

VOLUME I OF II

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from Lexington County

D. Craig Brown, Circuit Court Judge

RECEIVED

JUN 28 2016

SC SUPREME COURT

BENNIE GOLSTON,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2016-000289

A P P E N D I X

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STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

COURT OF GENERAL SESSIONS

STATE OF SOUTH CAROLINA

-vs-

BENNIE GOLSTON,

Defendant.

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TRANSCRIPT OF RECORD

09-GS-32-5027

May 13-14, 2009
Lexington, South Carolina

B E F O R E:

HONORABLE R. KNOX MCMAHON, Judge; and a jury.

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

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Attorneys for the Defendant

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Circuit Court Reporter

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STATE'S EXHIBITS

6	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
7	1	Hatchet	53	205
8	2	Small log	69	179
9	3	Photograph	69	192
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STATE'S EXHIBITS

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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1 (The following proceedings are reported on
2 May 13, 2009).

3 THE COURT: Solicitor, you may call your next
4 case for trial.

5 MR. BUCHANAN: Your Honor, may we approach
6 briefly?

7 THE COURT: Yes, sir.

8 (Whereupon there was a bench conference off
9 the record in the presence of the jury panel but out of
10 the hearing of the jury panel).

11 THE COURT: Solicitor, you may call your next
12 case for trial.

13 MS. PATTERSON: Thank you, Your Honor. May it
14 please the Court. The State calls 2009-GS-32-5027, the
15 State of South Carolina versus Bennie Golston for the
16 charge of criminal domestic violence of a high and
17 aggravated nature.

18 (Hands to Court).

19 THE COURT: Thank you. Thank you, Solicitor.

20 Ladies and gentlemen of the jury panel, if you
21 would please give me your complete and undivided
22 attention. Again, good morning. We are fixing to begin
23 a procedure whereby we are going to select a trial jury
24 for the trial of this next case that the solicitor has
25 called for trial.

1 I will ask you a series of questions. I would
2 ask you to please consider yourselves still under oath.
3 You were placed under oath Tuesday during the general
4 jury qualification process. I would ask you to please
5 again consider yourselves under oath and to have your
6 responses be full, complete, and accurate.

7 The State has called for trial Indictment
8 2009-GS-32-05027. It is captioned the State versus
9 Bennie Golston. The indictment reads that Bennie
10 Golston did in Lexington County, South Carolina, on or
11 about March 22, 2008, one, cause physical harm or injury
12 to a family or household member, and/or, two, offer or
13 attempt to cause physical harm or injury to a family or
14 household member with apparent present ability under
15 circumstances reasonably creating fear of imminent
16 peril, namely Myrtle Johnson, by striking the victim an
17 undetermined amount of time with closed fists and a
18 wooden log approximately 18 inches in length and 3
19 inches -- 3 feet in diameter.

20 That would be approximately 18 inches in
21 length and 3 feet in diameter, and used a hatchet to rub
22 on the victim's arms and threaten her in violation of
23 16-25-65 of the Code of Laws of South Carolina, 1976 as
24 amended. That is an indictment for criminal domestic
25 violence of a high and aggravated nature.

1 Ladies and gentlemen, the indictment is the
2 formal charging document. It is the formal document by
3 which a defendant is placed on notice of the charges
4 that have been brought against him or her. These are
5 mere allegations contained within the indictment, and
6 they are not in any sense evidence of the allegations
7 contained therein.

8 The Solicitor's Office will be represented by
9 Assistant Solicitors Patterson and Whetstone.
10 Solicitor, if you would please stand and introduce
11 yourself and any other members of the Solicitor's staff
12 that will assist you in the prosecution of this case.

13 MS. PATTERSON: Good morning. My name is
14 Rhonda Patterson. I'm an assistant solicitor with the
15 Lexington County Solicitor's Office. This is Kate
16 Whetstone. She will be assisting me in this trial.

17 THE COURT: Thank you. Thank you very much,
18 Solicitor.

19 The Defendant, Mr. Golston, is represented by
20 Mr. Buchanan. Mr. Buchanan, would you please stand and
21 introduce yourself and any other members of your firm
22 that are going to assist you in the representation of
23 Mr. Golston.

24 MR. BUCHANAN: Hello, everybody. My name is
25 Matt Buchanan. I'm the attorney for Mr. Golston. This

1 is David Mauldin. He is an attorney with our firm and
2 is going to be helping me out. My paralegal and
3 investigator, Trisha Reese, will also be here.

4 THE COURT: You may introduce your client at
5 this time also.

6 MR. BUCHANAN: Thank you, Your Honor. This is
7 Bennie Golston. He is the Defendant, and I represent
8 him in this case.

