what is SLED item #5?

7 A It's a buccal swab described as the subject buccal
8 swab collection kit for DNA testing.

9 THE COURT: What is that word you're using before
10 swabs?

11 MS. SMITH: Buccal swab.

12 THE COURT: Buckle, b-u-c-k-l-e?

13 MS. SMITH: B-u-c-c-a-l.

14 THE COURT: B-u-c-c-a-l. Okay.

15 Q All right. Ms. Smith, once you took that into
16 evidence -- or when did you become in contact with
17 item #5?

18 A I received item #5 from Lieutenant C.S. Wilkie of the
19 Abbeville Police Department on February 4th, 2013 at
20 11:17 a.m.

21 Q And Ms. Smith, what did, what did you do when you
22 received that item #5?

23 A I packaged the item number, I mean the item, according
24 to our policies and procedures, and I used the SLED
25 request form and logged the information into our

DIRECT EXAMINATION OF COURTNEY SMITH BY MR. BROWN 263

1 computer system which generated a unique lab number
2 for the evidence and then I transferred the evidence
3 to our secure intake location in our evidence room.

4 Q And the number that your computer system gave you for
5 that was #5?

6 A It generates item #5, but it generates the unique lab
7 number which was L12-03527.

8 Q To associate it all with, with all the other evidence
9 already in custody of SLED?

10 A Yes.

11 Q So, you said you were given item #5 from Lieutenant
12 Wilkie of the Abbeville Police Department?

13 A Yes.

14 Q And then you placed item #5, which is the buccal swab
15 of the Defendant in this case, where?

16 A Into a heat-sealed pouch and I sealed it.

17 Q And then what did you do with it?

18 A I had Lieutenant Wilkie initial and date across the
19 heat seal.

20 Q And after you did that, what did you do with the
21 pouch?

22 A I transferred it to our secure intake location in our
23 evidence room.

24 Q I'm going to show you what's already been put into
25 evidence as State's Evidence #35 or State's Exhibit

DIRECT EXAMINATION OF COURTNEY SMITH BY MR. BROWN 264

1 #35.

2 THE COURT: Is that in evidence?

3 COURT REPORTER: We've got two #35s.

4 THE COURT: I'm sorry?

5 COURT REPORTER: We've got two, #35s, I think. Don't
6 you?

7 THE COURT: We're talking about State's #35. I've got
8 it in evidence without objection.

9 COURT REPORTER: Yes.

10 THE COURT: You're right. I've got two of them here.

11 COURT REPORTER: I had it written down just swabs and
12 I thought I'd already marked it and I didn't.

13 THE COURT: Well, let's straighten it out.

14 COURT REPORTER: Okay. It's #37.

15 THE COURT: This, the last one is #37?

16 COURT REPORTER: Yes, sir. Well, no, not the one he
17 just handed her.

18 MS. BOLEN: It's the swab from the clothing now,
19 that's #37?

20 MR. BROWN: The swabs from the clothing are #37 now.

21 MS. BOLEN: The buccal swab is #35.

22 COURT REPORTER: Yes. I'm sorry.

23 MR. BROWN: Are they both in evidence?

24 THE COURT: I have them both in evidence.

25 COURT REPORTER: I do, too.

DIRECT EXAMINATION OF COURTNEY SMITH BY MR. BROWN 265

1 THE COURT: It won't hurt to offer it again.

2 MR. BROWN: Judge, at this time, I want to make sure
3 that I offer what's been now been marked as States Exhibit
4 #37, which was previously ---

5 THE COURT: One of the 35 ---

6 MR. BROWN: --- previously marked #35, as State's
7 Evidence #37.

8 THE COURT: All right. And what is it?

9 MR. BROWN: This is all the swabs of the clothing that
10 Verona Gibson ---

11 THE COURT: All right.

12 MR. BROWN: --- logged at SLED.

13 THE COURT: Any objection to those?

14 MS. NELSON: The only thing I'll say, Your Honor, I
15 know we've already made no objection to the admission of
16 that evidence. I would just like to, and I would concede
17 that I may have misunderstood or not fully heard Ms.
18 Stephens' testimony earlier, but just for purposes of the
19 record would like to renew the objection we made ---

20 THE COURT: What is that?

21 MS. BOLEN: --- not too long ago relating to the chain
22 of custody.

23 THE COURT: Chain of custody. Okay.

24 MS. BOLEN: On item #37.

25 THE COURT: All right.

DIRECT EXAMINATION OF COURTNEY SMITH BY MR. BROWN 266

1 MS. BOLEN: Which was the clothing swabs.

2 THE COURT: All right. Okay. I appreciate your
3 position. I overrule ---

4 MS. BOLEN: But I do understand we might have missed
5 something ---

6 THE COURT: I'll overrule your objection.

7 MS. BOLEN: Yes, sir.

8 (WHEREUPON, clothing swabs are entered into evidence
9 as State's Exhibit #37, over objection)

10 THE COURT: Okay. Go ahead.

11 Q Now, Ms. Smith, I want to show you what's State's
12 Evidence #35. Tell me what that is.

13 A According to my chain of custody, this is the buccal
14 swab that I logged in.

15 Q And the buccal swab that belongs to, this is a buccal
16 swab of who?

17 A To the Defendant.

18 Q And you got that from?

19 A Lieutenant Wilkie.

20 Q And then you placed that on what evidence shelf?

21 A I placed it on DNA intake shelf 36.

22 Q And who came in contact with this -- who took it off
23 that shelf?

24 A Forensic technician, Patricia Crooks.

25 Q She also goes by Pat Crooks?

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

267

1 A Pat Crooks.

2 MR. BROWN: No further questions for Ms. Smith.

3 THE COURT: Any cross examination?

4 MS. BOLEN: No, sir, Your Honor.

5 THE COURT: Thank you very much. You can step down.

6 Next witness.

7 MR. BROWN: Judge, I beg the Court's indulgence.

8 MR. STUMBO: Your Honor, the State would call forensic
9 analyst, Lily Gallman, to the stand.

10 THE COURT: Lily Gallman.

11 (After being duly sworn by the Clerk of Court, **LILY**
12 **GALLMAN**, testified as follows:)

13 DIRECT EXAMINATION

14 BY MR. STUMBO:

15 Q Good afternoon, Ms. Gallman.

16 A Good afternoon.

17 Q Where are you employed?

18 A I'm employed with the South Carolina Law Enforcement
19 Division.

20 Q Okay. How long have you been with SLED?

21 A I began working with SLED in January of 1990.

22 Q So, twenty-three years with SLED?

23 A Yes, sir.

24 Q Okay. What is your current role there at SLED?

25 A I'm employed as a forensic DNA analyst.

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 268

1 Q Okay. Would you tell the jury a little bit about your
2 training, background, and education.

3 A Prior to begin working at the South Carolina Law
4 Enforcement Division, I worked with the University of
5 South Carolina as a research specialist in the area of
6 genetics. Once I began working with SLED, I was hired
7 as a forensic DNA analyst. I've attended the DNA
8 typing schools at the FBI. I've also taken advanced
9 genetics and statistic courses, all to help me in
10 doing a better job at SLED and I've also been trained
11 by a serologist in the area of forensic serology.

12 Q Okay. How long have you been conducting DNA analysis
13 with SLED?

14 A Since, probably, the very beginning. Twenty-three
15 years at SLED and, approximately, ten years prior to
16 that doing DNA work at USC.

17 Q Approximately, how many cases have you analyzed in
18 those twenty-three years at SLED?

19 A Hundreds.

20 Q Now, how many times have you testified in the courts
21 of this state as an expert in this field?

22 A Approximately, sixty, in DNA.

23 Q Approximately sixty? Is that what you said?

24 A Yes, in DNA.

25 MR. STUMBO: Your Honor, at this time, the State would

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 269

1 offer Ms. Gallman as an expert in the field of Forensic DNA
2 Analysis.

3 THE COURT: Any questions you want to ask her about
4 her qualifications?

5 MS. BOLEN: No, sir, Your Honor.

6 THE COURT: All right. Go ahead and ask your
7 questions.

8 MR. STUMBO: Thank you, Judge.

9 Q Ms. Gallman, would you tell the jury what DNA, what it
10 stands for.

11 A DNA stands for deoxyribonucleic acid. It's considered
12 to be the blueprint of the body. Everyone's DNA is
13 unique except for identical twins and since everyone's
14 DNA is unique, we're able to take samples from a crime
15 scene, which would be evidence, and compare it to a
16 known standard be it from the victim or the subject in
17 a particular case to determine whether it matches or
18 it does not match.

19 Q So, the only people that have the same DNA in the
20 world are identical twins. Is that correct?

21 A That's correct.

22 Q Now, as far as your analysis or comparison on DNA,
23 what do you compare?

24 A It depends on what type sample it is. We receive
25 swabs from different samples, or cuttings from

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 270

1 different samples, and we take it through a process to
2 extract the DNA from those samples and then we also
3 extract DNA from the standard, be it blood or from a
4 buccal swab which it's a, it's a swab from inside of
5 the mouth, and we use that to compare the two.

6 Q What does DNA look like if you see it through a
7 microscope?

8 A Like strands, but basically, we can't see anything
9 with the naked eye.

10 Q Okay. Through, through microscopic analysis, what's
11 the shape of a DNA strand?

12 A It's a double helix, meaning it's, if you, it's
13 twisted around itself. If you twist it, it will look
14 like a ladder.

15 Q Okay. And these places on the DNA strand, are those
16 things that you're able to see and analyze through,
17 through a microscope?

18 A Yes. We look at different chromosomes with our
19 analysis to determine a person's DNA profile.

20 Q Okay. Now, did you have an occasion to analyze
21 evidence in a case involving the Defendant, Dwayne
22 Starks?

23 A Yes, I did.

24 Q Okay. Do you have your report with you?

25 A Yes, I do.

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

271

1 MR. STUMBO: If I may approach the witness, Your
2 Honor?

3 THE COURT: Go ahead.

4 Q Ms. Gallman, I'm gonna show you what's been marked for
5 I.D., at this point only, as State's Exhibit #26.
6 Have you seen this before?

7 A Yes. It's the chart that's the last page of my
8 supplemental report.

9 Q Okay. It's just an enlarged version or copy of that
10 report?

11 A Yes, it is.

12 Q Okay.

13 MR. STUMBO: Your Honor, at this time I'd move State's
14 #26 into evidence with permission to publish to the jury.

15 THE COURT: Any objection?

16 MS. BOLEN: No objection, Your Honor.

17 THE COURT: Other than your continued objection on the
18 chain of custody. All right. Go ahead.

19 MS. BOLEN: Yes. Thank you, Your Honor.

20 (WHEREUPON, a chart from Ms. Gallman's report is
21 entered into evidence as State's Exhibit #26, without
22 objection)

23 Q All right. Ms. Gallman, if you could, pointing to
24 these little columns here that are going down the page
25 that start with a "D", could you explain to the jury

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

272

1 what those columns signify?

2 A Okay. Is it okay if I stand?

3 THE COURT: Yes. Sure. You can move about freely.

4 A Okay. What you're seeing here is the last page of all
5 of the reports we issue on DNA. We put them on the
6 chart with the evidence and whatever standard that is
7 submitted to us and why I say this is my supplemental
8 report, the first report that I issued did not have
9 the standard from Mr. Starks on the chart. It only
10 had the evidence that was submitted. So, once I
11 received his standard, I compared it to the evidence
12 to determine whether it was a match or was not a
13 match.

14 THE COURT: When you say the standard from him, you're
15 talking about that swab of his that was submitted?

16 MS. GALLMAN: Yes, sir.

17 A I'm talking about, they submitted, brought the swabs
18 from Mr. Starks. It could have been his blood, but
19 they used a buccal swab and it is the same thing.

20 Q And just, just to interrupt you just briefly Ms.
21 Gallman, did you request the suspect's standard, the
22 buccal swab from the agency?

23 A Yes. I asked if they had a standard, because I did
24 have DNA profiles from the evidence and I had enough
25 information to compare to determine whether someone

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 273

1 matches or whether they could be included or excluded
2 in the evidence.

3 Q Okay. And ultimately, did they submit the buccal swab
4 to you for analysis?

5 A Yes, they did.

6 Q Okay. And just briefly, you can stay standing there.
7 I'm gonna show you what's in evidence as State's
8 Exhibits #35 and #37. If I could just have you look
9 at #35 and #37 here briefly. Let me know when you're
10 done.

11 A This is item #35, which is the buccal swab submitted
12 using the buccal swab collection kit. It's the buccal
13 swab from, that was submitted as being from Mr.
14 Starks. That's what that -- and in this pouch, you'll
15 find the cuttings, I'm sorry, the swabs and whatever
16 debris that were collected during the evidence
17 process.

18 Q Okay. And whose name is that on the front of this
19 package of swabs ---

20 A That's ---

21 Q --- in State's #37?

22 A That's Verona Gibson. She is the evidence processing
23 technician who made the swabs and did all the
24 collection, placed them in this pouch and sealed it
25 and then placed it in the DNA, on the DNA shelf so

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

274

1 that I could pick it up and do analysis on it.

2 Q Okay. When you received State's #35 and State's #37,
3 were they sealed?

4 A Yes, they were.

5 Q Had they been tampered with in any way?

6 A No.

7 Q Did it appear that they'd been opened?

8 A No. If they had been, based on our protocol, we're
9 supposed to backtrack and find out exactly why this
10 pouch is opened, when the evidence was put in this
11 pouch, what was supposed to be in there.

12 Q And -- and what's the reason for that? Why would you
13 backtrack that?

14 A It's all based on integrity. We want to make sure
15 that what you're getting is exactly what the agency is
16 expecting you to have to do an analysis on.

17 Q Okay. And these packets, State's #35 and State's #37,
18 you indicate, were both sealed when you received them?

19 A Yes, they were.

20 Q Okay. Did you cut them open and -- for analysis?

21 A Yes, I did.

22 Q All right. And did you re-seal them after you got
23 done?

24 A Yes.

25 Q Okay.

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

275

1 A I sealed it here and you have my initials and the seal
2 date. And on this particular pouch, the heat seal was
3 a little too hot, but it did seal it and then my
4 initials and the date that I sealed this is right
5 here. (Indicating)

6 Q Okay. It's on the seal.

7 A Yes.

8 Q So, it hasn't been opened? It doesn't appear to have
9 been opened since you signed off on it that day and
10 put it back into evidence.

11 A That's correct.

12 Q Okay.

13 A It has not been.

14 Q Ms. Gallman, if you could just stay there. Now, this
15 chart here, you say you did analyze these items that
16 were in State's #37, the packets that Ms. Gibson
17 provided to you. If you could identify those on the
18 chart for the jury.

19 A Okay. In that first column, we placed the
20 identification of each sample and this the standard
21 from Mr. Starks or the swab from the pants, which is
22 item #1.1. 2.1 and 2.2 are swabs from the ski mask.
23 3.1 is also a swab from the ski mask and item 4.1 is a
24 swab from the jacket. And they were given to me as
25 items or swabs for ownership. When you receive

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 276

1 samples, they always indicate whether they are looking
2 for blood or for semen or looking for ownership and in
3 this particular case it was for ownership.

4 Q Okay. Were you able to develop a DNA profile on any
5 of those items from the swabs from the clothing?

6 A Yes, I did. I need to back up just for one second so
7 that this will make sense to you. You get part of
8 your DNA from your mother and part from you father. If
9 you look at Mr. Stark's DNA profile, which runs across
10 that first row, you don't see any more than two
11 numbers. So, that's just him. But when you look at
12 the samples that were collected from the evidence
13 you'll see three or more numbers, meaning there's a
14 mixture there of more than one individual and that's
15 how my report would read that the DNA obtained from,
16 for example, sample #1.1, it's a mixture of at least
17 two individuals. But in sample #1.1 which is a swab
18 from the ski mask, I was able to distinguish a major
19 and a minor contributor which means that there's more
20 of one person's DNA than of another. And in
21 particular, in that particular sample 1.1, there's
22 more DNA of Mr. Stark's than it is of the minor
23 contributor. So, I was able to say that the major DNA
24 profile developed from the major contributor to this
25 sample matches the DNA profile of Dwayne Starks.

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 277

1 Q Okay. And when you say major and minor contributor,
2 now does that just mean that there's possibly another
3 individual who could have contributed to that ---

4 A That's ---

5 Q --- that item?

6 A Yes. That's what I'm saying. Now, this is a mixture
7 and I have more in that particular sample, more of Mr.
8 Stark's DNA than of the minor contributor.

9 Q And is that what makes Mr. Starks here the major
10 contributor in this sample?

11 A Yes, it does.

12 Q Okay. You're referring to the swab from the pants,
13 which is item 1.1. Is that correct?

14 A That's correct.

15 Q And if you could just show, as far as these numbers,
16 what does that mean just for the jury's edification?

17 A Like I said, you get a part of your DNA from your
18 mother and a part from your father. If you look at
19 the first column, you see only a 14 there. That means
20 that the DNA that -- it's the -- the DNA that's there
21 is how many repeats this person makes up for this
22 particular section of DNA. His mother and father both
23 make 14. That does not mean that they are related or
24 anything like that but they only make but each one of
25 them make fourteen and that's why you only see one

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 278

1 number there. But in the next column you see a 28 and
2 a 29. So, there's 28 repeats of that same DNA, either
3 from his mother or father, and 29 repeats, either from
4 his mother or father.

5 Q Okay.

6 A And that's what the numbers are.

7 Q Okay. And you've said on item 1.1, the major
8 contributor, based on your analysis comparison, was
9 Dwayne Starks, the Defendant.

10 A That's correct.

11 Q Okay. Now, item 2.1, which is labeled the ski mask,
12 were you able to develop a DNA profile on 2.1?

13 A No, I was not. It was insufficient for reliable
14 interpretation. It's not enough information there to
15 include or exclude any individual.

16 Q Okay. Is that what the little dashes signify in the
17 boxes, that you could not develop that repeat
18 that you were talking about?

19 A Those dashes mean that at particular area on the
20 chromosome, I was not able to get a DNA profile from
21 that particular area on the chromosome.

22 Q All right. How about item 2.2 from the ski mask? How
23 about that sample? Were you able to make any
24 comparisons there?

25 A Item 2.2, the swab from the ski mask, is also a

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

279

1 mixture. I was able to distinguish between a major
2 and minor contributor and in this particular sample,
3 also, Mr. Starks is the major contributor. So, I was
4 able to match into the major contributor to that
5 sample.

6 Q Okay. And item 3.1, which is also labeled and is a
7 different ski mask and has a different number there, a
8 three instead of two, what profile, if any, were you
9 able to develop from 3.1?

10 A Hold on. I'll tell you exactly what I said for that
11 item. Sorry.

12 Q Take your time.

13 A Item 3.1 is a mixture of at least two individuals.
14 Dwayne Starks cannot be excluded as a contributor to
15 this mixture. Based on the information I have for
16 3.1, I could not exclude him but I could not give you
17 a statistical value for that particular sample. There
18 was no indication of him not being there, but I could
19 not give you a statistical value for that sample.

20 Q So, that particular sample is inconclusive?

21 A Well, I'm saying he could not be excluded from that
22 sample. It's just not enough information there to
23 say. If I say he matches in a particular sample, we
24 are required to give a statistical value to that and
25 since I cannot, the only thing I can say is whether

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

280

1 he's included or excluded.

2 Q When you say, "statistical value," you mean one out of
3 a particular number?

4 A Like sample #1.1. When you look at the major
5 contributor, it's approximately 1 in 2.3 quadrillion.

6 Q Okay. Now, lastly you have item 4.1 that's labeled,
7 the jacket. Were you able to develop a profile of
8 that?

9 A Yes, I was. It's also a mixture, but in this
10 particular sample I was not able to distinguish from
11 major or minor contributor. The DNA in that sample
12 was equally distributed between individuals involved.

13 Q Okay. And in relation to or in comparison to item #5,
14 the Defendant's DNA swab, were you able to make any --
15 can you render any opinion comparing those two items?