9 THE COURT: Thank you. Thank you,
10 Mr. Buchanan, Mr. Mauldin.

11 Is any member of the jury panel related by
12 blood or marriage or close personal friends of either
13 Assistant Solicitor Patterson or Whetstone or any
14 employee of the Lexington County Solicitor's Office? If
15 so, please stand.

16 (Juror stands).

17 THE COURT: Yes, sir, your number and name,
18 please? This is Mr. Span?

19 PROSPECTIVE JUROR: Yes, sir.

20 THE COURT: This is 157?

21 PROSPECTIVE JUROR: Yes, sir.

22 THE COURT: Tell me your situation, Mr. Span.

23 PROSPECTIVE JUROR: Former deputy with
24 Lexington County.

25 THE COURT: Hold on just a second. Is my

1 speaker on, my mechanical speaker? If you would repeat
2 that for me, Mr. Span. I've got an assistant up here.

3 PROSPECTIVE JUROR: Yes, sir. Kevin Wilson,
4 he is an investigator with the Solicitor's Office. We
5 also worked together as deputies with the Lexington
6 County Sheriff's Department in prosecuting cases.

7 THE COURT: I will set Mr. Span aside for the
8 trial of this case. Thank you very much, Mr. Span. You
9 may be seated. Any others?

10 (There is no response).

11 THE COURT: The Defendant, of course, is
12 represented by Mr. Buchanan and Mr. Mauldin of the
13 Public Defender's Office. Is any member of the jury
14 panel related by blood or marriage or close personal
15 friends of either Mr. Buchanan or Mr. Mauldin? If so,
16 please stand.

17 (There is no response).

18 THE COURT: Has any member of the jury panel
19 or a member of your immediate family ever been
20 represented by Ms. Patterson, Ms. Whetstone,
21 Mr. Buchanan, or Mr. Mauldin? If so, please stand.

22 (There is no response).

23 THE COURT: Has any member of the jury panel
24 or a member of your immediate family ever been
25 prosecuted by Ms. Patterson or Ms. Whetstone? If so,

1 please stand.

2 (There is no response).

3 THE COURT: This indictment alleges an
4 incident that occurred in Lexington County on or about
5 March 22, 2008. The Defendant named is Mr. Bennie
6 Golston that has stood before you previously. The
7 individual named in the indictment is Myrtle Johnson.
8 Is Myrtle Johnson present?

9 MS. PATTERSON: Yes, sir.

10 THE COURT: Ms. Johnson, would you please
11 stand and face the jury panel. This is Ms. Johnson to
12 my front right. Thank you, Ms. Johnson.

13 Is any member of the jury panel related by
14 blood or marriage or close personal friends of either
15 Mr. Golston, the Defendant, or Ms. Johnson? If so,
16 please stand.

17 (Juror stands).

18 THE COURT: Yes, sir, your number and name,
19 please?

20 PROSPECTIVE JUROR: Edward Crum, Number 43.

21 THE COURT: You know -- tell me your
22 situation, Mr. Crum.

23 PROSPECTIVE JUROR: I know Mr. Golston.

24 THE COURT: How do you know Mr. Golston?

25 PROSPECTIVE JUROR: He is from my

1 neighborhood.

2 THE COURT: You live off what, 21?

3 PROSPECTIVE JUROR: Yes, sir.

4 THE COURT: How long have you been neighbors
5 with Mr. Golston?

6 PROSPECTIVE JUROR: About seven years.

7 THE COURT: Are y'all close neighbors? I
8 mean, close in distance?

9 PROSPECTIVE JUROR: You could say that.

10 THE COURT: Are y'all friends?

11 PROSPECTIVE JUROR: We see each other every
12 once in a while.

13 THE COURT: The fact that you have been a
14 neighbor of Mr. Golston for about seven years, I believe
15 you said, and you see each other every once in a while,
16 could you still be a fair and impartial juror to both
17 the State and the defense in this case?

18 PROSPECTIVE JUROR: Yes, sir, I think so.

19 THE COURT: When you say I think so, that may
20 be a matter of semantics.

21 PROSPECTIVE JUROR: I am giving you an honest
22 answer, I think.

23 THE COURT: Do you know Ms. Johnson?

24 PROSPECTIVE JUROR: No, sir.

25 THE COURT: Thank you. I will leave you with

1 us right now. Thank you, Mr. Crum. You may be seated.

2 Does any member of the jury panel have any
3 knowledge about the facts of this case?

4 (There is no response).

5 THE COURT: Does any member of the jury panel
6 have any bias or prejudice towards either the parties,
7 that would be the State or the Defendant, or the subject
8 matter involved in the case? If so, please stand.

9 (There is no response).

10 THE COURT: Has any member of the jury panel
11 heard or know anything about the case from any source
12 whatsoever? If so, please stand.

13 (There is no response).

14 THE COURT: I will call a list of names. I
15 would ask if these individuals are present when I call
16 your name, if you would please stand and face the jury
17 panel.

18 I would advise the jury panel the witnesses do
19 not have to be present at this time. So you may hear
20 names called and no one will stand. Deputy Kevin Blake,
21 Lexington County Sheriff's Department. This is Deputy
22 Blake to my front right. Thank you.

23 Deputy Shannon Radford. This is Deputy
24 Radford to my front right also. Thank you. Deputy Mike
25 Merckle, who is not present at this time. Myrtle

1 Johnson who has previously stood before you.

2 Is any member of the jury panel related by
3 blood or marriage or close personal friends of any of
4 those individuals whose names I just called? If so,
5 please stand.

6 (There is no response).

7 THE COURT: Next we have Gail Jones. This is
8 Ms. Jones to my front, halfway back. Thank you,
9 Ms. Jones. Tarik Johnson. This is Mr. Johnson to my
10 front right. Thank you, Mr. Johnson. Jennifer Watson.
11 This is Ms. Watson to my front right.

12 Is any member of the jury panel related by
13 blood or marriage or close personal friends of any of
14 those individuals whose names I just called and stood
15 before you? If so, please stand.

16 (There is no response).

17 THE COURT: Next we have Trisha Reese. This
18 is Ms. Reese to my front left. Nellie Golston. Amy
19 Golston.

20 Is any member of the jury panel related by
21 blood or marriage to any of those individuals whose
22 names I just called and/or who stood before you? If so,
23 please stand.

24 (There is no response).

25 THE COURT: Has any member of the jury panel

1 or any member of your immediate family ever been a
2 victim of a crime of personal violence? If so, please
3 stand.

4 (Jurors stand).

5 THE COURT: If y'all would come forward for
6 me, please, to the rail.

7 (Whereupon a bench conference with the Court,
8 counsel, and the first juror is reported as follows).

9 BAILIFF: Juror Number 76, Judge.

10 THE COURT: Yes, ma'am, if you would tell me
11 your situation, Ms. Hill.

12 PROSPECTIVE JUROR: Childhood. My mother --
13 my father would beat my mother.

14 THE COURT: The fact that this occurred, would
15 you still be a fair and impartial juror to both the
16 State and the defense in this case?

17 PROSPECTIVE JUROR: I believe I could.

18 THE COURT: Like I told Mr. Crum, it may be a
19 matter of semantics when you say you believe you could.
20 Of course, the case is decided by what you hear in the
21 courtroom, the witnesses, the evidence in the courtroom,
22 not what may have happened to you. If you are chosen on
23 this jury, could you make your decision based on what
24 you hear in the courtroom and not what you have
25 experienced?

1 PROSPECTIVE JUROR: Yes, sir.

2 THE COURT: I believe you can stay with us.
3 Thank you. Do not say anything to your fellow jurors.
4 I know you won't.

5 (The juror leaves the bench, and a bench
6 conference with the next juror was reported as follows).

7 BAILIFF: Number 30, Judge.

8 THE COURT: Ms. Charles, tell me your
9 situation. Good morning. Tell me your situation.

10 PROSPECTIVE JUROR: My niece was murdered by
11 her fiancée.

12 THE COURT: When did this occur?

13 PROSPECTIVE JUROR: About 12 years ago.

14 THE COURT: The fact that this occurred, this
15 tragedy occurred, could you still be a fair and
16 impartial juror to both the State and the defense in
17 this case?

18 PROSPECTIVE JUROR: I'm sure I can.

19 THE COURT: Thank you. You can stay with us.
20 Thank you very much. Do not say anything to your fellow
21 jurors.

22 (The juror leaves the bench, and a bench
23 conference with the next juror was reported as follows).

24 BAILIFF: Number 132, Your Honor.

25 THE COURT: Mr. Prince. Yes, sir, good

1 morning.

2 PROSPECTIVE JUROR: About four years ago my
3 daughter was accosted and held captive and was beaten up
4 by her boyfriend, and he got ten years for it.

5 THE COURT: The fact that this occurred to
6 your daughter by her then boyfriend, could you still be
7 a fair and impartial juror to both the State and the
8 defense in this case?

9 PROSPECTIVE JUROR: It wouldn't affect my
10 feeling.

11 THE COURT: Thank you. I believe you can stay
12 with us. Thank you very much.

13 (The bench conference is concluded).

14 THE COURT: Has any member of the jury panel
15 or a member of your immediate family ever been employed
16 with the Lexington County Sheriff's Department or the
17 State Law Enforcement Division as a police officer? If
18 so please stand.