16 A Say it again?

17 Q Can you compare item #5 and item #4.1? Is there --
18 what's your opinion as to those comparisons?

19 A For item 4.1, and comparing item #5, which is Dwayne
20 Stark's, he could not be excluded as a contributor to
21 this mixture and I was able to generate a statistical
22 value for that. I need to step back to item 3.1, I'm
23 sorry.

24 Q Yes, ma'am.

25 A On that particular sample, I was only -- I able to

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 281

1 only use one area on the chromosome for statistical
2 value. So, I still could only say that he could not
3 be excluded, but the statistical value is extremely
4 low on that sample.

5 Q Okay. Let's -- in summary here, what is your opinion,
6 in terms of statistical value, comparing the
7 Defendant's DNA to the swab from the pants? Start
8 with 1.1?

9 A Okay. Item #1.1, as I said, is a mixture and I was
10 able to distinguish a major and minor contributor in
11 that particular sample and since I was able to
12 distinguish a major and a minor contributor to that
13 sample, I generated a statistical value for the major
14 contributor. And that ---

15 THE COURT: Let me ask, let me interrupt you so I can
16 understand. What do you, and you may have said this
17 before, but what do you mean by major contributor?

18 MS. GALLMAN: It means, like if I swabbed your pen and
19 someone else used your pen, but you were the major user of
20 it, more of your DNA is on that pen than say mine if I
21 touched it and so when I was able to distract DNA and
22 generate a DNA profile, I'll pick out more of you and you
23 would be considered the major contributor in that sample.

24 THE COURT: Do you have any, do you have any number to
25 assign to that, like there was two times as much DNA of the

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

282

1 major contributor as the minor contributor or any number
2 you can assign to that other than just say, major and
3 minor?

4 MS. GALLMAN: No, sir. We only need to distinguish
5 whether this is a major contributor. When we look at the
6 data, we can ---

7 THE COURT: So, it could be fifty-one to forty-nine?

8 MS. GALLMAN: No, we -- you have to be over sixty
9 percent. I'm sorry.

10 THE COURT: Over sixty percent.

11 MS. GALLMAN: I didn't understand exactly what you
12 meant.

13 THE COURT: Okay.

14 MS. GALLMAN: It has to be over sixty percent
15 difference in the ---

16 THE COURT: So, major means sixty percent or more and
17 minor means forty percent or less?

18 MS. GALLMAN: Yes, sir.

19 THE COURT: Okay.

20 Q All right. As far as statistical comparisons and the
21 number you came up with, what is the statistical
22 analysis for item 1.1, the major contributor on the
23 pants?

24 A Okay. I am reading from my report, and it's states
25 that the probability of randomly selecting in

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 283

1 unrelated individual matching the major contributor to
2 this item, which is item #1.1, is approximately one in
3 2.3 quintillion.

4 THE COURT: 2.3 what?

5 MS. GALLMAN: Quintillion.

6 Q How many zero's are behind quintillion?

7 A I believe it's eighteen.

8 Q Eighteen zero's?

9 A Yes.

10 Q What's the population of the world?

11 A Between six and seven billion.

12 Q Which is nine zero's, if I'm correct.

13 A This is a lot of money.

14 Q Okay. All right. Were you able to come up -- you say
15 2.1, you were not able to come up with a sufficient
16 profile there. How about 2.2? You did have a major
17 contributor there, which was the Defendant's DNA. Do
18 you have a statistical number ---

19 THE COURT: What item is that?

20 MR. STUMBO: Item 2.2, which is the ski mask.

21 THE COURT: The ski mask.

22 A The statistical value would be the same as 1.1.

23 Q Okay.

24 A Because the profile is the same. So, it would be 2.3,
25 quintillion.

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 284

1 Q Okay. Now, as the Judge was asking earlier about over
2 sixty percent, do you give a number between sixty and
3 a hundred as to how major of a contributor Mr. Starks
4 was for this item?

5 A I'd have to look at my data.

6 Q So, that's not something you put in your report?

7 A No, sir.

8 Q Now, let's go to item 3.1, were you able to come up
9 with statistical number for item 3.1?

10 A Yes, it was just 1 in 15 because I was only able to
11 use this one locus or area right down here, on one
12 area. Because of the lack of information that was
13 provided, he was only 1 in 15. When you generate a
14 statistic on a sample, the statistical value for each
15 one of these dipping areas on a chromosome, you
16 multiply it against each other and that's why, if you
17 got a full profile, you're able to get 1 in 2.3
18 quintillion. Only when you have 1 by itself it is
19 only giving you the frequency of that event and gives
20 a population on it, 1 in 15.

21 Q Okay. Then if I -- looking at the chart correctly,
22 six of the sectors or places on the chromosome, on the
23 strand here, didn't render any information on 3.1.
24 Correct?

25 A That's correct.

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO

285

1 THE COURT: What was that? What item was that?

2 MR. STUMBO: 3.1.

3 THE COURT: What is it?

4 MR. STUMBO: It's the second ski mask, Your Honor.

5 THE COURT: The second ski mask.

6 MR. STUMBO: Right. Which, I believe, is State's #30.
7 It's in evidence as State's #30.

8 THE COURT: All right.

9 Q Now, last, the jacket, item 4.1, the swab from the
10 jacket. Were you able to develop a complete profile
11 for the jacket?

12 A Again, this item generated a mixture, but I was not
13 able to distinguish a major or minor contributor so,
14 what's generated from that is what's called a mixture
15 statistical of value for that item and for that
16 particular item, the mixture, that is 1 in 1100.

17 Q Okay. 1 in 1100?

18 A Huh? Yes.

19 Q On the jacket?

20 A Yes. There's certain -- based on our protocol that we
21 follow, there's, if there is a locus or area that has
22 a number in parentheses, you not able to use that in
23 your statistical calculations. So, each one that
24 drops out, the number changes.

25 Q Okay. And just one last question, this "X" and "Y",

DIRECT EXAMINATION OF LILY GALLMAN BY MR. STUMBO 286

1 what are those again? Are those chromosomes?

2 A This is an antigen, which is the sex chromosome. "X"
3 and "Y", no male. "X" is just for female. In this
4 particular sample, there was a y there but it didn't
5 rise above the threshold that we use in the
6 laboratory.

7 Q And that was in 2.1, the incomplete profile?

8 A Yes.

9 Q Okay. But all the other ones you have "X" and "Y",
10 what does that mean?

11 A Meaning, a male.

12 Q Okay. It's a male contributor?

13 A Yes.

14 Q You can return to the stand Ms. Gallman. Thank you.
15 And I believe, you may have testified to this earlier,
16 but the swabs, when you were done with your analysis
17 and your comparison, did you seal them up and return
18 them to evidence?

19 A Yes, I did.

20 Q Okay. And they were to be returned to the agency
21 after ---

22 A Yes.

23 Q --- you put them back into evidence. And who did you
24 -- do you still have the chain of custody up there?
25 Who were they submitted to after they left your

CROSS EXAMINATION OF LILY GALLMAN BY MS. BOLEN

287

1 department?

2 A I put them in the DNA return and then the DNA forensic
3 technician, Sherry Brown, retrieved them from there.

4 Q Okay. And I believe you looked at this earlier, but
5 this seal, is that your initials and your writing? It
6 says 3/28.

7 A Yes.

8 Q That's the date you sealed them back up?

9 A Yes.

10 Q And does this State's #35 and #37 appear to have been
11 tampered with or opened ---

12 A No.

13 Q --- since that time?

14 MR. STUMBO: I beg the Court's indulgence, Your Honor.
15 No further questions at this time, Your Honor. Please
16 answer any questions Ms. Bolen may have for you.

17 MS. BOLEN: Thank you, Your Honor.

18 CROSS EXAMINATION

19 BY MS. BOLEN:

20 Q Ms. Gallman, I have just a couple of questions. On
21 your report of the different items that were analyzed,
22 I just want to go down the list. You stated in your
23 report that item number 1.1 was a mixture of a least
24 two individuals. Right?

25 A That's correct.

CROSS EXAMINATION OF LILY GALLMAN BY MS. BOLEN

288

1 Q And you say at least two others individuals. There
2 could be more. Correct?

3 A Yes, but based on looking, I don't see anyone else.

4 Q Okay. And then item 2.1 is not sufficient. And then
5 you say item 2.2 is a mixture and this is the gray
6 mask. You say that's a mixture of at least three
7 individuals. Correct?

8 A Yes. Yes, it's mixture of at least three.

9 Q And item 3.1, this is the one you say cannot, that my
10 client can't be excluded from, but you can't say it
11 was him. Correct? Right?

12 A I could not exclude him from that mixture. Correct.

13 Q And that's, again, at least two individuals, as you
14 put in your report?

15 A Yes.

16 Q Okay. And lastly, item 4.1, again, you say my client
17 can't be excluded, but that's, again, at least two
18 individuals?

19 A Yes, I said he could not be excluded from that
20 mixture.

21 Q But there's, you also say there's a mixture of at
22 least two individuals on that. Right?

23 A That's correct.

24 Q So, for everything you analyzed, there's at least two
25 and on at least one case, three individual's DNA on

CROSS EXAMINATION OF LILY GALLMAN BY MS. BOLEN

289

1 these items. Right?

2 A Yes, they were mixtures.

3 Q Okay. And none of these items that you analyzed were
4 hairs or anything like that. Right?

5 A Were what?

6 Q Hairs.

7 A No, I did not analyze any hairs.

8 MS. BOLEN: I don't have anything further of Ms.
9 Gallman. Thank you.

10 THE COURT: Thank you very much. You can step down,
11 or are there any other questions?

12 MR. STUMBO: No other questions.

13 THE COURT: Thank you for coming. You're free to go.

14 MR. STUMBO: We would ask that Ms. Gallman be excused from
15 the subpoena, Your Honor.

16 THE COURT: Without objection. All right. Call your
17 next witness. Anybody on the jury need a break at this
18 point? If so, raise your hand. All right. We'll take a
19 short break.

20 (Jury out at 3:42 p.m.)

21 MS. BOLEN: Your Honor, I think we have going to have
22 a matter of law.

23 THE COURT: All right. What is it?

24 MS. BOLEN: Your Honor, the Solicitor has informed me
25 that they're intending to play, right now, the video and, I

MOTIONS

290

1 believe, the 911 tape. These were previously introduced
2 into evidence, however they were never published to the
3 jury and our position is they, they cannot now be published
4 just through the Solicitor's office. Any witness that
5 could have -- they could have introduced it through them.
6 They have already testified and they're excused and what
7 that means, Your Honor, is that after these are played, I
8 lose any opportunity to cross examine the witness who had
9 introduced this about these ---

10 THE COURT: I wouldn't let her do that. If you want
11 to cross examine them afterwards about -- somebody about it
12 afterwards, I'll bring them back to the stand.

13 MR. BROWN: We can get them back ---

14 MS. BOLEN: And that would be my witness.

15 THE COURT: No, I -- I -- I'll let you have full
16 range. You can cross examine as much as you want. If you
17 want to bring them back.

18 MS. BOLEN: Okay.

19 THE COURT: So, who are we talking about? Who are the
20 potential people that need to come back?

21 MR. BROWN: Your Honor, the surveillance video came in
22 through Ms. Tealee ---

23 THE COURT: All right.

24 MR. BROWN: --- Keeno who's the store manager of the
25 convenience store.

MOTIONS

291

1 THE COURT: Yeah.

2 MR. BROWN: She was here with this morning and the 911
3 tape ---

4 THE COURT: We'll try to get her back if you want her
5 back.

6 MR. BROWN: We have her number, Your Honor.

7 THE COURT: And then who else?

8 MR. BROWN: That's all from this ---

9 THE COURT: Keeno and who else?

10 MR. BROWN: Keeno and then, Ms. Kim -- Kim Wells who's
11 the 911 dispatch.

12 THE COURT: Okay.

13 MR. BROWN: The 911 audio came in through her.

14 THE COURT: All right. So we'll get them both back
15 if you want them.

16 MS. BOLEN: Your Honor, I don't know if it would be so
17 much them, you know, they were here to lay the foundation
18 for them and then they weren't published at that time.
19 Then we've had -- they came in early on. The only witness
20 prior to them was Ms. Williams and we passed several ---

21 THE COURT: What's your point?

22 MS. BOLEN: That we've had several law enforcement
23 witnesses since then who we didn't get to ask any questions
24 of so ---

25 THE COURT: What -- if you want to call -- if you want

MOTIONS

292

1 me to call any of them back that you want to question after
2 hearing these and seeing this, I'll be glad to do so.

3 MS. BOLEN: Okay. Thank you, Your Honor. All right.
4 So bring the jury in. But I'll gonna allow it to be played
5 now. Just bring the jury in.

6 (Jury in at 3:53 P.m.)

7 THE COURT: All right. We have the jury back with us
8 and Mr. Starks is present along with his attorneys. All
9 right. What do you want to do now?

10 MR. BROWN: Your Honor, the State would ask -- would
11 request permission to publish State's Evidence #27 which is
12 the video of the armed robbery.

13 THE COURT: All right.

14 MR. BROWN: Entered into evidence by Tealee ---

15 THE COURT: All right.

16 MR. BROWN: --- Keeno.

17 THE COURT: All right. Play it.

18 MS. BOLEN: We just note our previous ---

19 THE COURT: All right.

20 MS. BOLEN: --- objection for the record, Your Honor.

21 THE COURT: All right. I'm gonna allow it.

22 (Jury watches video)

23 THE COURT: All right. What's next?

24 MR. BROWN: Judge, at this time the State would like
25 to publish State's Evidence #24 which was entered into

MOTIONS

293

1 evidence with Kimberly Wells, entered into evidence by the
2 custodian. This is the 911 call that was ---

3 THE COURT: All right.

4 MR. BROWN: --- recorded.

5 THE COURT: And your position in regard to this is
6 maintained.

7 MS. BOLEN: Thank you, Your Honor.

8 THE COURT: All right.

9 (Jury listens to 911 call)

10 THE COURT: All right. What's next?

11 MR. BROWN: Your Honor, that's the State's case.

12 THE COURT: All right.

13 MR. BROWN: Unless we need to call Nakelia Williams.

14 THE COURT: Let me talk. Members of the jury panel, I
15 need to discuss timing now, scheduling with the lawyers a
16 little bit, so I'm going to let you go the jury room again.
17 I'll be back with you just as soon as I can. I need to
18 discuss a few matters with the lawyers at this point.

19 (Jury out at 4:07 p.m.)

20 THE COURT: All right. Now that we've seen the video
21 and heard the tape of the 911 or heard the disk of the 911
22 call and do y'all want me to recall, get Ms. Keeno back
23 over here or Ms. Wells?

24 MS. BOLEN: No, Your Honor, we've discussed it and we
25 don't want to recall anyone else in the matter.

MOTIONS

294

1 THE COURT: All right. So that finishes the State's
2 case then. So y'all ready to call any witnesses?

3 MS. BOLEN: Before -- before that Your Honor, the
4 defense needs -- is making a motion ---

5 THE COURT: Go right ahead. Make your motion.

6 MS. BOLEN: Making a motion for directed verdict on
7 the bases that there's not been a gun found. That the
8 identification by the witness unreliable given the
9 testimony that came out and that there's not sufficient
10 evidence for this case to get to the jury.

11 THE COURT: I appreciate your position. I deny your
12 motion. All right. Are you gonna call any witnesses?

13 MS. BOLEN: The next motion, Your Honor, we're
14 renewing our objection to the chain. There's two people in
15 the chain that Sharee Brown and officer xxxxx who were
16 called by the State so we'd ask that the DNA evidence be
17 included on xxxxxxxx.

18 THE COURT: I thought it was complete?

19 MR. BROWN: It was -- it's complete, Your Honor.

20 THE COURT: All right. Well, I'm gonna -- I
21 appreciate your position. I deny your motion.

22 MS. BOLEN: Thank you, Your Honor.

23 THE COURT: All right. Anything else?

24 MS. BOLEN: Your Honor, the defense is resting and
25 renewing our motion for directed verdict.

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

FIFTH AMENDMENT RIGHTS

295

1 THE COURT: All right. So you're not going to call
2 any witnesses?

3 MS. BOLEN: No, sir.

4 FIFTH AMENDMENT RIGHTS

5 THE COURT: Mr. Starks, I want to make sure that you
6 understand you have a perfect right to testify under the
7 constitution of this State and of the United States and
8 all. If you want to tell your side of it or anything to
9 the jury so far as anything about this case is concerned,
10 of course, complying with the rules of evidence and rules
11 of procedure and all, you're certainly willing to do, you
12 certainly are welcome to do so. I want to make sure you
13 understand that.

14 MR. STARKS: I understand that.

15 THE COURT: All right. And have you talked this over
16 and discussed it with your lawyers?

17 MR. STARKS: Yes, sir.

18 THE COURT: And what's your decision?

19 MR. STARKS: I don't want to testify.

20 THE COURT: All right. All right. So, given the
21 hour, a quarter after four and all with y'all's arguments
22 and with my charge, I don't think we can get this jury, get
23 this to the jury before 5:00 and I've gotten to where I
24 don't like to send a case to the jury that late in the day.
25 So, I suggest that we argue and charge tomorrow morning.

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 MR. BROWN: Yes, sir.

2 THE COURT: Not only do I suggest it, it's what we're
3 going to do.

4 MR. BROWN: Sounds like a good, a good point.

5 THE COURT: All right. Bring the jury back in.

6 MS. NELSON: I know what your ruling is going to be,
7 but did you actually rule on our, our directed verdict
8 motion?

9 THE COURT: No. Well, I deny your motion again.

10 MS. NELSON: Thank you, Your Honor.

11 THE COURT: All right. Bring the jury in.

12 (Jury in at 4:10 p.m.)

13 THE COURT: All right. Y'all be seated. All right,
14 that finishes all the testimony and the evidence that the
15 parties wish you to consider in this case. We still have
16 arguments, summations and arguments from the attorneys and
17 also my instructions to you about the law and what your
18 duties and responsibilities are and I would estimate that
19 would take probably -- take us beyond 5:00 this afternoon
20 and I've got to where I don't -- I don't think it's a good
21 idea to make you work overtime and all after 5:00. So,
22 we're going to stop for the day and come back tomorrow
23 morning and finish this case tomorrow. We'll have
24 arguments, my instructions to you, and then you'll have
25 your deliberations and then you'll give us your decision in

1 this case about these charges made against Mr. Starks.
2 Again, do not discuss the case with family, friends, or
3 anyone else. Now you know about where this crime happened
4 and all. I don't know whether any of you go and come that
5 way going home or not but don't investigate, don't do any
6 independent investigation, turning off, or looking around
7 or whatever, and everything. You can't help passing by it
8 if you're going by there, to Calhoun Falls or wherever and
9 all, but over that way and everything, but don't do any
10 private investigation while you're on the way home or
11 coming back tomorrow morning or anything of that sort and
12 with that, I'll let you go and ask you to be back with us
13 tomorrow morning at 9:30. We'll get started just as soon
14 as we can after that. Have a nice evening. Give your note
15 pads to the bailiff as you leave.

16 (Jury out at 4: 13 p.m.)

17 THE COURT: All right. We'll be in recess then until
18 tomorrow morning at 9:30.

19 MS. BOLEN: Thank you.

20 THE COURT: Ms. Williams you looked real calm on that
21 video, but you didn't sound so calm on the 911 call.

22 MS. WILLIAMS: Yeah.

23 THE COURT: You handled yourself real well on the
24 video and on the 911 call.

25 MR. STUMBO: Judge, as far as charging, this doesn't

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

1 need to be on the record but as far as your charge, we're
2 not requesting any specific charge.

3 THE COURT: All right. I'll just give my general
4 charges and read the statute to them and all.

5 MR. STUMBO: That sounds fine with us, Judge.

6 THE COURT: Why don't y'all make me a copy of each one
7 of the statutes involved, okay?

8 MR. STUMBO: Okay.

9 THE COURT: So I won't have to look it up.

10 MR. STUMBO: Yes, sir.

11 4-3-13 MORNING

12 THE COURT: All right. Anything before we bring the
13 jury out?

14 MR. STUMBO: Your Honor, you asked if we'd print the
15 statutes ---

16 THE COURT: Oh, yeah.

17 MR. STUMBO: --- out. Mr. Brown is printing them out
18 right now.

19 THE COURT: All right. That's fine.

20 MR. STUMBO: He should be right ---

21 THE COURT: All right. We'll wait a minute then.

22 MR. STUMBO: Is there anything else you need from us
23 concerning the charge, Judge?

24 THE COURT: No, thank you. I'll just give what is
25 contained within the indictment itself. I just wanted to

1 look at the statute and see exactly what it said ---

2 MR. STUMBO: Yes, sir.

3 THE COURT: --- about each one. Okay. Y'all ready?

4 MS. NELSON: Yes, sir, Your Honor.

5 THE COURT: Who's going to argue?

6 MS. NELSON: Ms. Bolen.

7 MS. BOLEN: I am, Your Honor.

8 THE COURT: You're going to open on the law and they
9 argue fully and then you finish?

10 MR. STUMBO: Well, they -- they didn't put up a case,
11 Judge.

12 THE COURT: That's right.

13 MS. NELSON: Right.

14 THE COURT: They get the last argument. Thanks for
15 reminding me. So, you're going argue in full and then they
16 are going to argue in full?

17 MR. STUMBO: Yes, sir.

18 THE COURT: All right. Getting a little forgetful.

19 MR. BROWN: I'm moving a little slow this morning
20 myself.

21 MR. STUMBO: Your Honor, I believe we're having
22 technical difficulty with our printer.

23 THE COURT: We'll go ahead. Bring the jury out.

24 THE BAILIFF: Yes, sir.

25 MR. STUMBO: Your Honor, we need to take a little

CLOSING ARGUMENT - MR. STUMBO

300

1 break between arguments and charge to ---

2 THE COURT: I think that will be okay. If it works
3 out that way and we're able to, but don't worry about it.

4 MR. STUMBO: Yes, sir.

5 (Jury in at 9:34 a.m.)

6 THE COURT: All right. We have the jury with us and
7 Mr. Starks is present, along with his attorney. I
8 appreciate you being on time and we can just get started
9 with the arguments and summations from the attorneys and
10 then my instruction to you on the law. We will proceed
11 with that. The way we go about hearing from the attorneys
12 is, first of all the Solicitor, Mr. Stumbo, will argue
13 fully to you on the facts and the law and then we'll go to
14 the other side and Ms. Bolen, who represents Mr. Starks,
15 will argue fully to you on the facts and the law. And
16 after that, I'll discuss with you more fully, as I said,
17 what your duties and responsibilities are as a jury in this
18 case and the law as it regards to the charges made in this
19 case and then you go to the jury room and you'll deliberate
20 and you'll give us your decision. So keep that in mind.
21 All right. Mr. Stumbo?

22 MR. STUMBO: Thank you, Your Honor, if it please the
23 Court.

24 CLOSING ARGUMENT - MR. STUMBO

25 Nakelia Williams, she didn't deserve this. She's a

CLOSING ARGUMENT - MR. STUMBO

301

1 hard working member of this community in Abbeville. She was
2 born and raised here. She has two children at home who she
3 supports going to work at her job at Greenwood Petroleum,
4 going to work at the convenience store at night. When she
5 went in last February, she didn't deserve to have Dwayne
6 Starks come in and put a gun in her face, shove her behind
7 that counter, put her in fear for her life. She didn't
8 deserve it, folks.

9 So, Mr. Brown and myself we -- you'll hear from the
10 Judge, you've heard throughout the beginning of this case
11 that we bear the burden, you know, we bear the burden of
12 proof. That's a burden we gladly bear. We gladly bear
13 that burden for Ms. Williams. We gladly bear it for the
14 Abbeville Police Department, Lieutenant Wilkie and his
15 colleagues that worked hard that night to solve this case
16 and we gladly bear that burden on behalf of the community
17 here in Abbeville.

18 Now, what's the burden of proof? That's something you
19 don't hear in everyday lingo. Beyond a reasonable doubt.
20 What is proof beyond a reasonable doubt? All that is, is
21 what Mr. Brown told you in his opening, that it's firmly
22 convinced. Is it proof that leaves you firmly convinced of
23 the Defendant's guilt. That's not a scientific formula
24 that you put together in a lab or some mathematical
25 equation. It's just a firm conviction. It's that firm

CLOSING ARGUMENT - MR. STUMBO

302

1 conviction that you have after you've heard all the
2 evidence, heard the testimony, seen the evidence and you
3 have a firm conviction that he did what we said he did and
4 what he's charged with. That's it. That's the burden of
5 proof in this case. That's proof beyond a reasonable
6 doubt. Like I said, that's a burden that Mr. Brown and I
7 gladly bear in this case. From all the evidence you've
8 seen, from the testimony you've heard from the stand,
9 particularly from Ms. Williams, we gladly bear that burden
10 on her behalf.

11 Now, one of the elements of the crime. Let's get some
12 of this legalese out of the way first. This is some stuff
13 you're going to hear from the Judge and if I say something
14 different than you hear from Judge Hughston, he's the Judge
15 of the law in this case, you listen to him. But armed
16 robbery is fairly simple. It's a robbery using a deadly
17 weapon. By the use of a deadly weapon.

18 Now, what's robbery? Under the law, robbery is just a
19 larceny. It's a fancy legal word for stealing or theft and
20 it's theft using force to get what you're -- what the
21 person is trying to get. Okay? So, it's a theft or
22 stealing by the use of force. And if you use a deadly
23 weapon to accomplish that force, then that's an armed
24 robbery under the laws of our state.

25 Possession of a weapon during the commission of a

CLOSING ARGUMENT - MR. STUMBO

303

1 violent crime. The Judge will instruct you that an armed
2 robbery is a violent crime as defined by our state law. So,
3 if you commit an armed robbery and if you have a gun or a
4 knife, a deadly weapon, then you're guilty of that crime,
5 as well. So, it's not complicated.

6 I would submit to you, ladies and gentlemen, what you
7 saw yesterday afternoon in that surveillance video, what
8 you heard Nakelia describe to you from the witness stand,
9 that's an armed robbery and that's possession of a weapon
10 during the commission of a violent crime.

11 Now, the question you have to ask yourself is if you
12 are firmly convinced it's Dwayne Starks that is the one
13 that was in that store that night robbing Ms. Williams.
14 Folks, I would submit to you it's not just beyond a
15 reasonable doubt, it's beyond most all doubt in this case.

16 Ms. Nelson, she's a fine attorney and Ms. Bolen is, as
17 well. She's going to, they are going to get a chance to
18 come speak to you after I do, so they'll get the last word
19 in this case. They're fine attorneys and I've worked with
20 them in the past and I'll tell you what they're going to
21 do. They're going to come up and offer a lot of
22 alternative explanations for everything that you've seen in
23 court this week, try to muddy the waters and try to cloud
24 the issues to where you won't think that it's their guy
25 that did it. I know they are fine attorneys and they'll do

CLOSING ARGUMENT - MR. STUMBO

304

1 a good job doing that, but what I'm going to ask you to do
2 is keep your eye on the ball.

3 I've been around the game of baseball my whole life.
4 I've played it. My son plays it. I've coached, and if
5 I've heard the term "keep your eye on the ball" once, I've
6 heard it a thousand times. That's what you do when you go
7 out to the baseball field. You tell the kids, "Keep your
8 eye on the ball, keep your eye on the ball," and that's
9 what I'm going to ask you to do here, because there's going
10 to be a lot of things that if you suspend your common sense
11 and suspend reality, which is what they want you to do,
12 then you may be swayed to think that there is somebody else
13 that did this. But if you keep your eye on the ball, on
14 all this evidence which you're going to have back in the
15 jury room with you, there's only one verdict here, ladies
16 and gentlemen, and that's guilty as charged.

17 Now, what are some of the things you may hear? Well,
18 how about I heard the question asked, we'll don't they wear
19 a mask at the packing plant, the employees, when they work.
20 What is that? That is nothing more, ladies and gentlemen,
21 than an attempt to throw you off and get your eye off the
22 ball. There's no evidence in this case that somebody from
23 the packing plant came into that store that night and
24 robbed Ms. Williams. None. Why did they throw that
25 question out there? Maybe to be able to distract you.

CLOSING ARGUMENT - MR. STUMBO

305

1 Maybe it will muddy the waters enough so you think their
2 guy didn't do it.

3 What about Mr. Starks? He shed his clothes that
4 night. You'll see -- you've seen the video. You'll have
5 these pictures back in the jury room, along with that green
6 coat, black pants, and white shoes that he was wearing when
7 they arrested him, and a gray ski mask. We know he was
8 shucking those clothes as fast as he could, running from
9 that store. Why? They find the coat halfway between on
10 the path back to where they found him a few minutes later.
11 They find this mask in the trash can ten feet from him.
12 His DNA is all over around the mouth of the mask.

13 Ms. Nelson used an analogy in her opening about the
14 cookie jar. Now, I have kids too and I've seen the way
15 they operate, and typically, the crumbs on the fingers,
16 there might be an ultimate explanation like she said, maybe
17 given some to little sister or the dog or something, but
18 it's not what we have here, ladies and gentlemen. Ms.
19 Nelson's client doesn't just have crumbles on his fingers,
20 he's got them on the corners of this mouth, he's got them
21 all over his clothes. And not only that, but remember what
22 he said, remember what Officer Thomason said, as soon as he
23 walks up, he'd already cut his lights off. He wasn't
24 running after him. He just called his name. What did he
25 say? "I didn't do anything." My experience with my kids

CLOSING ARGUMENT - MR. STUMBO

306

1 similar to that is, if they tell me immediately, before I
2 even say what I'm there for that they didn't do anything,
3 that's also a pretty good indicator that they did
4 something.

5 Now, he had it worked out though. He had shed all his
6 clothes. He had a mask on when he went into the store,
7 certain they can't identify him with a mask on. "They can't
8 prove me guilty of this." But what's the one thing he kept
9 on him? Pretty hard to explain why there's \$146.00 in his
10 pocket in a big wad of bills. That's the one thing he
11 didn't throw out, because it's the one thing that he was
12 after. He needed the money. And what was it Ms. Williams
13 testified to? That she had already put up the twenties,
14 recently. And again, you'll have this back in the jury
15 room, but if you look, there are only three twenty dollar
16 bills here, but most of it is tens, fives, and ones. Just
17 like she testified about. She'd already put the twenties
18 up in the safe. You keep them in the safe. That, ladies
19 and gentlemen, what that is, is that corroborates her
20 identification of Dwayne Starks. It's the cookie crumbs on
21 the mouth and in his pocket. They're going to try to get
22 you to look somewhere else other than the ball and maybe
23 somebody else, packing plant employees. How about somebody
24 else out there? What about the fact we can't find the gun?
25 It could be anywhere out there. It could have been at

CLOSING ARGUMENT - MR. STUMBO

307

1 somebody's house, in one of these trailers. He's found
2 right here beside all of these mobile homes. The
3 underbrush, remember that? Officers testified that this is
4 thick in here. They looked everywhere. They couldn't find
5 it. Does that make him any less guilty of having that gun
6 and pointing it at her? And y'all will have this picture
7 in the jury room. He's not just pointing it at her, but
8 walking up, and you saw it on the video, he put the gun to
9 her head. Does it eliminate his guilt that we can't find
10 the gun? That he may have stashed it in one of those
11 trailers that the officers couldn't get into or out in the
12 brush? It doesn't, but I'm sure they will bring that up to
13 keep your eye off the ball and muddy the waters.

14 At the end of the day, ladies and gentlemen, this is
15 about the truth. What we do here in this courtroom is a
16 search for the truth. And, in fact, the word verdict, and
17 the Judge will give you a verdict form when you'll be going
18 back to render a verdict, but all the word verdict means,
19 it's a Latin term, from two Latin terms, *verum dictum*. It
20 means, to speak the truth. *Dictum* means to speak and *verum*
21 means the truth. *Verum dictum*, speaks the truth. So
22 verdict just means you're going back there and decide what
23 the truth is here, that leaves you firmly convinced that
24 what the truth is here is that he's guilty.

25 There is only one verdict here, ladies and gentlemen.

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

CLOSING ARGUMENT - MR. STUMBO

308

1 You've spent three days out here in this courtroom. We're
2 on our third day. You have jobs. You have families.
3 There are probably a lot of other places you'd rather be
4 than here in this courtroom this week. I could stand up
5 here and talk for thirty more minutes. I'm not going to do
6 that. I could play back all the evidence for you. You've
7 heard the evidence. You know what the truth is. Dwayne
8 Starks is guilty. He is guilty of terrorizing Ms. Williams
9 that night, putting a gun to her head and stealing the
10 money out of that store. It's not complicated. It's not
11 rocket science. It's not a scientific formula. I'm
12 firmly convinced that he did it. All the clothes laying
13 around him, his DNA present, the SLED analyst testified to
14 it and I -- I apologize we had to put witness after witness
15 up yesterday with all that boring testimony about who had
16 it and chain of custody and all that. I hope you don't
17 think we would have done that just to waste your time.
18 That's our burden of proof to prove that the evidence has
19 integrity and that it is what we say it is and that's why
20 all those witnesses from the State Law Enforcement Division
21 had to come up from Columbia yesterday and testify for us.
22 The case is not complicated, folks. Dwayne Starks is
23 guilty of armed robbery. I would ask you to consider the
24 evidence. Go back in that jury room and talk about it.
25 Come back and return a verdict that speaks the truth. Use

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

CLOSING ARGUMENT - MS. BOLEN

309

1 your common sense. Use your life experiences that you
2 brought in this courtroom with you and judge the evidence
3 in light of that. Listen to the Judge's instructions on
4 the law. So, I would ask you to return a verdict of guilty
5 in this case, both for armed robbery and possession of a
6 weapon during the commission of a violent crime. Thank you
7 for your attention.

8 THE COURT: Ms. Bolen?

9 MS. BOLEN: Thank you, Your Honor. May it please the
10 Court.

11 CLOSING ARGUMENT - MS. BOLEN

12 Good morning, ladies and gentlemen. When Ms. Nelson
13 opened yesterday morning, she asked you to consider all the
14 evidence in this case, to think beyond just the easiest
15 explanation and to think towards that there could be other
16 explanations. And what I want to talk to you about today
17 is where you can find reasonable doubt in this case and
18 where you can find other possible explanations. This case
19 is not as easy as saying crumbs on the hands, that must be
20 the person.

21 There are numerous incidences in this case for
22 reasonable doubt and I think when you look at the evidence
23 and you look at what we, what the State doesn't have, what
24 they could have done and with evidence they don't have and
25 we'd ask you to return the verdict of not guilty based on

CLOSING ARGUMENT - MS. BOLEN

310

1 the State not meeting it's burden of proof.

2 So, reasonable doubt. Where in this case is there
3 reasonable doubt? The identification. Now, I'm going to
4 talk about each of these in turn, but Ms. Williams'
5 identification of Dwayne, my client, is not a reliable
6 identification. We'll talk about that in a minute. Where
7 else is there reasonable doubt? In the DNA evidence. And
8 again, we'll talk about this in a minute, but you heard
9 from the SLED witnesses that on every single item there
10 were at least two contributors and in some incidences three
11 contributors besides just Dwayne.

12 The investigation, that also gives you reasonable
13 doubt. Similar to what Ms. Nelson was saying yesterday,
14 she could have stopped when she walked in on her son with
15 empty cookie jar and not looked for any other explanation.
16 That's basically what the investigators did in this case.
17 They stopped. Didn't keep looking, didn't look for other
18 reasons, other explanations. And finally, the biggest
19 piece that is missing and the biggest piece of evidence or
20 lack of evidence that gives you reasonable doubt is that
21 there is no gun found on Dwayne or anywhere near where he
22 was.

23 Let's talk about identification for a minute. It's
24 clear from the pictures it's clear from Ms. Williams'
25 testimony, and clear from the video, that the robber in the

CLOSING ARGUMENT - MS. BOLEN

311

1 store was wearing a mask. She testified she didn't get a
2 good look at his face. There can be no facial
3 identification of the robber in the store. She said that
4 she identified him based on his voice and body build.
5 However, she also testified, and investigator Wilkie
6 testified to this, that the robber disguised his voice.
7 Another explanation is that there wasn't a disguise, it was
8 someone else's voice. She didn't see his face, just heard
9 a voice. Her identification of Dwayne in the police car is
10 not based on his voice, not based on body build. All it's
11 based on is seeing his face from a distance, that is to say
12 a good fifty, sixty feet away, while it's dark out, along
13 with sitting in a police car. Remember, she is inside the
14 store behind the cash register. Dwayne is in a police car
15 in the parking lot and that's where she makes a facial
16 identification and remember the testimony is that the
17 police car stops for only a few seconds. How is that a
18 reliable identification? How can you, late at night, with
19 all the distance from you with someone in the car, can you
20 make a facial recognition of someone?

21 Another thing I want you to consider in terms of
22 identification is the mask. This gray mask right here. You
23 can see it has writing all over it, yet nowhere in the
24 testimony do we hear anything about this mask that the
25 robber was wearing in the store having any writing on it.

CLOSING ARGUMENT - MS. BOLEN

312

1 She doesn't mention it in her 911 call. She doesn't
2 testify to it. The robber in the store, the mask that that
3 robber was wearing did not have writing on it.

4 And finally, with that identification, let's look at
5 her 911 call. And again you'll have that back in the jury
6 room with you. You heard it yesterday and if you listen
7 carefully, she's not sure who it is in that 911 call. She
8 says several times, "I'm not sure who it is. I'm not sure
9 of his name." Then she says, "I think it's the Starks."
10 She's not sure of his first name. But when she first calls
11 she does not know who it is and again she says, he tried to
12 disguise his voice.

13 And another important thing to remember in terms of
14 her identification of Dwayne is that she testified that she
15 hadn't really ever have a full conversation with Dwayne.
16 She said he'd been in the store numerous times but they
17 only exchanged a few sentences. And I ask you to consider,
18 if you haven't really talked to someone, how do you make an
19 identification based on that person's voice? Not on their
20 face, not anything else, but based on their voice if you
21 haven't really talked to them before.

22 Now, let's talk a little bit about the DNA evidence.
23 Ms. Gallman testified that on every single piece she
24 analyzed there were at least two people's DNA and in some
25 cases, three. So, that means that in addition to Dwayne

CLOSING ARGUMENT - MS. BOLEN

313

1 there was someone else on that clothing. Someone else had
2 worn it. Someone else's DNA was on it. And we know that
3 the other explanation can't be that it was investigator
4 Wilkie's DNA because he testified that he always wore
5 gloves when handling the clothing and that his officers
6 would have done the same. So, there's someone else out
7 there who is on all of this clothing.

8 We also heard from the SLED witnesses that the roll of
9 coins that was submitted into evidence right here, that
10 they could have gotten a swab of DNA off of this and yet
11 they weren't asked to. That would be pretty important
12 evidence, right? To be able to swab this and get the
13 robber's DNA off of this and yet that wasn't done. That's
14 a piece of evidence that is missing that leads to
15 reasonable doubt. We also heard from SLED about these
16 possible hairs that were collected. You heard that from
17 one of the chain witnesses and then we never really heard
18 about this again. You never heard were they hairs, were
19 they not. We did know from Ms. Gallman that they were
20 never analyzed or tested, but again, what happened to them?
21 Why weren't they tested? Why wasn't there something more
22 about these possible hairs that were collected off of this
23 mask?

24 Let's talk a little bit about the investigation.
25 Again, like Ms. Nelson's son, you can stop an investigation

CLOSING ARGUMENT - MS. BOLEN

314

1 or you can keep going. You can keep looking and collecting
2 evidence. The things that could have happened in this case
3 and didn't and that are likely to have produced evidence
4 but now is evidence that we don't have are these things:
5 No fingerprints are collected from the coins, the wrappers
6 of the coins, or the paper money that was found on the
7 road. Remember, there's that five dollar bill and a couple
8 rolls of coins. Not tested for fingerprints, not even sent
9 to SLED for fingerprints and not tested for DNA.

10 Another piece of the investigation that's missing is
11 that there's no prints from the door of the store. Watch
12 that video and you can see that the robber clearly, when
13 opening the door, puts his or her hand on the door and yet
14 there's not even an attempt to lift prints off of that.
15 There's also not an attempt to lift the prints off of the
16 plastic bag where the robber grabbed the bag and put the
17 money in. Lieutenant Wilkie, investigator Wilkie said,
18 "Well, there could have been multiple people's prints on
19 that of people that could have used that. If you watch
20 that video closely you will see that that bag was behind
21 the counter. It's not something that any customer could
22 have come in and touched. But we also see from the video
23 that the robber clearly touches that bag and yet there is
24 no attempt to get those prints or even try to get touched
25 DNA. That bag is not even collected or put into evidence.

CLOSING ARGUMENT - MS. BOLEN

315

1 Furthermore, we know from Ms. Williams' testimony and
2 the video that the robber put the money in a plastic bag
3 and yet there's not a plastic bag ever found near Dwayne or
4 anywhere the officer searched. So, where is that plastic
5 bag? If it was really Dwayne, wouldn't the plastic bag be
6 near him? They searched diligently. They testified to
7 searching diligently, yet they don't find something that's
8 a pretty key piece of evidence.

9 Another piece of evidence is missing. We know from
10 Ms. Williams' testimony that Dwayne was in that store about
11 an hour earlier. We also know from Ms. Keeno's testimony
12 that they keep the videos for a couple of months. Why
13 wasn't that video pulled? Wouldn't it be important to see,
14 if they're going to say Dwayne is the robber, what he was
15 wearing when he walked into the store earlier? And yet we
16 don't have it. That's another piece of evidence that's
17 missing.

18 And finally, with respect to the video, a big piece of
19 evidence that's missing is the robber's walk up to the
20 store. What I mean by that is if you watch that video
21 closely, the video starts, well it starts with another
22 individual walking out, but you don't see the robber until
23 the robber is right at the door of the store. You don't
24 see the robber walking up in the parking lot and surely the
25 surveillance video would have caught that because it

CLOSING ARGUMENT - MS. BOLEN

316

1 catches someone else walking out. And again, why is that
2 important? Because maybe the robber was putting on his
3 mask as he was walking up and maybe that would have showed
4 who the real robber was. But we don't have that. The
5 video starts with the robber at the door, not with him
6 walking up to the store.

7 We didn't hear any testimony about how much money was
8 actually taken from that store. The State wants you to
9 believe and assume that it must have been \$146.00, because
10 that was found on Dwayne. They want you to assume that,
11 but there's absolutely no evidence and no testimony that
12 this is the amount taken from the store. And I want you to
13 consider that just because Dwayne had money in his pocket
14 doesn't mean he robbed the store. I have money in my
15 wallet, but that doesn't mean I robbed a store. And there
16 is another explanation for this money. The officer
17 testified that Dwayne said, "I have been out gambling".
18 That's the other explanation for where this money came
19 from.

20 And lastly with the investigation, the officers didn't
21 talk to anyone in the trailer park. Investigator Wilkie
22 said he talked to a few people, but they didn't see
23 anything. But they didn't talk to anyone to see, did you
24 see anything, was any running, anyone running through?
25 Nothing like that. They also don't pull any of the other

CLOSING ARGUMENT - MS. BOLEN

317

1 surveillance tapes from the store to see if maybe someone
2 was in the store just a minute before the robber and maybe
3 that person would have crossed the robber in the parking
4 lot and maybe that would be a witness. None of that is
5 done. That's another piece of evidence that's missing in
6 this case, but the biggest piece of missing evidence and
7 the thing that gives you the most reasonable doubt in this
8 case is the missing gun. It's clear from the video, clear
9 from the testimony, that the robber had a gun. We heard a
10 lot of testimony yesterday from several officers that they
11 searched very thoroughly. They looked really, really hard
12 for this gun. Investigator Wilkie said they looked under
13 trailers. They looked all around in the brush. They
14 looked on the pathways. They searched that whole area. He
15 said that several officers searched for an hour that night
16 and then he, and perhaps other officers, continued looking,
17 came back and looked later that day and the days afterward.
18 They did a very thorough search of this area, this area for
19 that gun, right here and yet they don't find a gun. It's
20 not near the store. It's not near the other convenience
21 store, Cherokee Trail. It's nowhere near where Dwayne was
22 found. Why is that problem? Why is that a big piece of
23 missing evidence? If Dwayne was really the robber wouldn't
24 the gun be found on him or near him?

25 You've heard a lot of testimony about the timing in

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

CLOSING ARGUMENT - MS. BOLEN

318

1 this case. Officers responded right away. By their own
2 testimony it was minutes, two, three, four minutes between
3 the call and when they saw Dwayne in the Sawmill Acres
4 Trailer Park. If Dwayne was the robber he would not have
5 had time to go somewhere else. Maybe in this direction
6 over here, over here, he would not have had time to do
7 that, stash a gun and then be back. If he was the robber
8 he would have that gun on him or somewhere near him and yet
9 after hours of searching the police never find that gun.
10 Also remember that Corporal Thomason testified that when he
11 saw Dwayne, Dwayne was walking, not running. Walking. He
12 was calm. He was corporative. Is that really the behavior
13 of someone who had just robbed the store and have the
14 police come up? Is that really the behavior of someone
15 who's going to be trying to hide evidence? He's walking,
16 he's not running away from the police. So, what the other
17 explanation is for all this is that the gun is with the
18 real robber, not with Dwayne.

19 Ladies and gentlemen, what we're asking is that you
20 look at the pieces of the puzzle that are missing. You
21 look at the lack of evidence that gives you reasonable
22 doubt. You look at the other possible explanations. You
23 look at what the State doesn't have. We're asking you to
24 find that the State did not meet it's burden of proving
25 Dwayne guilty beyond reasonable doubt. Keep in mind the

CHARGE ON THE LAW

319

1 unreliable identification: The fact that there's other
2 people's DNA on those clothes, the fact there's no gun
3 found and the fact the investigation pretty much stopped
4 that night without following up on other things that could
5 have been investigated. We're asking that you find that
6 the State didn't meet it's burden and that you find Dwayne
7 not guilty. Thank you.

CHARGE OF THE COURT

9 THE COURT: Thank you. Members of the jury, you have
10 heard and seen the evidence presented to you in this case
11 and it's now my duty and responsibility, under the
12 constitution and the code of laws of this state, to discuss
13 with you what your duties and responsibilities are at this
14 point in this trial and the law insofar as the charges that
15 the State has made it's concern and then you go to the jury
16 room and you'll deliberate and you'll give us your
17 decision.

18 As you know from the statements that I made earlier
19 and from the statements that the attorneys have made, the
20 charges against Mr. Starks are relatively simple in terms
21 of what he's accused of doing. One charge is that he
22 committed what is called armed robbery and this piece of
23 paper I have in my hand, we call it an indictment. It's the
24 way we let someone know what he's charged with, what he's
25 being charged with doing and one of the charges is armed

CHARGE ON THE LAW

320

1 robbery and I'll read the exact wording of that to you a
2 little later. The other one is a charge of possessing a
3 firearm and in this case, a pistol or a handgun, during the
4 commission of what is called a violent crime as defined
5 under the statutes of this state and again I'll read that
6 to you a little later before you go to the jury room.

7 And as I said, Mr. Starks has entered pleas of not
8 guilty to these charges and that's why you were asked to
9 serve as the jury in this case. That's why we've been here
10 yesterday and today, hearing the testimony and seeing the
11 evidence presented. He's said I'm not guilty of this and
12 that places the burden of proving him guilty on the State.
13 A person who is charged is never required to prove himself
14 innocent. The State has the burden of proof throughout the
15 trial until you, the jury, have reached the conclusion at
16 the end of the trial that the State has prove him guilty
17 beyond a reasonable doubt.

18 This is a real presumption of innocence and is as much
19 a fact of this case as anything that has been testified to
20 from the witness stand and the only way that presumption of
21 innocence is removed is by testimony and evidence presented
22 here in court that convinces you beyond a reasonable doubt
23 that he's guilty of what the State claims and what the
24 State charges. That's how the State removes the
25 presumption of innocence; presents the testimony, presents

CHARGE ON THE LAW

321

1 facts that convince you beyond a reasonable doubt that he's
2 guilty. If the State doesn't do that, then he's entitled
3 to a verdict of not guilty.

4 Now, what do we mean when we say that the State must
5 prove someone guilty beyond a reasonable doubt? What so
6 those words, beyond a reasonable doubt, mean?

7 Well, let me back up a minute, I meant to mention this
8 to you a little earlier. You have to decide the facts of
9 this case. I've tried to emphasize that to you at the
10 start of this case of what your job is. You are the sole
11 judges of facts of this case. I don't have anything to do
12 with the facts. Again, I told you that earlier and I tell
13 you that again. At the outset of this trial and during the
14 course of this trial, I've asked questions. Sometimes
15 people don't think that's a very good idea, but if I don't
16 understand something, I'm afraid that you might not
17 understand something. So, any questions that I've asked,
18 it was designed to get information that I think might help
19 you in some way. But don't try to read into any of my
20 questions or anything how you may think I feel about the
21 case or I believe about the case, because that was not my
22 intention. My intention was to help you, not to favor one
23 side or the other. That wasn't what I was trying to do or
24 had any idea of doing. That's not what I'm supposed to do.
25 That's what I didn't do and I try, I try not to do. It was

CHARGE ON THE LAW

322

1 solely for the purpose of getting information to you and
2 for me that I thought might help you in your evaluation of
3 the case. So don't read anything -- don't read into
4 anything that I might have said or done during the trial,
5 anything that you feel or you think I feel about the case.

6 You have to decide, like I said, who and what to
7 believe or the credibility, the believability of the
8 witnesses. You have to decide how much do I believe what
9 that witness tells me here in court about this case.

10 That's what your job is. You have to decide who and what
11 to believe in regard to the testimony and the evidence in
12 this case. I would suggest you go about doing that in much
13 the same way you decide that issue in your every day life.
14 You and I, everyday, have to decide whether to believe what
15 someone tells us. It's so much a part of everyday life
16 that we often time don't think about any mental process we
17 may go through in deciding whether to believe someone, but
18 you do it everyday whether at home, on your job, on the
19 street, wherever. When someone comes up to you and makes a
20 factual statement and someone says something like, such and
21 such just happened or you should do this because, or you
22 should do that because, when a person makes that type of
23 statement to you, you have to decide do I believe what that
24 person tells me, how much trust, how much faith do I put in
25 what that person tells me. As I said, I would suggest you

CHARGE ON THE LAW

323

1 go about deciding who and what to believe in regarding the
2 testimony and the evidence in this case in much the same
3 way you decide that issue in your everyday life.

4 Some of the things you may want to consider and this
5 is by no means complete, but some of the things that you
6 may want to consider are such things as: demeanor or manner
7 of the witness who testified, was the witness hesitance in
8 answering or straight forward and positive in what he or
9 she said, was the testimony of the witness consistent or
10 inconsistent, how did the witness come to know the facts
11 they he or she testified to or what was his or her ability
12 to know these facts, was the testimony of a witness
13 consistent or inconsistent, was the testimony of the
14 witness strengthened or weakened by the testimony or the
15 evidence presented. Throughout this entire process of
16 deciding who and what to believe in regard to the testimony
17 and the evidence, you have one goal really and that is to
18 seek the truth.

19 Now, under the same constitution and code of laws that
20 makes you the finder of the facts in this case, it also
21 makes me the instructor in the law and this means you must
22 accept the law as I explain it to be, the correct law. You
23 should not be concerned with what you may think the law
24 should be, but only with what the law is.

25 As I said, the burden of proof is always on the State

CHARGE ON THE LAW

324

1 in a criminal trial, but you must reach the decision that
2 the State has proven Mr. Starks guilty of the charge beyond
3 a reasonable doubt. What do those words mean? What does
4 it mean when we say that the State must prove someone
5 guilty beyond a reasonable doubt? It is not an imaginary
6 or fanciful doubt or a weak doubt. The term, reasonable
7 doubt, may be best understood by just giving it its plain
8 and ordinary meaning. A reasonable doubt is a kind of
9 doubt that would cause a reasonable person to hesitate to
10 act. If, after considering all the evidence, you hesitate
11 to convict Mr. Starks on the evidence that's been
12 presented, then he is entitled to a verdict of not guilty.

13 Reasonable doubt may arise from evidence which has
14 been presented in this case or from the lack or absence of
15 evidence in this case. You alone must decide whether
16 reasonable doubt exists as to the guilt of Mr. Dwayne Eddie
17 Starks, here charged with armed robbery and possession of a
18 firearm during the commission of a violent crime.

19 Now, lawyers and judges talk about evidence of two
20 kinds, two basic types that we classify evidence as. One
21 is what we call direct evidence. That's evidence that a
22 witness testifies to based on his or her physical senses;
23 I saw something, I felt something, I smelled something, I
24 heard something. That's the type of evidence that we refer
25 to as direct evidence. When someone takes the witness

CHARGE ON THE LAW

325

1 stand and tells you what they saw or heard or felt, or
2 whatever, based on physical senses, that's what we refer to
3 as direct evidence.

4 We also talk about circumstantial evidence.
5 Circumstantial evidence may be used to prove a crime. It's
6 no different than direct evidence in the fact that it can
7 be used to prove someone did something or prove something a
8 fact that's necessary to prove someone guilty of a crime.
9 There's no distinction between direct evidence and
10 circumstantial evidence or the weight that may be assigned
11 to it or anything of that sort. You can, you can consider
12 and use both direct evidence and circumstantial evidence in
13 your consideration of whether the State has met its burden
14 of proof of proving every fact necessary to establish the
15 guilt of Mr. Starks of the charges made against him. So,
16 there's no distinction. The law does not make a
17 distinction between direct and circumstantial evidence in
18 establishing the facts necessary to prove someone guilty of
19 a crime. You can consider both circumstantial evidence and
20 direct evidence in deciding whether the State has met its
21 burden of proof of proving Mr. Starks guilty beyond a
22 reasonable doubt.

23 Now, of course, one of the facts necessary for the
24 State to prove him guilty beyond a reasonable doubt is that
25 he was the one that did it, the identification of Mr.

CHARGE ON THE LAW

326

1 Starks as the person who committed the crimes. And there's
2 no doubt, you know, based on what we saw here in court and
3 the testimony, and so forth, that someone committed a
4 robbery, an armed robbery of the Shell store on the night,
5 I believe it was the 27th of February. You know, there's
6 no doubt that some one did it, you know, based on the
7 evidence that's been presented. Of course, the question is
8 whether it was Mr. Starks or not. So I charge you now in
9 considering the testimony of any eye witnesses or any
10 witnesses in the identification of Mr. Starks, that you
11 should consider whether a witness has made a good faith
12 error or mistakenly identified Mr. Starks as the person who
13 committed the robbery. In evaluating such testimony, I
14 instruct you that you should consider all of the
15 circumstances surrounding the identification of the
16 Defendant. The State has the burden of proof, as I said,
17 in regard to every element of the offense and that includes
18 the fact that it was actually Mr. Starks and it was
19 actually an accurate eye witness identification that they
20 were reliable and trustworthy beyond a reasonable doubt.
21 And so in evaluating the identification testimony of a
22 witness, you should consider these things: are you
23 convinced that the witness had the capacity and inadequate
24 opportunity to observe the offender, whether the witness
25 had the opportunity to observe the offender at the time of

CHARGE ON THE LAW

327

1 the offense, will it be affected by such matters as how
2 long or short of time was available, how far or close a
3 witness was, how good were the lighting conditions, whether
4 the witness had a occasion to know the person in the past
5 and what else was going on at the time. In other words,
6 consider all of the circumstances surrounding the
7 identification in your evaluation of it. You may take into
8 account any indication if there was any failure to make an
9 identification of the offender.

10 I emphasize, the burden of proof is on the State and
11 it extends to every element of the crimes charged and this
12 specifically includes, beyond a reasonable doubt and the
13 identity of Mr. Starks as the one who committed the crime.
14 If, after examining all the testimony, if you have a
15 reasonable doubt as to the accuracy of the identification,
16 you must find the defendant not guilty.

17 Now, Mr. Starks did not testify and did not present
18 any evidence in this case. This is his constitutional
19 right. Under the constitution of this state and the United
20 States, he does not have this burden in a criminal case,
21 throughout. As I've said, the burden of proof is always on
22 the State to convince you of his guilt. He's never
23 required to prove himself innocent of a charge. This, as I
24 said, this is his constitutional right and you may not take
25 the fact that he did not testify or present any evidence,

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

CHARGE ON THE LAW

328

1 you may not take that fact into consideration in any way
2 during the course of your deliberations. If somebody in
3 the course of your deliberations brings that up and says he
4 didn't do anything, he just sat out there, or whatever,
5 that's a violation of your oath that you took at the start
6 of this trial. The constitution guarantees the right to do
7 as he did in this case and you may not let that fact, in
8 any way, affect your deliberations and the way you decide
9 this case. That's not a fact for you to consider in any
10 way against him as you deliberate in this case. The fact
11 that he did not take the witness stand or testify or
12 present any evidence does not create any prejudice against
13 him. You're not permitted to weigh this, in the slightest
14 degree, against the Defendant, nor should this fact enter
15 into deliberations or discussions or help you decide in any
16 manner.

17 Now, you'll have with you in the jury room these two
18 pieces of papers. These, as I said, we call them
19 indictments. These are the two pieces of paper that say
20 exactly what the State charges Mr. Starks with having done
21 and on the inside you'll see the charge. This is the one
22 for armed robbery, violation section, 16-11-330. That's
23 just the number of the code that's assigned to it. And it
24 says that he did on the 27th day of February, 2012, while
25 armed with a deadly weapon -- and in this case, a hand gun

CHARGE ON THE LAW

329

1 or a pistol or whatever you want to call it, but it
2 explains it was a deadly weapon and that he was either
3 actually armed with a deadly weapon and the way the State
4 defines armed robbery, it also includes anything that the
5 victim or persons reasonably believes was a deadly weapon.
6 So, it doesn't have to actually be a pistol. When somebody
7 goes in with plastic gun that looks like a pistol and the
8 person that's being confronted with it believes it's a real
9 pistol, that qualifies as armed robbery also -- So, the
10 State claims he was armed with a deadly weapon or what
11 reasonably appeared to be a deadly weapon and that while
12 doing that he took money from Ms. Williams, stole money
13 from Ms. Williams, and the money actually belonged to the
14 Shell station but he actually took it from her is what the
15 State claims. So, that was the facts that State claims Mr.
16 Starks did and it constitutes armed robbery. As I said,
17 you have to decide whether the State has met its burden of
18 proving him guilty of what's charged beyond a reasonable
19 doubt. Every element of the crime must be proven to your
20 satisfaction beyond a reasonable doubt.

21 On the back of the indictment you'll find the word
22 "verdict" over here in this corner where I have my finger.
23 Below that there is a couple of blank lines and below the
24 last line is foreman. Mr. Foreman, I would ask you to
25 write your verdict, whatever it might be, on the back of

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

CHARGE ON THE LAW

330

1 the indictment. We keep up with this. We use the
2 indictment as a record keeping vehicle also. So we'll keep
3 it and the clerk will have it on file and that's how we'll
4 know in the future what your decision was. If the State
5 has not meet it's burden of proof, you simply write the
6 words "not guilty" and sign your name as foreman. If the
7 State has meet it's burden of proof, simply write the word
8 "guilty" and sign your name as foreman.

9 Same thing goes to the second charge contained in this
10 other indictment, and again, on the inside, if you have any
11 question about what exactly it is the State charges, it
12 must prove what's in the indictment. In this case the
13 State says that he did on February 27, 2012 possess a
14 firearm, or physically displayed what appeared to be a
15 firearm or physically displayed a knife, but there's no
16 testimony about a knife being involved. It all has to do
17 with a firearm while he was committing the offense of armed
18 robbery and that, that is a violent offense under the laws
19 of this state and it is, an armed robbery is considered a
20 violent offense under the laws of this state. That is a
21 separate crime and the legislature has, by statute,
22 declared that possession of a firearm, a deadly weapon
23 during the commission of a violent crime, in this case,
24 armed robbery, is a violent offense. Again, on the back of
25 the indictment, if you find the facts to be under the laws

CHARGE ON THE LAW

331

1 as I instructed you the law to be, you find that the State
2 has not meet its burden of proof proving this crime
3 committed by Mr. Starks, you simply write the words "not
4 guilty" and sign your name as foreman of jury. We will
5 know that's your decision. If the State has meet it's
6 burden of proof, simply write the word "verdict" there, I
7 mean, excuse me, write the word "guilty" there below the
8 word verdict, sign your name so we know that's your
9 decision.

10 Now, you were selected both by the State and Mr.
11 Starks as fair and impartial jurors. You took an oath to
12 decide this case based on your fair evaluation of the
13 testimony and the evidence that has been presented to you
14 from this witness stand and my instructions to you on the
15 law. When you comply with the oath, when you do what you
16 said you were going to do at the start of this case when
17 the clerk swore you, you will fully comply with the laws
18 with regard to your duties and responsibilities as a juror
19 in this case, regardless of what your verdict or what your
20 decision will be. You have no friends to reward nor
21 enemies to punish. Your job is to do what you said you
22 would do at the start of this case, decide it based on your
23 fair evaluation, all the testimony, all the evidence
24 presented and my instructions to you under the law. When
25 you do that, no one will have the right to criticize your

CHARGE ON THE LAW

332

1 verdict regardless of what that verdict may be. Your
2 verdict must be unanimous. All twelve of you must agree on
3 what the decision is before you come back to the courtroom
4 and tell us you reached a verdict. We don't have majority
5 verdicts in South Carolina, all twelve of you must agree.

6 Now, I'm going to ask you to go to the jury room for a
7 few minutes. Don't start your deliberations yet. As you
8 know, I've been looking at some notes during the course of
9 my discussing this case with you. I need to look over my
10 notes and make sure I've told you everything I need to tell
11 you. If I send the indictments back, along with the
12 physical evidence, to the jury room, you will know at that
13 time you can begin your deliberations. If I've overlooked
14 something, I'll bring you back out to tell you what I've
15 overlooked before you begin your deliberations. So, if you
16 would go to the jury room, please.

17 (Jury out at 10:27 a.m.)

18 THE COURT: All right. We got the jury out. Now, any
19 objections from the State?

20 MR. STUMBO: Your Honor, just one thing. Your
21 reasonable doubt charge. I know you charged by the book on
22 the hesitate to act language. Typically, I've asked in the
23 past to also include the "proof that leaves you firmly
24 convinced of the Defendant's guilt" from Victor v. Nebraska
25 and my experience is that a number of judges that I've

QUESTION FROM THE JURY

333

1 worked with, will charge both in that situation. So, if
2 there's any way ---

3 THE COURT: I appreciate that. I'm not going to bring
4 them back out. I told that -- what you're talking about is
5 not incorrect and everything, but I don't think it's, I
6 don't think it's necessary, you know, so I appreciate your
7 position, but I'm not going to add that to what I told
8 them.

9 MR. STUMBO: Yes, sir.

10 THE COURT: All right. Anything else?

11 MS. NELSON: Nothing from ---

12 THE COURT: Anything from the Defendant?

13 MS. NELSON: No, sir, nothing from the Defendant.

14 THE COURT: Let's go and make sure we've got all --
15 make sure we send all the evidence back. Nobody send them
16 any notes or anything.

17 (Evidence and verdict form are sent back to the jury
18 room at 10:32 a.m.)

19 (Jury in at 10:55 a.m.)

20 QUESTION FROM THE JURY

21 THE COURT: All right. Mr. Starks is present, along
22 with his attorneys, and I believe you had a request. You
23 want to watch the in-store video again and also listen to
24 the audio of the 911 call. Is that correct?

25 MR. FOREMAN: Yes, sir.

VERDICT

334

1 THE COURT: All right, we will play - which one will go
2 first?

3 MR. BROWN: The 911 call.

4 THE COURT: All right. The 911 call will be played
5 first.

6 (WHEREUPON, an audio of the 911 call and the video
7 from the in-store camera are played for the jury.)

8 THE COURT: The bailiff has given me a note from one of
9 the juror's and the simple answer to that is no. All
10 right. So, we will let you return to the jury room and
11 continue your deliberations.

12 (Jury out at 11:11 a.m.)

13 THE COURT: If y'all want to come see what the note
14 says, I'll let you read it. (Attorneys approach)

15 (Second question from the jury made Court's Exhibit #2)

16 VERDICT

17 THE COURT: I understand we have a verdict. Mr. Starks
18 is present along with his attorneys, so bring the jury in.

19 (Jury in at 11:33 a.m.)

20 THE COURT: All right. We have the jury present.
21 Y'all be seated. Mr. Starks is present along with his
22 attorneys. The jury has returned a verdict of guilty in
23 regard to each of the charges made by the State. Anything
24 prior to discharge of the jury from the State? Nothing
25 from the State?

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

VERDICT

335

1 MR. STUMBO: None from the State.

2 THE COURT: Anything from the Defendant?

3 MS. NELSON: Your Honor, we would just like the jury
4 polled.

5 THE COURT: All right. Members of the jury panel, let
6 me tell you what that means. Under our rules, once the
7 jury's verdict is returned, as it has been and it's be
8 published here in court, the rules do provide for what is
9 called a polling of the jury and this is what that means:
10 I'm going to call each one of your names. When I do call
11 your name, if you would raise your hand so I can see who is
12 responding to that name and then the question that I'm
13 asking you is this; was the verdict as I reported here in
14 court, guilty, was it your verdict when you last voted in
15 the jury room and is it still your verdict here in open
16 court. That's the question that I'm asking you. Was the
17 verdict guilty in regard to the charge of armed robbery and
18 guilty in regard of the charge of possession of a firearm
19 during the commission of a violent crime. Was it your
20 verdict when you last voted in the jury room and is it
21 still your verdict here in open court. If it was either
22 not your vote in there or is not your vote here in open
23 court, answer, no. If it was your vote when you last voted
24 in there and is your verdict still here in open court, then
25 answer, yes. Winfield Lohr, was that your verdict when you

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

VERDICT

336

1 last voted in the jury room and is it still your verdict
2 here in open court?

3 MR. LOHR: Yes.

4 THE COURT: David Bonds, was that your verdict when
5 you last voted in the jury room and is it still your
6 verdict here in open court?

7 MR. BONDS: Yes, sir.

8 THE COURT: Andrea Lollis, was that your verdict when
9 you last voted in the jury room and still your verdict here
10 in open court?

11 MS. LOLLIS: Yes.

12 THE COURT: J-E-N-A-E, Jenae Jackson, was that your
13 verdict when you last voted in the jury room and still your
14 verdict here in open court?

15 MS. JACKSON: Yes, sir.

16 THE COURT: Deborah Scott, was that your verdict when
17 you last voted in the jury room and still your verdict here
18 in open court?

19 MS. SCOTT: Yes, sir.

20 THE COURT: Sheryl Pittard, was that your verdict when
21 you last voted in the jury room and still your verdict here
22 in open court?

23 MS. PITTARD: Yes, sir.

24 THE COURT: Bessie Darby, was that your verdict when
25 you last voted in the jury room ---

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

VERDICT

337

1 MS. DARBY: Yes, sir.

2 THE COURT: --- and still your verdict here in open
3 court?

4 MS. DARBY: Yes, sir.

5 THE COURT: Lucy Hauptvogel, was that your verdict
6 when you last voted in the jury room and still your verdict
7 here in open court?

8 MS. HAUPTVOGEL: Yes, sir.

9 THE COURT: Reggie Smith, was that your verdict when
10 you last voted in the jury room and still your verdict here
11 in open court?

12 MR. SMITH: Yes.

13 THE COURT: James Gilchrist, was that your verdict
14 when you last voted in the jury room and still your verdict
15 here in open court?

16 MR. GILCHRIST: Yes.

17 THE COURT: Ronald Chapman, was that your verdict when
18 you last voted in the jury room and still your verdict here
19 in open court?

20 MR. CHAPMAN: Yes, sir.

21 THE COURT: Marie McMurtury, was that your verdict
22 when you last voted in the jury room and still your verdict
23 here in open court?

24 MS. MCMURTURY: Yes.

25 THE COURT: All right. I believe that completes the

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

VERDICT

338

1 polling of the jury. Did I miss anybody? If so, raise
2 your hands. (No response) All right. Thank you very much.
3 That finishes you up then as far as your service is
4 required in regard to this case. Solicitor, do we have any
5 more jury trials at this point or do you know?

6 MR. STUMBO: We don't this week, Your Honor.

7 THE COURT: All right. So this will be the last they
8 will be needed here. Is that correct?

9 MR. STUMBO: Yes, sir. They can be released for the
10 week.

11 THE COURT: All right. Thank you very much then. You
12 just heard it from the Solicitor that -- he's the one that
13 calls the cases for trial by the way and he says we have
14 some other business, non-jury business, pleas and so forth,
15 that we'll be doing for the rest of the week, but that this
16 will be the only case that is called for trial this week so
17 that finishes you up in regard to your service on the jury.
18 I want to thank you very much for your service. I'm never
19 really interested in what a jury's verdict is. I am
20 interested in the way that you go about arriving at your
21 verdict and by that I mean to my observation; you paid
22 attention during the presentation of the testimony and the
23 evidence, you paid attention when the lawyers were talking
24 to you and you paid attention while I was discussing the
25 case with you, and in my observation, you did all three of

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

SENTENCING

339

1 those things. So thank you very much for your service. If
2 you have notes, if you made any notes, tear those up or
3 take them with you, whatever you want to do. You're free
4 to discuss the case with anyone if anybody wants to ask you
5 about anything. You're free to discuss it at this point
6 because your service on the jury has been completed. So
7 thank you very much, you're free to go.

8 MR. STUMBO: Your Honor, we are ready to receive the
9 sentence in this case.

10 THE COURT: All right. And we will be sentencing if
11 anybody wants to stay for a few minutes.

12 (Jury out 11:33 a.m.)

13 SENTENCING

14 THE COURT: All right. We have Mr. Dwayne Eddie
15 Starks now for sentencing on these two convictions.
16 Anything else from the State?

17 MR. STUMBO: Your Honor, just the Defendant's prior
18 record.

19 THE COURT: All right.

20 MR. STUMBO: It is extensive. It may take me a second
21 to read through this summary ---

22 THE COURT: Take more than a second. Take what time
23 you need.

24 MR. STUMBO: Yes, sir. Mr. Starks' criminal history
25 goes back to 1983 and I'll just start from that point.

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

SENTENCING

340

1 THE COURT: All right.

2 MR. STUMBO: He's convicted of shoplifting, receiving
3 stolen goods and attempted house breaking in 1983. He was
4 given a YOA sentence for that attempted housing breaking.
5 He was convicted in 1985 for larceny, simple assault and
6 battery, drawing a weapon, petit larceny. 1986, simple
7 assault and battery, disorderly conduct. 1987, disorderly
8 conduct, petit larceny and assault and battery of a high
9 and aggravated nature, two counts. He received an eight
10 year sentence for that. 1992, simple assault and battery,
11 he received a fine for that. 1993, receiving stolen goods,
12 ten years suspended to probation. 1993 and 1994, he had
13 four more ---

14 THE COURT: Do you know what happened with that? Was
15 he successful or not on probation?

16 MR. STUMBO: It appears that it was successful. I
17 don't see a revocation at that point. Now, he was revoked
18 later on.

19 THE COURT: That's what I mean.

20 MR. STUMBO: And I'll get to that ---

21 THE COURT: All right. Go ahead.

22 MR. STUMBO: He does not appear to have been revoked on
23 that particular probation.

24 THE COURT: Okay.

25 MR. STUMBO: Simple assault and battery four times,

SENTENCING

341

1 trespassing ---

2 THE COURT: When, when was that, when was ---

3 MR. STUMBO: That was 1993 and 1994.

4 THE COURT: '93 and ---

5 MR. STUMBO: And separate incidents.

6 THE COURT: All right. '93 and '94 for what?

7 MR. STUMBO: Four convictions for assault and battery.

8 THE COURT: All right.

9 MR. STUMBO: Your Honor, in 1994, he had another
10 assault and battery of high and aggravated nature. There
11 again that was five years suspended to probation. This
12 probation was revoked in 1995 and it was revoked for three
13 years on that particular ABHAN. 1997, when it gets out,
14 resisting arrest. 1997, open container and receiving
15 stolen goods. And another assault and battery of a high
16 and aggravated nature in 1998, Your Honor. He was given
17 ten years suspended to seven months and then another
18 probation at that point. He was revoked on that probation
19 for a second time, the first time for that particular
20 offense, but it was a second probation violation, overall.
21 It was revoked for six months. 1999, he has a disorderly
22 conduct, malicious injury to personal property, disorderly
23 conduct, trespassing. Those were all in 1999. Moving on
24 to 2001, Your Honor, he had a criminal domestic violence
25 and a malicious injury to personal property under a

SENTENCING

342

1 thousand. 2003, we have another disorderly conduct,
2 resisting arrest, criminal domestic violence. 2004, he's
3 convicted of traffic offense, driving without a license and
4 operating an uninsured vehicle. 2005, we have trespassing,
5 driving under suspicion, and a hit and run with property
6 damage. Later on in 2005, Your Honor, he has a burglary,
7 second degree and a strong armed robbery. Five years
8 suspended to probation on both of those to run concurrent.
9 He has a criminal domestic violence in 2006, which also
10 revokes his probation on that strong armed robbery and
11 burglary. He was revoked for eighteen months. He has a
12 resisting arrest in 2008. Trespassing in 2008. 2009, he
13 gets another criminal domestic violence. He does thirty
14 days on that. 2010, Your Honor, Mr. Starks has a
15 harassment in the second degree and assault and battery
16 third. As you know assault and batter third is kin to the
17 old common law simple assault and battery. He received
18 twenty-nine days on each of those particular charges. He
19 was revoked on his probation, Your Honor, for like I said,
20 for the strong armed robbery, the most recent time which
21 was the third time he's been on supervision and been
22 revoked. Your Honor, it's the position of the State here
23 that, obviously, the armed robbery carries a mandatory
24 minimum time, but we believe, based on ---

25 THE COURT: What is the mandatory minimum on that?

STATE OF SOUTH CAROLINA VERSUS DWAYNE STARKS

SENTENCING

343

1 MR. STUMBO: It's ten years, Your Honor.

2 THE COURT: That's what I thought.

3 MR. STUMBO: It's ten to thirty.

4 THE COURT: That's what I thought.

5 MR. STUMBO: But, Your Honor, it's our position that
6 based on his criminal record, he, he cannot operate in
7 society without hurting people and committing crimes.
8 That's the bottom line. If there is any case that, that
9 justifies a mandatory sentence, not just for what he did to
10 Ms. Williams, but for this ridiculously long prior record,
11 this is it. And so, Your Honor, we would ask for the
12 maximum sentence on this particular case to try to keep
13 this man away from the community of Abbeville for as long
14 as we possible keep him.

15 THE COURT: All right.

16 MR. STUMBO: And that's the State's position, Your
17 Honor. I don't believe Ms. Williams -- do you want to
18 address the Judge?

19 MS. WILLIAMS: I do.

20 MR. STUMBO: She would like to address, Your Honor.

21 THE COURT: All right. I'll be glad to hear from you.
22 Come on up if you want too. Yes, ma'am?

23 MS. WILLIAMS: Sir, I just wanted to say I'm just glad
24 that I'm able to take care of my kids today. I just wish
25 it...

SENTENCING

344

1 THE COURT: I appreciate it very much and I appreciate
2 you being here and as I told you yesterday, I thought you
3 handled yourself real well under the circumstances after
4 watching the video.

5 MS. WILLIAM: All right.

6 THE COURT: Thank you very much. All right. If
7 there's nothing more from the State then we'll switch now
8 to the other side. Ms. Bolen, what would you like to tell
9 me on behalf of your client?

10 MS. BOLEN: Thank you, Your Honor. May it please the
11 Court. The Solicitor has read out my client's prior
12 history and I'd to note that most of those are misdemeanor
13 level offenses. He has relatively few felony offenses.
14 And his record doesn't have any sort of weapons charges or,
15 aside from some of the assault and batteries and ABHANS,
16 nothing of what we would characterize as violent in nature.
17 I would like for you take that under consideration. In
18 addition, Your Honor, I'd like you to consider that
19 although it didn't come out in trial, some of the evidence
20 presented in the discovery process indicated that Dwayne
21 was likely under the influence of some alcohol that night
22 and I'd just like to bring that up to you.

23 THE COURT: I don't doubt that.

24 MS. BOLEN: His thinking wasn't clear because of
25 alcohol that evening. I'd also like to bring up that

SENTENCING

345

1 unlike in some armed robberies, no one was actually hurt in
2 this armed robbery and I'd like ---

3 THE COURT: Glad of that.

4 MS. BOLEN: you to note that, as well. And finally,
5 Your Honor, we've got -- Dwayne has had his mother and
6 sister up here with him all week. They're both present.
7 Dwayne has several children, one of whom recently graduated
8 from high school. He does have family that love him and
9 support him and we'd ask that you take that into
10 consideration when sentencing.

11 THE COURT: All right. And we'll turn now to you Mr.
12 Starks. I'd be glad to hear anything you want to say. You
13 don't have to, but be glad to hear anything you want to
14 say.

15 MR. STARKS: I still plead my innocence.

16 THE COURT: I'm sorry.

17 MR. STARKS: I still plead my innocence.

18 THE COURT: Well, that's fine, but you have been
19 convicted by the jury and I certainly agree with the jury's
20 decision in the case, but you're certainly, it's your
21 prerogative, your right to maintain your innocence. All
22 right. Let me just look over things here for just a
23 minute.

24 All right. Well, looking at your record, of course,
25 that's the major thing in terms of, at least, that I

SENTENCING

346

1 consider the major thing in terms of sentencing at this
2 point, Mr. Starks, and according to the record that was
3 read out by the Solicitor, I believe that this makes this
4 either the six or seventh time that you've been in General
5 Sessions court on what I would consider a major conviction.

6 So, considering that and the nature of the present
7 offenses, the sentence of the armed robbery is that you be
8 confined to the South Carolina Department of Corrections
9 for a period of twenty-five years. You get credit for your
10 jail time toward that. Five years concurrent on the
11 weapons conviction. Credit for your jail time towards
12 that. Good luck to you.

13 MS. BOLEN: Thank you, Your Honor.

14 MS. NELSON: Thank you, Your Honor.

15 MR. STUMBO: Thank you, Judge.

CERTIFICATE

I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TENTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT IS A TRUE, ACCURATE, AND COMPLETE TRANSCRIPT OF RECORD OF THE HEARING IN THE CAPTIONED CASE, IN THE COURT OF GENERAL SESSIONS FOR ABBEVILLE COUNTY, SOUTH CAROLINA ON APRIL 1-3, 20013, AT THE ABBEVILLE COUNTY COURTHOUSE, TO THE BEST OF MY SKILL AND ABILITIES.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

AUGUST 30, 2013



JO RICE

WITNESSES

Neil Henderson
Abbeville Police Department

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

WARRANT NUMBER

J097435

COURT OF GENERAL SESSIONS

July Term, 2012
Indictment # 12GS01-391

THE STATE

vs.

Dwayne Eddie Starta

Date: JUL 27 2012

Foreman of the Grand Jury

TRUE BILL

VERDICT

Guilty

Foreman

INDICTMENT FOR

ARMED ROBBERY
16-11-0330

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

INDICTMENT FOR

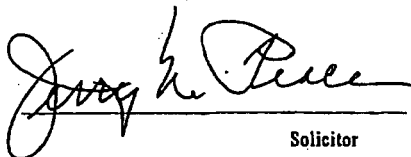
ARMED ROBBERY

16-11-0330

At a Court of General Sessions, convened on the 27th day of July, 2012 the Grand Jurors of Abbeville County present upon their oath:

That Dwayne Eddie Starks, did in Abbeville County, state aforesaid, on or about the 27th day of February, 2012 willfully and unlawfully while armed with a deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon, or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, feloniously take from the person or presence of Nakella Shanna Williams, by means of force or intimidation, goods or monies described as follows: United States currency, with intent to deprive the owner, One Stop Gas Station, permanently of such property, in violation of Section 16-11-330 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 cases made and provided.



Solicitor

TRUE COPY
BY Ghandu Boag
ABBEVILLE COUNTY CLERK OF COURT

WITNESSES

Neil Henderson
Abbeville Police Department

THE STATE OF SOUTH CAROLINA

COUNTY OF ABBEVILLE

COURT OF GENERAL SESSIONS

July Term, 2012
Indictment # 12CS01- 392

WARRANT NUMBER

1097436

THE STATE

vs.

Dwayne Eddie Starke

Robert Hosen

Date: JUL 27 2012
Foreman of the Grand Jury

TRUE BILL**VERDICT**

Guilty

Linkfield Tol

Foreman

INDICTMENT FOR

POSSESSION OF A FIREARM OR KNIFE
DURING COMMISSION OF A CRIME
16-23-0490

THE STATE OF SOUTH CAROLINA

INDICTMENT FOR

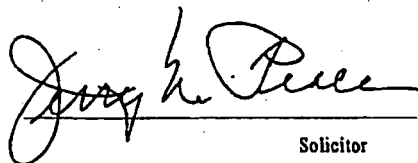
COUNTY OF ABBEVILLE

POSSESSION OF A FIREARM OR KNIFE
DURING COMMISSION OF A CRIME
16-23-0490

At a Court of General Sessions, convened on the 27th day of July, 2012 the Grand Jurors of Abbeville County present upon their oath:

That Dwayne Eddie Starks, did in Abbeville County, state aforesaid, on or about the 27th day of February, 2012 possess a firearm or visibly displayed what appeared to be a firearm, or visibly displayed a knife during the commission of a violent offense, to wit: Armed Robbery, or any lesser included violent offense, in violation of Section 16-23-490 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 cases made and provided.



Solicitor

TRUE COPY
BY Shandae Bagg
ABBEVILLE COUNTY CLERK OF COURT

ARREST WARRANT

J-097435

STATE OF SOUTH CAROLINA

County/ ☒ Municipality of

ABBEVILLE

THE STATE

against

WAYNE EDDIE STARKS

Address: [REDACTED]

ABBEVILLE SC 29620

Phone: [REDACTED]

Sex: M Race: B Height: 6-4 Weight: 230

State: SC DOB: [REDACTED]

Agency ORI#: SC0010100

Prosecuting Agency: ABBEVILLE POLICE DEPARTMENT

Prosecuting Officer: PTL THOMAS G. THOMASSON JR.

Offense: ARMED ROBBERY

Offense Code: 0139

Code/Ordinance Sec. 16-11-0330 (A)

This warrant is CERTIFIED FOR SERVICE in the

County/ ☐ Municipality of

to be arrested and brought before me to be

call with according to law.

Signature of Judge. (L.S.)

RETURN

copy of this arrest warrant was delivered to

defendant WAYNE EDDIE STARKS

2-28-2012

Signature of Constable/Law Enforcement Officer

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

Signature of Judge

STATE OF SOUTH CAROLINA

County/ ☒ Municipality of

ABBEVILLE

Personally appeared before me the affiant

being duly sworn, deposes and says that defendant

did within this county and state on

State of South Carolina (or ordinance of

in the following particulars:

DESCRIPTION OF OFFENSE: 16-11-0330(A) / ARMED ROBBERY

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:

ON 02/27/2012 DWAYNE STARKS DID ENTER THE ONE STOP LOCATED AT 810 WEST GREENWOOD STREET IN THE CITY

LIMITS OF ABBEVILLE. MR. STARKS DID PRESENT HIMSELF TO BE ARMED WITH A WEAPON TO THE STORE/CLERK. MR.

STARKS DID TAKE MONEY FROM THE CASH REGISTER AND EXIT THE STORE. THIS IS FROM INCIDENT 2012-1452.

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

AFFIDAVIT

IT, CHRIS WILKIE

being duly sworn, deposes and says that defendant

did within this county and state on

State of South Carolina (or ordinance of

in the following particulars:

DESCRIPTION OF OFFENSE: 16-11-0330(A) / ARMED ROBBERY

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:

ON 02/27/2012 DWAYNE STARKS DID ENTER THE ONE STOP LOCATED AT 810 WEST GREENWOOD STREET IN THE CITY

LIMITS OF ABBEVILLE. MR. STARKS DID PRESENT HIMSELF TO BE ARMED WITH A WEAPON TO THE STORE/CLERK. MR.

STARKS DID TAKE MONEY FROM THE CASH REGISTER AND EXIT THE STORE. THIS IS FROM INCIDENT 2012-1452.

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Form Approved by
U.S. Department of Justice
April 13, 2009
50CCA3181

Shanda Bagp

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

Affiant's Telephone

Signature of Affiant

Affiant's Address

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that

on 02/27/2012 defendant DWAYNE EDDIE STARKS

did violate the criminal laws of the State of South Carolina (or ordinance of

County/ ☒ Municipality of ABBEVILLE

DESCRIPTION OF OFFENSE: ROBBERY / ARMED ROBBERY, ROBBERY WHILE ARMED OR ALLEGEDLY

ARMED WITH A DEADLY WEAPON

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 the 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 2/28/2012 (L.S.)

Signature of Issuing Judge

Judge Code: 6665

Signature of Issuing Judge

Judge's Address

Judge's Telephone

Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit

Case # 2012-1452

351

ORIGINAL

ARREST WARRANT
J-097436
STATE OF SOUTH CAROLINA
County/ ☒ Municipality of
ABBEVILLE
THE STATE
against

WAYNE EDDIE STARKS
address: [redacted]
ABBEVILLE SC 29620
one: [redacted] SSN: [redacted]
x: M Race: B Height: 6-4 Weight: 230
Site: [redacted]
IB: Agency ORI#: SC0010100
DEVILLE POLICE DEPARTMENT
Issuing Officer: THOMAS G THOMASSON JR
Offense: POSSESSION OF A FIREARM DURING A
VIOLENT CRIME Offense Code: 0549
Per/Ordinance Sec: 16-23-0490
is warrant is CERTIFIED FOR SERVICE in the
County/ ☐ Municipality of
The accused
to be arrested and brought before me to be
all with according to law.
Signature of Judge (L.S.):
RETURN
copy of this arrest warrant was delivered to
endant DWAYNE EDDIE STARKS
2-28-2012
J.T. Gamao
Signature of Constable/Law Enforcement Officer
TURN WARRANT TO: Recd. 3/5/2012
MUNICIPAL COURT JUDGE
2 S. MAIN STREET
BEVILLE, SC 29620

STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
ABBEVILLE
Personally appeared before me the affiant LT. CHRIS WILKIE
being duly sworn deposes and says that defendant DWAYNE EDDIE STARKS
did within this county and state on 02/27/2012 to 02/27/2012 violate the criminal laws of the
State of South Carolina (or ordinance of ☐ County/ ☒ Municipality of ABBEVILLE)
in the following particulars:
DESCRIPTION OF OFFENSE: 16-23-0490 / POSSESSION OF A FIREARM DURING A VIOLENT CRIME

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:
ON 02/27/2012 DWAYNE STARKS DID ENTER THE ONE STOP LOCATED AT 810 WEST GREENWOOD STREET IN THE CITY
LIMITS OF ABBEVILLE. MR. STARKS DID PRESENT HIMSELF TO BE ARMED WITH A WEAPON TO THE STORE CLERK. ONCE
PRESENTING HIMSELF AND WEAPON TO THE STORE CLERK MR. STARKS DID TAKE MONEY FROM THE CASH REGISTER
AND EXIT THE STORE. THIS IS FROM INCIDENT 2012-1452.

Shanda Boggs

Signature of Affiant [Signature]
STATE OF SOUTH CAROLINA
☐ County/ ☒ Municipality of
ABBEVILLE
Affiant's Address 102 SOUTH MAIN STREET
ABBEVILLE SC 29620
Affiant's Telephone 864-366-5832

ARREST WARRANT
TO ANY LAW ENFORCEMENT OFFICER IN THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:
It appearing from the above affidavit that there are reasonable grounds to believe that
on 02/27/2012 defendant DWAYNE EDDIE STARKS
did violate the criminal laws of the State of South Carolina (or ordinance of
☐ County/ ☒ Municipality of ABBEVILLE)
DESCRIPTION OF OFFENSE: WEAPONS / POSS. WEAPON DURING VIOLENT CRIME, IF NOT ALSO
SENTENCED TO LIFE WITHOUT PAROLE OR DEATH

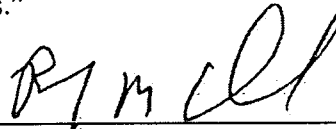
Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said
defendant and bring him or her before me forthwith to be dealt with according to the law. A copy of this Arrest Warrant shall be delivered
to the defendant at the time of its execution, or as soon thereafter as is practicable.
Sworn to and subscribed before me
on 2/28/2012 (L.S.)
Signature of Issuing Judge [Signature]
Judge's Address
Judge's Telephone
Issuing Court: ☐ Magistrate ☒ Municipal ☐ Circuit
Judge Code: 6665
Case: 2012-1452

ORIGINAL

352

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for Appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."



Robert Dudek
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1330

ATTORNEY FOR APPELLANT

February ^{26th} 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County

Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DWAYNE EDDIE STARKS,

APPELLANT

APPELLATE CASE NO. 2013-000869

FINAL BRIEF OF APPELLANT

John Edward Robinson
Attorney for Appellant
McDowell Law Offices
36 Broad St.,
Charleston, SC 29401
(843-723-5152)

Robert Dudek
Second Counsel
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES ON APPEAL	1
STATEMENT OF THE CASE	2
ARGUMENT	
The Trial Court's admission of a witness identification of appellant deprived him of due process because the witness initially identified Appellant in a manner other than visual identification, and Appellant's "show-up" identification, done in the back of a police car, lasting mere seconds, at night, was a suggestive and improper identification.....	3
Statement of Facts.....	3
Discussion.....	6
CONCLUSION.....	12

TABLE OF AUTHORITIES

Cases

<i>Coleman v. Alabama</i> , 339 U.S. 1 (1970).	10
<i>Gibbs v. State</i> , 403 S.C. 484, 744 S.E.2d 170 (2013).	9
<i>Jefferson v. State</i> , 425 S.E.2d 915, 918 (Ga. Ct. App. 1992).	9
<i>Manson v. Brathwaite</i> , 432 U.S. 98 (1977).	9, 10
<i>Neil v. Biggers</i> , 409 U.S. 188 (1992).	8, 9, 11
<i>Perry v. New Hampshire</i> , 132 S. Ct. 716 (2012).	9
<i>State v. Blassingame</i> , 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1996).	9
<i>State v. Dukes</i> , 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013), <i>petition for cert. filed</i> , No. 5148 (S.C. Oct. 23, 2013).	10
<i>State v. Frazier</i> , 394 S.C. 213, 715 S.E.2d 650 (Ct. App. 2011).	9, 12
<i>State v. Liverman</i> , 398 S.C. 130, 727 S.E.2d 422 (2012).	9, 10
<i>State v. Mansfield</i> , 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000).	9, 11
<i>State v. Moore</i> , 343 S.C. 282, 540 S.E.2d 445 (2000).	8, 9, 10, 12
<i>State v. Stewart</i> , 275 S.C. 447, 272 S.E.2d 628 (1980).	11
<i>State v. Traylor</i> , 360 S.C. 74, 600 S.E.2d 523 (2004).	11
<i>State v. Turner</i> , 373 S.C. 121, 644 S.E.2d 693 (2007).	10
<i>Stovall v. Denno</i> , 388 U.S. 293 (1967).	8, 9

STATEMENT OF ISSUE ON APPEAL

Did the trial court's admission of the witness's identification of Appellant deprive him of due process where the witness admitted she initially identified Appellant by voice, the show-up identification was done with Appellant in handcuffs seated in the back of a moving patrol car, at night, lasting only for a few seconds, where the witness admitted she could only see Appellant's face at the show-up, and without the opportunity for voice identification?

STATEMENT OF THE CASE

The Abbeville County grand jury indicted Appellant on one count of armed robbery and one count of possession of a firearm or knife during the commission of a crime. (Record on Appeal p. 6, lines 2-11). On April 1, 2013, Appellant proceeded to trial before a jury and the Honorable Thomas L. Hughston, Jr. Patricia Bolen and Janna Nelson represented Appellant and David Stumbo and Yates Brown represented the State. (R. p. 1).

At the conclusion of the trial on April 3, 2013, the jury found Appellant guilty of armed robbery and possession of a firearm in the commission of a crime. (R. p. 333, lines 20-25). For the armed robbery charge, Judge Hughston sentenced Appellant to twenty-five years imprisonment. For the weapons charge, the Judge sentenced Appellant to five years concurrent with credit for time served in jail prior to trial. (R. p. 345, lines 6-12).

This appeal follows.

ARGUMENT

THE TRIAL COURT'S ADMISSION OF A WITNESS IDENTIFICATION OF APPELLANT DEPRIVED HIM OF DUE PROCESS BECAUSE THE WITNESS INITIALLY IDENTIFIED THE APPELLANT IN A MANNER OTHER THAN VISUAL IDENTIFICATION, AND APPELLANT'S "STAND UP" IDENTIFICATION, DONE IN THE BACK OF A POLICE CAR, LASTING MERE SECONDS, AT NIGHT, WAS A SUGGESTIVE AND IMPROPER IDENTIFICATION.

STATEMENT OF FACTS

Late on the evening of February 27, 2012, sometime around 11:30 p.m., the Shell gas station on Highway 72, near Abbeville, S.C., was robbed by a hooded assailant in a ski mask. (R. p. 116, line 20-p. 120, line 18). The cashier on duty that night, Nakelia Williams, gave the robber the contents of her cash register. (R. p. 119, lines 20-22). The assailant then left the store. Ms. Williams stated she "believed" Appellant as the robber on the basis of "body build" and a voice identification. (R. p. 88, lines 13-22). Ms. Williams indicated she had prior interaction with Appellant at her store, and "he always comes in the store." (R. p. 87, lines 11-14). However, Ms. Williams was unable to see the face of the robber as it was obscured by a ski mask and hood. (R. p. 84, line 15- p. 85, line 19). Ms. Williams called Abbeville 911 and reported both the robbery and that she believed Appellant was the robber. On the call, she did not state to a certainty that Appellant was the assailant. (R. p. 153) (911 Call State Ex. 24); (R. p. 137, lines 17-21). Williams never saw the robber's face. (R. p. 138, lines 13-15).

Corporal Thomason of the Abbeville Police Department heard the 911 dispatch operator's report of the robbery and responded within a few minutes of hearing the initial report. Corporal Thomason took his patrol car to Sawmill Acres, a trailer park within a mile's distance of the Shell station. (R. p. 154, lines 2-4; p. 157, lines 19-24). Apparently,

this was on the basis that Corporal Thomason had previous familiarity with Appellant and knew him to be a resident of the area. (R. p. 158, lines 4-8). Upon entering the neighborhood in his car, Corporal Thomason came upon Appellant, wearing a red shirt, khaki slacks, and white shoes. (R. p. 158, line 24-p. 159, line 2). Corporal Thomason performed a *Terry* frisk on Appellant, found cash in his pocket, and placed him in the back of his patrol car. (R. p. 159, line 22-p. 162, line 4). Appellant did not evade or run from law enforcement. (R. p. 172, line 24-p. 173, line 3). While Appellant was detained, Thomason and Officer McAllister, who had also responded to the 911 call, searched the vicinity where he was detained and found rolls of coins, a ski mask, and other items on the ground. (R. p. 176, lines 10-25). After this discovery, Officer McAllister returned to the patrol car containing Appellant and read him his Miranda rights. (R. p. 188, lines 18-24).

Officer McAllister and another officer, Lieutenant Wilkie, left the scene of Appellant's arrest and returned to the Shell station, where they met with Ms. Williams and asked her if she could identify the person who robbed the store. (R. p. 67, lines 9-14, 21-23, 24-p. 68, line 3). When Ms. Williams agreed to comply despite a stated reluctance to closely examine their detainee, Corporal Thomason brought the patrol car into the parking lot of the Shell station, turned on the interior lights of the car, and then drove on. According to testimony, the car stopped for a few seconds during the identification process. (R. p. 68, lines 13-20; p. 179, line 25-p. 180, line 3) By Investigator Wilkie's account, the alleged identification lasted a couple of seconds. (R. p. 68, lines 22-25). Appellant's attire did not match the initial description given by Ms. Williams to 911. (R. p. 174, lines 8-15). At no point was Ms. Williams given the opportunity to examine a voice identification of Appellant, the basis on which she had previously identified him. (R. p. 91, lines 2-11).

Moreover, Appellant was handcuffed, alone, in the back of a patrol car. (R. p. 69, lines 10-14; R. p. 70, lines 10-15). Appellant was then taken to the city police department. (R. p. 169, lines 10-13).

At the hearing in this case, Appellant's trial counsel properly moved for a *Neil v. Biggers*¹ hearing, seeking to exclude Ms. Williams' momentary visual identification. (R. p. 68, line 22-p. 70, line 17). During cross-examination by Appellant's counsel, Investigator Wilkie described the fleeting and cursory nature of the show-up from the back of the patrol car:

Q. Just a couple of questions, Investigator Wilkie. You said it was less than a minute. It was really just a couple of seconds according to that video. Right?

A. Yes, ma'am.

Q. In fact, Sergeant Thomason didn't even really stop his car.

A. Correct.

Q. It was very close to midnight, so it's fair to say it was dark out?

...

Q. Okay. And my client was in the back of the police car. Correct?

A. Yes, ma'am.

Q. And he was wearing handcuffs?

A. They were on him at the time. Yes, ma'am.

Q. And he was obviously brought to the victim by the police. Correct?

A. Yes, ma'am.

¹ 409 U.S. 188 (1992).

- Q. Okay. And he was not wearing what she reported the robber was wearing. Right?
- A. No, ma'am.
- Q. He was wearing a red shirt, I believe?
- A. A red shirt. Yes, ma'am.
- Q. His face was unobstructed?
- A. Yes, ma'am.
- Q. And he was wearing beige pants?
- A. Yes, ma'am. He was.
- ...
- Q. And prior to Sergeant Thomason coming up, did you tell her anything about who was coming up?
- A. I asked her if she felt comfortable viewing him or seeing him so that she could identify him and she said that was fine.
- Q. And there wasn't anyone else in the car, right? Other than the officer and my client?
- A. That's correct.
- Q. And you didn't bring anyone else up there at any other time to the victim to view. Correct?
- A. No, ma'am.
- Q. And you didn't do a lineup?
- A. No, ma'am.

Id. Furthermore, at the *Biggers* hearing, Ms. Williams admitted during cross-examination by Appellant that she could not really see Appellant during the show-up, and her identification of his clothing that night does not match that of Investigator Wilkie and she herself was unsure of what he was wearing:

Q. The person in the store was wearing a mask? Okay. And when you saw him in the back of the police car, was he handcuffed?

A. Yes.

THE COURT: Could you see?

A. I couldn't really. I could see his head and him just sitting in the car and they shined the light and I seen his face.

Q. Okay. So, he was sitting in the car.

A. Yes, ma'am.

Q. They didn't take him out? They didn't take him out of the car?

A. No, they didn't take him out.

Q. Okay. And what was ---

A. Because I asked them not to, because they asked me first could they bring him back up there and I could fully identify him. I told them that I didn't want to, as far as him coming in the store. But they said, well, I'll leave him in the car and have him seated and they will shine the light and ---

Q. And he was wearing a red shirt in the car. Right?

A. No, ma'am.

Q. What was he wearing?

A. He had that, a green jacket on, if I'm not mistaken.

Q. In the car?

A. Yes, ma'am, I think so. I really just couldn't tell. I seen his face.

Q. In the car?

A. Yes, ma'am.

Q. So, you didn't really notice what he was wearing in the car?

A. No.

(R. p. 90, line 12-p. 91, line 23). Tr. April 1, pp. 90, ll. 12-91,23. Despite some contradictory testimony of the witnesses, the witness' own admission that she could not see, and the brief and cursory nature of the show-up outside the police station, the trial court ruled that the identification was admissible over Appellant's objection, and without reviewing all of the *Neil v. Biggers* factors. (R. p. 100, line 10-p. 101, line 4). During the course of the trial, Ms. Williams bolstered her own statements beyond those made in the pretrial hearing; contrary to prior testimony, she claimed a greater degree of certitude about the identification during cross-examination by Appellant's counsel. (R. p. 130, lines 5-8).

DISCUSSION

I. Law enforcement's suggestive identification procedure was conducive to mistaken identification and violated Appellant's right to due process.

An identification procedure that is unnecessarily suggestive and conducive to irreparable mistaken identification violates an individual's right to due process of law. *Stovall v. Denno*, 388 U.S. 293, 301-02 (1967); *State v. Moore*, 343 S.C. 282, 286, 540 S.E.2d 445, 447 (2000). In *Neil v. Biggers*, the Supreme Court crafted a two-prong inquiry to determine the admissibility of out-of-court identifications. 409 U.S. 188 (1992). First, the trial court must ascertain whether the identification process was unduly suggestive. Second, the trial court must determine whether the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed. *Id.* at 198. This

determination must be fact-specific: “there is no bright line rule concerning show-ups, as the ultimate decision is controlled by the particular facts and circumstances.” *Gibbs v. State*, 403 S.C. 484, 744 S.E.2d 170 (2013). See also *State v. Liverman*, 398 S.C. 130, 138, 727 S.E.2d 422, 426 (2012) (citing *Biggers*, 409 U.S. at 198). Corporal Thomason and Officer McAllister’s attempt to elicit an identification from Ms. Williams, at night, without the patrol car even stopping, as it moved past the Appellant made the procedure unnecessarily suggestive and conducive to irreparable mistaken identification. Since Ms. Williams’ identification was not reliable, any evidence of it and fruits thereof should have been excluded at trial.

A. Law enforcement violated Appellant’s due process rights by using an identification method that was patently suggestive.

Pursuant to *Biggers* and its progeny,² both the United States Supreme Court and the Courts of South Carolina require trial courts to scrutinize identification processes that are unduly suggestive. Some identifications are considered suggestive as a matter of law, including show-ups. *Moore*, 343 S.C. at 287, 540 S.E.2d at 448. See also *State v. Frazier*, 394 S.C. 213, 715 S.E.2d 650 (Ct. App. 2011). Such suggestive identifications are disfavored as a law enforcement practice, and one-on-one show-ups have been widely condemned as “inherently suggestive.” *Stovall*, 388 U.S. at 302; *Moore*, 343 S.C. at 287, 540 S.E.2d at 448 (citing *Jefferson v. State*, 425 S.E.2d 915, 918 (Ga. Ct. App. 1992)).

South Carolina Courts consistently recognize that having the witness in the presence of the suspect, where no other individuals are detained, is suggestive. *Gibbs*, 403 S.C. at 494, 744 S.E.2d at 175; *Liverman*, 398 S.C. at 141, 727 S.E.2d at 427; *Moore*, 343 S.C. at 288, 540 S.E.2d at 448; *Frazier*, 394 S.C. at 221, 715 S.E.2d at 654; *State v.*

² E.g., *Perry v. New Hampshire*, 132 S. Ct. 716 (2012); *Manson v. Brathwaite*, 432 U.S. 98 (1976).

Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000); *State v. Blassingame*, 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999). Moreover, the South Carolina Supreme Court has categorized stand up identification procedures as “patently suggestive.” *Moore* at 448. If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, a subsequent in-court identification is not admissible, as it is fruit of the poisonous tree. *Manson v. Brathwaite*, 432 U.S. 98 (1977); *Moore*, 343 S.C. at 286, 540 S.E.2d at 447. Examples of non-suggestive identifications include photographic lineups, even where the photos contain varying background colors, or a witness’ spontaneous identification of a defendant without law enforcement prompting. *E.g.*, *State v. Dukes*, 404 S.C. 553, 745 S.E.2d 137 (Ct. App. 2013), *petition for cert. filed*, No. 5148 (S.C. Oct. 23, 2013); *State v. Turner*, 373 S.C. 121, 644 S.E.2d 693 (2007). *Accord Coleman v. Alabama*, 339 U.S. 1 (1970) (noting the absence of the crucial element of police overreaching where witness’ identification was virtually spontaneous).

In the present case, the actions of Investigator Wilkie, Sergeant McAllister, and Corporal Thomason made Ms. Williams’ identification of Appellant unnecessarily suggestive and conducive to an irreparable mistaken identification. First, the officers’ protocol for the show-up was patently and inherently suggestive in our jurisprudence. There is no dispute in the record by law enforcement or Ms. Williams that the identification lasted mere seconds, and in no case, more than a minute. Ms. Williams’ testimony indicates that Thomasons’ patrol car may not have even come to a stop. Appellant was alone and handcuffed in the rear of the patrol car. A light was momentarily shown in his face for the benefit of Ms. Williams, yet Ms. Williams conceded she “couldn’t really” see. (R. p. 90, line 12-p.91, line 23). No opportunity was given for a photo line up or a “stand up” at the

police station. Appellant was not shown in attire matching the witness's initial description, and the witness even admitted she couldn't really see. In fact, on the whole, the identification of Appellant was cursory, as if it were a foregone conclusion that Appellant was guilty. Appellant satisfies the first prong of the *Biggers* test by virtue of the method of his abbreviated and flawed show-up identification. Under all circumstances, it falls squarely in the category of identifications treated as suggestive by the U.S. Supreme Court and the South Carolina appellate courts.

B. *The witness' identification of Appellant was not reliable enough to mitigate the suggestive nature of law enforcement's identification method.*

Once the Court has determined that an identification is suggestive, it must proceed to evaluate its reliability. *Dukes*, 404 S.C. at 560–61, 745 S.E.2d at 141. If the out-of-court identification was nevertheless so reliable that no substantial likelihood of misidentification existed, the identification may be admitted. *Liverman*, 398 S.C. at 138, 727 S.E.2d at 425–26 (citing *Biggers*, 409 U.S. at 198). Five factors should be considered when evaluating, in the totality of the circumstances, the reliability of an identification pursuant to *Biggers*: (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the perpetrator; (4) the level of certainty demonstrated by the witness; and (5) the length of time between the crime and the confrontation. *Id.* at 138; 727 S.E.2d at 426. See also *State v. Stewart*, 275 S.C. 447, 450, 272 S.E.2d 628, 629 (1980).

In South Carolina, courts have only found out-of-court identifications to be sufficiently reliable when at least two of the *Biggers* factors are satisfied. A witness' identification during a single person show-up was found to be sufficiently reliable

(overcoming the taint of suggestiveness and minimizing the possibility of mistaken identification) because he had a “protracted opportunity” to observe and remember the defendant’s face and noted particularly his heightened attention to the defendant’s features during the commission of a burglary. *Mansfield*, 343 S.C. at 79, 538 S.E.2d at 263. Similarly, a “patently suggestive” method of identification was upheld because three witnesses saw their assailant for several minutes in good light, and were able to provide a detailed description of the defendant prior to viewing his photograph. *State v. Traylor*, 360 S.C. 74, 83, 600 S.E.2d 523, 527. Finally, a single-person show-up identification was upheld where the witness was identified the defendant with a high degree of certainty only twenty minutes after the commission of the crime, even though the witness made his identification while being driven by the defendant while the defendant was being detained by law enforcement. *Frazier*, 394 S.C. at 222, 715 S.E.2d at 654.

Conversely, in *State v. Moore* the only factor supporting a finding of reliability was the short amount of time between the crime’s occurrence and the witness’ identification, and consequently the identification was excluded. 343 S.C. at 289, 540 S.E.2d at 449. The South Carolina Supreme Court noted that the witness originally did not get a good look at the criminal, and that the suggestiveness of a single person show-up, where the defendant was being detained and was surrounded by law enforcement, was not overcome or sufficiently mitigated. *Id.*

The case at hand aligns itself most closely with *Moore*. As in that case, there are not sufficient indicators of reliability, under *Biggers*, as to mitigate the suggestiveness of law enforcement’s identification procedure. There is no dispute that Ms. Williams initially identified Appellant in at the time of the robbery by voice identification and “body build.”

She said that she "believed" that the robber was Appellant, but her identification relied significantly on the voice identification. In addition to this agitated mental state, it is undisputed Ms. Williams never viewed the face of the robber while the crime was being committed. She stated that his face was covered by a ski mask and hood. Her opportunity to view her assailant at the time was therefore limited as to the second, visual identification.

Though her assailant was facially obscured, one must concede she observed her assailant for a short time. During this brief observation, Ms. Williams recalled that the assailant was masked and was wearing a green jacket. However, when the show-up identification was performed, Appellant was not masked, nor did his attire match her initial description. Ms. Williams admitted she only noticed Appellant's face during the show-up, and believed him to be wearing a green jacket. Investigator Wilkie testified that the Appellant was not wearing a green jacket at that point but rather a red shirt.

Additionally, Ms. Williams' opportunity to identify the Appellant as the masked assailant was fleeting at best. She was driven by the Appellant while he was in custody, without ever fully stopping. It around midnight and it is unclear exactly how much light was in the area where the Appellant was being detained. There is no evidence that the Appellant was ever made to get out of the police cruiser while Ms. Williams was attempting to identify him.

Related to the issue of the timing and completeness of the initial identification, Ms. Williams was never given the opportunity to make a voice identification; her recollection of Appellant's voice as a former patron in the store may have caused mistake or confusion in her identification. Because Appellant did not speak at the show-up, there was no opportunity to conduct a voice identification that would have substantiated the other

evidence provided by Ms. Williams. While Ms. Williams seemed to be certain of her assailant in her actual trial testimony, her initial identification in the 911 call came with the caveat that she "believed" Williams was the assailant, but the show-up itself was so truncated that there was the possibility of mistaken identification. Though the length of the time between the underlying offense and the identification admittedly was relatively brief (approximately an hour and a half), this fact must be balanced against the problematic nature of the suggestive identification protocol.

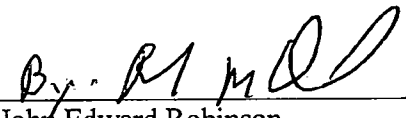
The evidence of Ms. Williams' identification of the Appellant was thus unreliable as a matter of law, and should not have been admitted at trial. The circumstances surrounding the identification demonstrate that there was a substantial likelihood of irreparable misidentification, and this likelihood was not mitigated by any reliability exhibited by Ms. Williams. Thus, having first shown that the show-up identification was inherently suggestive, Appellant also successfully demonstrates that the identification procedure was conducive to irreparable mistaken identification in the totality of the circumstances. As in *Moore*, these demonstrations give rise to a basis for remand.

Balancing the suggestiveness of the identification meetings with the factors bearing on the reliability of the identification, nothing in this case suggests that the generation of the out-of-court identification and the presentation of this evidence to the jury rose above the level of depriving Appellant of due process of the law. Appellant's identification should have been excluded as a matter of law, and should be the basis for a remand of this matter to the trial court.

CONCLUSION

Appellant respectfully requests that this Court find the show-up identification procedure unduly suggestive and the identification inherently unreliable as a matter of law, and remand this case for a new trial.

Respectfully submitted,



John Edward Robinson
Attorney for Appellant
McDowell Law Offices
36 Broad St.,
Charleston, SC 29401
(843-723-5152)

Robert Dudek
Second Counsel
South Carolina Commission on Indigent
Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589
(803) 734-1343

This 14th day of March, 2013.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

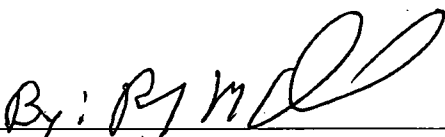
V.

DWAYNE EDDIE STARKS,

APPELLANT

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that the attached Final Brief of Appellant complies with Rule 211 (b) SCAR, this 14th day of March, 2014.

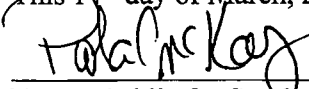
By: 

Robert M. Dudek
Chief Appellate Defender

John Edward Robinson
Co-Counsel

ATTORNEYS FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 14th day of March, 2014.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: July 24, 2022

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Abbeville County
Thomas L. Hughston, Jr., Circuit Court Judge

THE STATE,

RESPONDENT,

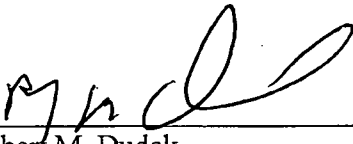
V.

DWAYNE EDDIE STARKS,

APPELLANT

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Christina Catoe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 14th day of March, 2014.



Robert M. Dudek
Chief Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
This 14th day of March, 2014.



(L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022.

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County
The Honorable Thomas L. Hughston, Jr., Circuit Court Judge
Appellate Case No. 2013-000869

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

v.

DWAYNE EDDIE STARKS,

APPELLANT.

FINAL BRIEF OF RESPONDENT

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General
SC Bar No. 73562

Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit

Post Office Box 516
Greenwood, SC 29648
(864) 942-8800

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUE ON APPEAL.....	1
STATEMENT OF THE CASE	2
ARGUMENT	3
CONCLUSION	15

AUTHORITIES CITED

Cases

<u>Gibbs v. State</u> , 403 S.C. 484, 744 S.E.2d 170 (2013)	8, 9
<u>Harker v. Maryland</u> , 800 F.2d 437 (4th Cir. 1983)	7
<u>Neil v. Biggers</u> , 409 U.S. 188 (1972)	7
<u>Perry v. New Hampshire</u> , ___ U.S. ___, 132 S. Ct. 716 (2012)	7, 14
<u>State v. Bailey</u> , 298 S.C. 1, 377 S.E.2d 581 (1989)	13
<u>State v. Blassingame</u> , 338 S.C. 240, 525 S.E.2d 535 (Ct. App. 1999)	11
<u>State v. Brown</u> , 356 S.C. 496, 589 S.E.2d 781 (Ct. App. 2003)	6-7, 10
<u>State v. Frazier</u> , 394 S.C. 213, 715 S.E.2d 650 (Ct. App. 2011)	12
<u>State v. Govan</u> , 372 S.C. 552, 643 S.E.2d 92 (Ct. App. 2007)	8
<u>State v. Liverman</u> , 398 S.C. 130, 727 S.E.2d 422 (2012)	6, 9, 14
<u>State v. Mansfield</u> , 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000))	8
<u>State v. Moore</u> , 343 S.C. 282, 540 S.E.2d 445 (2000)	7, 10, 11
<u>State v. Patterson</u> , 337 S.C. 215, 522 S.E.2d 845 (Ct. App. 1999)	12
<u>State v. Reeves</u> , 301 S.C. 191, 391 S.E.2d 241 (1990)	13
<u>State v. Roach</u> , 364 S.C. 422, 613 S.E.2d 791 (Ct. App. 2005)	12
<u>State v. Singleton</u> , 395 S.C. 6, 716 S.E.2d 332 (Ct. App. 2011)	13
<u>State v. Washington</u> , 323 S.C. 106, 473 S.E.2d 479 (Ct. App. 1996)	11-12

STATEMENT OF ISSUE ON APPEAL

The trial judge properly admitted testimony regarding the victim's identification of Appellant where the victim identified Appellant by name before the show-up took place; where the show-up was merely confirmatory; and where the victim's identification was reliable under the totality of the circumstances particularly considering her familiarity with Appellant as a regular and frequent customer in her store during the two years prior to the robbery. In any event, any possible error with respect to the identification issue was harmless beyond a reasonable doubt.

STATEMENT OF THE CASE

Appellant was indicted in Abbeville County in July 2012 for armed robbery and possession of a weapon during commission of a violent crime. On April 1-3, 2013, Appellant proceeded to trial before the Honorable Thomas L. Hughston, Jr., and a jury. The jury found Appellant guilty as indicted, and Judge Hughston sentenced Appellant to twenty-five years for armed robbery and five years, concurrent, for possession of a weapon. A timely notice of appeal was served and filed.

ARGUMENT

The trial judge properly admitted testimony regarding the victim's identification of Appellant where the victim identified Appellant by name before the show-up took place; where the show-up was merely confirmatory; and where the victim's identification was reliable under the totality of the circumstances particularly considering her familiarity with Appellant as a regular and frequent customer in her store during the two years prior to the robbery. In any event, any possible error with respect to the identification issue was harmless beyond a reasonable doubt.

Relevant Facts

On February 27, 2012, the victim was working the 6:00 pm to 1:30 am shift at the Shell Gas Station at 810 West Greenwood Street in Abbeville. (R. p. 116-117). Around 11:30 or 11:40 pm, she was coming up front from the cooler area when she noticed a man standing at the register wearing black pants, white tennis shoes, and a green jacket with a hood on his head. (R. p. 117; p. 126, lines 20-23; p. 128, lines 7-8). The victim greeted the man and asked him to take the hood off. (R. p. 117-18). When the man did not respond, the victim stated he would have to take the hood off or leave the store. (R. p. 118). The man then told the victim to give him the money out of the register. (R. p. 118, lines 6-8). The victim, a bit shocked, hesitated a moment, but then noticed that the man had a small black handgun pointed at her. (R. p. 118). The man also had on a grey ski mask. (R. p. 126, lines 20-21).

The man indicated he was not "playing" and that she had better get the money for him. (R. p. 118). At that point, the victim recognized the man as Appellant, Dwayne Starks, by his voice and by his body and build. (R. p. 120, line 19 – p. 121, line 6). Appellant had been coming into the gas station two or three times per week, every week, for the past two years the victim had worked there. (R. p. 121, lines 4-13). The victim knew Appellant's last name because she went to school with Appellant's nephew, Dexter Starks, and had heard Appellant's first name when someone called out his name in the

store on a previous occasion. (R. p. 121, lines 19-23).

Appellant then pushed the victim around to the register and followed her there. (R. p. 119). The victim opened the register and gave Appellant the money, which was mostly ten, five, and one dollar bills since it was the victim's practice to place the twenty dollar bills in the safe every time she acquired two hundred dollars' worth. (R. p. 119-20; p. 140, lines 7-10). Appellant then forced the victim to come out from behind the register while he left the store. (R. p. 120). Appellant exited the gas station, heading left in the direction of another gas station called Cherokee Trail. (R. p. 130, lines 12-16).

When she was sure Appellant was gone, the victim grabbed her cell phone and called 911. (R. p. 128, lines 22-25). She told the dispatcher that she had been robbed and that she "knew who it was." (R. p. 129, lines 5-7). She stated that she told 911 that the robber was "Dwayne Starks" and described the jacket he was wearing.¹ (R. p. 129, lines 8-16). The victim was sure that Appellant, Dwayne Starks, was the robber. (R. p. 130, lines 2-8). After the 911 call, Lieutenant Wilkie came to the store to speak with the victim. (R. p. 130). Wilkie then left but returned shortly with Appellant in the police car. (R. p. 131). The victim was not comfortable making an identification up close but agreed to see if she could identify the suspect while he sat in the patrol car. (R. p. 131, lines 6-23). As the victim stood inside the store behind the register, Corporal Thomason pulled his patrol car up to the store's front window and turned on the dome light inside. (R. p. 67, lines 11-20; p. 132; p. 142, lines 1-7). The victim was able to get a good look at the man's face, and she immediately recognized him as Dwayne Starks, the man who robbed her less than an hour and a half earlier. (R. p. 69, lines 1-9; p. 132-33).

¹ The victim testified she had not been sure how to pronounce Appellant's first name. (R. p. 137, line 25 – p. 138, line 2). The 911 dispatcher reported the robber's name as "D'won Starks" rather than "Dwayne Starks." (R. p. 28-29; p. 41, lines 15-16).

Meanwhile, Corporal Thomason, who was working the 7:00 pm to 7:00 am shift on the evening in question, responded to the 911 dispatch within a couple of minutes. (R. p. 153-56). Dispatch informed him that the robber was running on foot toward the Cherokee Trail gas station, so Corporal Thomason scanned that area and ultimately pulled in at Sawmill Acres trailer park, which was located behind the Cherokee Trail gas station. (R. p. 156-57). He observed Appellant, with whom he was familiar, walking between the third and fourth trailers in the trailer park. (R. p. 157-58). Appellant was at that point wearing a red shirt, a pair of khaki slacks, and white Nike shoes. (R. p. 158-59). Notably, inasmuch as it was around midnight and it was “pouring rain,” there was no one else in the area at the time. (R. p. 164). When Corporal Thomason asked Appellant to stop and come speak with him, Appellant turned around, put his hands up, and declared that he had not done anything wrong. (R. p. 159). Corporal Thomason performed a weapons frisk on Appellant and then placed him in investigative detention in his patrol car. (R. p. 159-60). Corporal Thomason did not find a weapon on Appellant’s person but did find a large wad of cash in one of his pockets. (R. p. 160-61). The cash was later collected by Lieutenant Wilkie and was determined to be \$146 dollars. (R. p. 213). Appellant’s cash included three twenty dollar bills but the remainder was comprised of ten, five, and one dollar bills. (See State’s Exhibit # 32; see also p. 305, lines 14-16).

After securing Appellant in the patrol car, Corporal Thomason proceeded to search the area for potential evidence of the crime. (R. p. 162). About ten feet from where Appellant had been initially located, Corporal Thomason found a green stocking cap, cash, rolled change, and loose change. (R. p. 162-63). In the same vicinity, police also found a gray ski mask in a trash can and a partially inside-out pair of black

“breakaway” pants, a type of pants that can be pulled on over other pants. (R. p. 163; p. 181, lines 2-14; p. 203, lines 6-12). Officers also backtracked the path they believed the suspect would have taken, and in doing so found a green jacket with a hood in a dirt path near the roadway. (R. p. 167; p. 205-207).

Appellant was the major contributor to a DNA mixture found on both the gray ski mask and the black pants, and he could not be excluded as being a contributor of DNA found on the green jacket. (R. p. 275-84).

A surveillance video from the gas station depicting the robbery was entered into evidence at trial and was played for the jury. (See R. p. 291-92; see State’s Exhibit # 27). Also, the audio of the victim’s 911 call was entered into evidence and played for the jury. (See R. p. 291-92; see State’s Exhibit # 24). The jury reviewed both of these pieces of evidence again during deliberations, and, after approximately one hour, returned a verdict of guilty on the charges of armed robbery and possession of a weapon during commission of a violent crime. (See R. p. 332-33). After reviewing Appellant’s extensive prior record dating back thirty years, the trial judge sentenced Appellant to twenty-five years for armed robbery and five years, concurrent, for possession of a weapon during commission of a violent crime. (See R. p. 338-45).

Applicable Law

“A criminal defendant may be deprived of due process of law by an identification procedure arranged by police which is unnecessarily suggestive and conducive to irreparable mistaken identification.” State v. Liverman, 398 S.C. 130, 138, 727 S.E.2d 422, 425 (2012) (citation omitted). If a suggestive out-of-court identification procedure created a very substantial likelihood of irreparable misidentification, an in-court identification is inadmissible. Id at 138, 727 S.E.2d at 425-26.

Under Neil v. Biggers, 409 U.S. 188 (1972), there is a two-prong inquiry used to determine the admissibility of out-of-court identifications. State v. Brown, 356 S.C. 496, 503, 589 S.E.2d 781, 784 (Ct. App. 2003). First, the court must determine if the identification process was unduly suggestive. Id. (citation omitted). If the court finds that a suggestive procedure has in fact been used, the court should then determine whether the identification was nonetheless reliable, and therefore admissible in evidence, under the totality of the circumstances. Id. (citations omitted). The following factors are normally considered to determine the reliability of an identification: “(1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the amount of time between the crime and the confrontation.” Id. at 503, 589 S.E.2d at 784 (citation omitted).

A trial judge should only exclude identification evidence if there is “a very substantial likelihood of irreparable misidentification.” Perry v. New Hampshire, ___ U.S. ___, 132 S. Ct. 716, 720 (2012) (emphasis added and citation omitted). Indeed, the exclusion of evidence is a “drastic sanction” and should be “limited to identification testimony which is manifestly suspect.” Harker v. Maryland, 800 F.2d 437, 443 (4th Cir. 1983). The decision to admit an eyewitness identification is within the trial judge’s discretion and will not be disturbed on appeal absent an abuse of that discretion or the commission of prejudicial legal error. State v. Moore, 343 S.C. 282, 288, 540 S.E.2d 445, 448 (2000).

Discussion

At issue in this case is a one-man show-up which took place shortly after the crime at the scene of the crime. In State v. Brown, this Court stated that, “[n]otwithstanding the inherent suggestiveness and general disfavoring of one-on-one show-up identifications, they may be proper where they occur shortly after the alleged crime, near the scene of the crime, as the witness’ memory is still fresh, where the suspect has not had time to alter his looks or dispose of evidence, and the show-up may expedite the release of innocent suspects and enable the police to determine whether to continue searching.” 356 S.C. 496, 503-504, 589 S.E.2d 781, 785 (Ct. App. 2003) (citing State v. Mansfield, 343 S.C. 66, 538 S.E.2d 257 (Ct. App. 2000)). This Court further stated that “[t]he closer in time and place to the scene of the crime, the less objectionable is a showup,” and noted that a show-up may be proper despite the fact that the police refer to a suspect as a “suspect,” and even though the suspect is handcuffed or is in the presence of the police. Id.

In State v. Govan, this Court held that a one-man show-up was not unduly suggestive where it occurred within forty-five minutes of the crime near the scene of the crime and where the defendant was still wearing clothing consistent with that described by the victim and was seen dropping evidence. 372 S.C. 552, 558-59, 643 S.E.2d 92, 95-96 (Ct. App. 2007).

Significantly, in Gibbs v. State, the South Carolina Supreme Court agreed with the reasoning in Brown, Govan, and Mansfield, and stated that “there is no bright line rule concerning show-ups, as the ultimate decision is controlled by the particular facts and circumstances.” 403 S.C. 484, 494, 744 S.E.2d 170, 175 (2013).

State v. Liverman also involved a one-man show-up. 398 S.C. 130, 727 S.E.2d

422 (2012). In Liverman, the South Carolina Supreme Court stated as follows:

[T]he fact that an identification witness knows the accused remains a significant factor in determining reliability. The suggestive nature of a show-up is mitigated by the witness's prior knowledge of the accused. **We concur with those jurisdictions that consider the show-up identification procedure, normally considered unduly suggestive, as merely confirmatory.** . . . After conducting a pretrial hearing, the trial court was satisfied that Tyrone knew Petitioner before the shooting and Tyrone's identification was sufficiently reliable because he identified Petitioner by his nickname to Investigator Gray prior to the suggestive police orchestrated show-up. Further, a review of Tyrone's trial testimony indicates that his in-court identification of Petitioner as the shooter originated not from any taint associated with the suggestive show-up but from Tyrone's prior association with Petitioner and his observation of Petitioner at the time of the shooting. Thus, despite the lack of a full Neil v. Biggers hearing, Tyrone's in-court identification was nonetheless properly admitted as **it had an independent origin.**

Id. at 141-42, 727 S.E.2d at 427-28 (emphasis added and citations omitted). Similarly, in Gibbs, the Supreme Court held that because the two witnesses had previously identified the defendant from a photographic lineup, a subsequent one-man show-up “may be characterized as merely confirmatory and therefore reliable, despite the suggestive procedure.” 403 S.C. at 494, 744 S.E.2d at 175.

In Appellant’s case, the one-man show-up occurred within an hour and a half of the crime, at the scene of the crime, at a time when the victim’s memory was still fresh. (See R. p. 68-69; p. 84, lines 17-18; p. 88-89). Although Appellant apparently had enough time to remove his hooded jacket, ski mask, and “breakaway” pants, these articles of clothing, along with other items of evidence, were found in the immediate proximity to where Appellant was initially seen, and cash matching the description of the money stolen was found in Appellant’s pocket. (R. p. 157-67; p. 213). Moreover, had the victim not identified Appellant, the show-up would have expedited the release of an innocent person and enabled the police to continue their search for the perpetrator. Finally, and

most importantly, since the victim had already identified Appellant by name prior to the show-up, the show-up identification was merely confirmatory. In other words, the show-up was conducted merely to confirm that the Dwayne Starks the police had located in the vicinity was the same Dwayne Starks with whom the victim was familiar and had named as the robber. Based upon the foregoing, the show-up procedure was not unduly suggestive, and the trial judge needed not proceed to evaluate the reliability of the victim's identification. (See R. p. 100-101). See State v. Moore, 343 S.C. 282, 287, 540 S.E.2d 445, 447-48 (2000) (the court need not consider the question of reliability if the procedure used was not suggestive).

However, even assuming the show-up in this case was unduly suggestive, the victim's identification was nevertheless reliable under the totality of the circumstances. As mentioned previously, the following five factors are to be considered: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's degree of attention at that time; (3) the accuracy of the witness's description of the criminal; (4) the level of certainty demonstrated by the witness at the pre-trial confrontation; and (5) the amount of time between the crime and the pre-trial confrontation. Here, first, the victim had a good opportunity to observe Appellant at the time of the crime since she was in close proximity to him for at least a couple of minutes in a well-lit gas station.² (See R. p. 117-21; see State's Exhibit # 27). Second, as a victim of a crime, she had a high degree of attention focused on Appellant. (See R. p.

² Appellant spends much time in his brief asserting that the victim had an insufficient opportunity to view Appellant as he sat in the patrol car. (See Brief of Appellant, p. 5-7; p. 10-11; p. 13). Notably, the opportunity to view the criminal at the time of the pre-trial confrontation is not one of the five reliability factors. See Brown at 503, 589 S.E.2d at 784. Nevertheless, the testimony presented established that the victim had a sufficient opportunity to see Appellant's face at the time of the pre-trial confrontation. (See R. p. 89, lines 1-23; p. 121; p. 132-33; p. 140-42; p. 170). Inasmuch as the victim was already familiar with Appellant, his face was all that she needed to see to confirm that the man in the car was the same Dwayne Starks whom she had already named as the robber.

133, lines 16-19). See e.g., State v. Blassingame, 338 S.C. 240, 252, 525 S.E.2d 535, 541-42 (Ct. App. 1999) (a victim in fear for his life has a heightened degree of attention). Third, she gave an accurate description of Appellant - including his name - to the 911 dispatcher,³ which became clear when police discovered the items of clothing Appellant attempted to discard in the trailer park. (See R. p. 41, lines 11-17; p. 126-29; p. 156, line 18 – p. 157, line 2; p. 166, line 12-18; p. 157-67; p. 275-84). Fourth, the victim expressed a high degree of certainty at the time of the pre-trial confrontation. Almost immediately after seeing Appellant's face, the victim told Lieutenant Wilkie that the man she saw was Dwayne Starks, the man who robbed her. (R. p. 67-70; see also p. 89-90; p. 219-21). At trial, the victim testified that she was "positive" that the man she saw in the backseat of the patrol car was Dwayne Starks, the man who robbed her. (R. p. 132, line 15 – p. 133, line 2). Sergeant McAllister testified that as soon as Corporal Thomason turned on the interior light in the police car, the victim stated that the man in the back was the person who robbed her and she was "extremely" confident in her identification. (R. p. 187, line 15 – p. 188, line 13). Finally, the amount of time between the crime and the pre-trial confrontation was very brief, less than an hour and a half. (See R. p. 68-69; p. 84, lines 17-18; p. 88-89). See Moore at 289, 540 S.E.2d at 449 (finding that a time of between one and a half and two hours from the time of the crime to the time of the confrontation would establish reliability if other reliability factors were present); see also State v. Washington, 323 S.C. 106, 112, 473 S.E.2d 479, 482 (Ct. App. 1996) (describing

³ Although the 911 dispatcher reported the robber's name as "D'won Starks" rather than "Dwayne Starks," the victim explained that she had not been sure how to pronounce Appellant's first name, since she had only heard it called out once in the store by someone speaking to Appellant. (R. p. 28-29; p. 41, lines 15-16; p. 88, lines 17-19; p. 121, lines 19-23; p. 137, line 25 – p. 138, line 2).

a lineup that occurred approximately two days after the crime as occurring within a “short period of time”); State v. Patterson, 337 S.C. 215, 230-31, 522 S.E.2d 845, 853 (Ct. App. 1999) (noting that the identification took place “only two weeks” after the crime).

Again, most significantly, the victim identified Appellant based upon her regular and continuous observations and interactions with him in the two years prior to the robbery. (See R. p. 84-95; p. 120-40). See State v. Frazier, 394 S.C. 213, 222, 715 S.E.2d 650, 654 (Ct. App. 2011) (upholding an identification as reliable under the totality of the circumstances, “[p]lacing particular weight on [the witness’s] acquaintance with [the defendant]”); State v. Roach, 364 S.C. 422, 429-30, 613 S.E.2d 791, 794-95 (Ct. App. 2005) (upholding an identification as reliable where the witness had many previous encounters with the defendant and was familiar with him), *vacated in part on other grounds by State v. Roach*, 377 S.C. 2, 659 S.E.2d 107 (2008); cf. Moore at 289, 540 S.E.2d at 449 (identification was not reliable where the witness, who was not a victim but instead a mere passerby, failed to recognize the defendant as a man she knew from the community at the time of the crime but later claimed to recognize the defendant at a show-up occurring at the police station). Indeed, the victim’s memory of Appellant’s voice, build, and mannerisms was especially fresh considering that he had visited the store as a customer the same evening prior to the robbery. (See R. p. 138, lines 16-24). The victim’s identification of Appellant by name, even before the show-up took place, was clearly based upon her previous familiarity with Appellant and was not tainted by any suggestibility present in the show-up procedure. Since the victim had an independent basis for identifying Appellant, the show-up was merely confirmatory and the identification was reliable.

Harmless Error

Significantly, even assuming the pre-trial and in-court identifications should have been excluded, the jury would have still been privy to the testimony indicating that the victim was familiar with Appellant and that she identified Appellant by name as the robber at the time the crime occurred. (See R. p. 120-30). The jury would have also heard the victim provide Appellant's name as the perpetrator to the 911 dispatcher. (See State's Exhibit # 24). Consequently, evidence regarding the show-up identification was insignificant in the context of the entire case. The real issue for the jury to decide was whether the victim's *pre*-show-up identification was credible and reliable in light of the other evidence against Appellant, including his proximity to the scene mere minutes after the crime, the cash found in his pocket, and the discarded clothing containing his DNA. (See R. p. 156-67; p. 275-84). Therefore, any error with respect to the pre-trial identification issue was harmless beyond a reasonable doubt. See, e.g., State v. Reeves, 301 S.C. 191, 194, 391 S.E.2d 241, 243 (1990) (an error is harmless if it could not reasonably have affected the outcome of the trial); State v. Bailey, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) ("When guilt has been conclusively proven by competent evidence such that no other rational conclusion can be reached, the Court should not set aside a conviction because of insubstantial errors not affecting the result."); see also State v. Singleton, 395 S.C. 6, 14-15, 716 S.E.2d 332, 336 (Ct. App. 2011) (any error in allowing the victim's identification testimony was harmless in light of the overwhelming evidence of defendant's guilt).

Furthermore, notwithstanding the overwhelming nature of the evidence presented during trial, other procedural safeguards protected Appellant from suffering any undue prejudice from the admission of the pre-trial identification evidence. Specifically, the

trial judge thoroughly instructed the jury regarding the State's burden of proof, the defendant's presumed innocence, the necessity that the State prove the defendant's identity as the perpetrator beyond a reasonable doubt, and the factors to be considered in evaluating identification evidence. (R. p. 318-30; p. 325-36). See Perry v. New Hampshire, 132 S. Ct. at 728-729 ("We also take account of other safeguards built into our adversary system that caution juries against placing undue weight on the eyewitnesses testimony of questionable reliability. These protections include the defendant's Sixth Amendment right to confront the eyewitness. Another is the defendant's right to effective assistance of an attorney, who can expose the flaws in the eyewitness' testimony during cross-examination and focus the jury's attention on the fallibility of such testimony during opening and closing arguments. Eyewitness-specific jury instructions, which many federal and state courts have adopted, likewise warn the jury to take care in appraising identification evidence. The constitutional requirement that the government prove the defendant's guilt beyond a reasonable doubt also impedes convictions based on dubious identification evidence." (citations and footnote omitted)).

Beyond the trial judge's instructions, defense counsel was able to expose alleged deficiencies in the victims' identifications of Appellant through cross-examination of the witnesses and was able to call into question the reliability of the identification in closing argument. (See R. p. 133-40; p. 171-75; p. 189-90; p. 225-35; p. 286-88; p. 308-18). Cf. Liverman, 398 S.C. at 143-144, 727 S.E.2d at 428-429 (finding any error in the admission of identification evidence to be harmless where the reliability of the identification evidence was fully vetted at trial, the weaknesses in the evidence were exposed on cross-examination, and defense counsel reminded the jury of those weaknesses during closing arguments). In light of the procedural safeguards at work in

this case, and considering the insignificance of the pre-trial identification testimony as discussed above, any error with respect to the identification issue was harmless. Accordingly, the trial judge did not commit reversible error by admitting the victim's pre-trial and in-court identifications, and Appellant's convictions should be affirmed. (See R. p. 100-101).

CONCLUSION

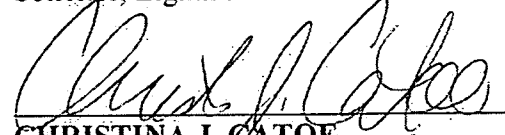
For the reasons discussed above, Respondent requests that this Court affirm Appellant's convictions and sentences.

Respectfully submitted,

ALAN WILSON
Attorney General

CHRISTINA J. CATOE
Assistant Attorney General

DAVID M. STUMBO
Solicitor, Eighth Judicial Circuit


CHRISTINA J. CATOE
SC Bar No. 73562

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 18, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County
The Honorable Thomas L. Hughston, Jr., Circuit Court Judge
Appellate Case No. 2013-000869

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

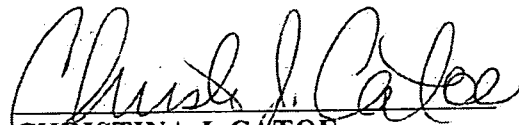
v.

DWAYNE EDDIE STARKS,

APPELLANT.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the **Final Brief of Respondent** complies with Rule 211(b), SCACR, and also complies with the South Carolina Supreme Court's August 13, 2007 **Order on Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings**.



CHRISTINA J. CATOE

Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3737

ATTORNEYS FOR RESPONDENT

March 18, 2014

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Abbeville County
The Honorable Thomas L. Hughston, Jr., Circuit Court Judge
Appellate Case No. 2013-000869

THE STATE OF SOUTH CAROLINA,

RESPONDENT,

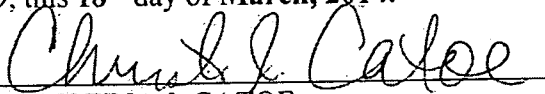
v.

DWAYNE EDDIE STARKS,

APPELLANT.

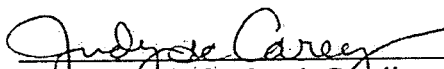
AFFIDAVIT OF SERVICE

The undersigned attorney hereby certifies that the **Final Brief of Respondent** in the above-referenced case has been served upon **John Edward Robinson**, McDowell Law Offices, 36 Broad Street, Charleston, SC, 29401, and **Robert M. Dudek**, Division of Appellate Defense, South Carolina Commission on Indigent Defense, Post Office Box 11589, Columbia, South Carolina 29211-1589, this **18th** day of **March, 2014**.


CHRISTINA J. CATOE
Assistant Attorney General

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3737

SWORN to before me this 18th day of March, 2014.


Notary Public for South Carolina.
My Commission Expires: 5/11/2014