19 (Juror stands).

20 THE COURT: I have you, Mr. Span. I think I
21 have set you aside. Thank you very much. Any others?

22 (There is no response).

23 THE COURT: Thank you. Has any member of the
24 jury panel or a member of your immediate family or close
25 personal friends ever been affiliated with or donated

1 money, goods or services to any auxillary police
2 organizations or any other citizen's groups whose
3 primary aim is the prosecution or pursuit of criminal
4 defendants? If so, please stand.

5 (There is no response).

6 THE COURT: Has any member of the jury panel
7 or a member of your immediate family or close personal
8 friend ever been affiliated with or donated money, goods
9 of services to any women's shelters or other programs
10 designed to offer assistance to victims, including
11 victims of domestic violence? If so, please stand.

12 (Jurors stand).

13 THE COURT: Yes, right here, your number and
14 name, please?

15 PROSPECTIVE JUROR: 113.

16 THE COURT: Were you a member of or volunteer?

17 PROSPECTIVE JUROR: I just donate to -- it's
18 behind the City of Cayce Police Department up on the
19 hill. I can't think -- Sistercare, random donations or
20 clothing or whatnot.

21 THE COURT: You have done this for a number of
22 years?

23 PROSPECTIVE JUROR: Maybe since I have lived
24 here, the past two or three years on occasion.

25 THE COURT: Did I get your name and number?

1 PROSPECTIVE JUROR: 113.

2 CLERK: William Metts.

3 THE COURT: Thank you, Mr. Metts. The fact
4 that you have given those donations to such
5 organizations, could you still be a fair and impartial
6 juror to both the State and the defense in this case?

7 PROSPECTIVE JUROR: Yes, sir.

8 THE COURT: Thank you. You may be seated.
9 You may stay with us. Yes, sir, your number and name,
10 please?

11 PROSPECTIVE JUROR: My name is Robert Koger,
12 Number 89. I used to work for a cell phone company. I
13 donated old phones for women with domestic violence. I
14 have done so previously, for the last ten years.

15 THE COURT: The fact that you have made those
16 types of donations to victims of domestic violence,
17 could you still be a fair and impartial juror to both
18 the State and the defense in this case?

19 PROSPECTIVE JUROR: Yes, Your Honor.

20 THE COURT: Thank you. You may stay with us
21 and you may be seated. Yes, ma'am, your number and
22 name, please?

23 PROSPECTIVE JUROR: My number is 57. Since
24 the '70s I have volunteered for suicide prevention and
25 crisis prevention in New York and I have helped --

1 COURT REPORTER: Judge, I'm sorry. I did not
2 hear all of that.

3 THE COURT: Ma'am, would you mind stepping up
4 here to the microphone. My court reporter couldn't
5 quite get everything down because of the distance, I
6 think. If you would go through that for us again.

7 PROSPECTIVE JUROR: All right. I am 57. My
8 name is Rosa Fang. Since the late '70s, I have
9 volunteered for the suicide prevention and crisis
10 service in Ithaca, New York, during which time I have
11 also helped found a women's shelter which houses women
12 in domestic violence situations for transitioning to
13 finding jobs, gainful employment. Since then I have
14 donated money to the shelter and sometimes household
15 goods, but I do feel like I can be impartial.

16 THE COURT: I think you have answered my next
17 question. You may stay with us. Thank you very much.
18 Any others?

19 (There is no response).

20 THE COURT: I have one further name. I failed
21 to name one of the further potential witnesses I failed
22 to call out. Bambi Gray. Is Ms. Gray present? Stand
23 up for me, please, and face the jury panel. This is
24 Ms. Gray to my front right. Thank you. Thank you very
25 much.

1 Is any member of the jury panel related by
2 blood or marriage or close personal friends of Ms. Gray?
3 If so, please stand.

4 (There is no response).

5 THE COURT: I would decline -- I think I have
6 asked number five in a different form earlier in voir
7 dire. Any additional requested voir dire from the
8 State?

9 MS. PATTERSON: Nothing from the State.

10 THE COURT: From the defense?

11 MR. BUCHANAN: Nothing from the defense, Your
12 Honor.

13 THE COURT: Finally, ladies and gentlemen of
14 the jury panel, does any member of the jury panel know
15 any reason whatsoever why you feel like you would not or
16 could not be a fair and impartial juror to both the
17 State and the defense in the trial of this case? If so,
18 please stand.

19 (There is no response).

20 THE COURT: I find our panel is qualified.
21 The strikes are five and five. Is that correct,
22 Solicitor, Mr. Buchanan?

23 MS. PATTERSON: That is correct, Your Honor.

24 MR. BUCHANAN: Yes, Your Honor.

25 THE COURT: I believe they know what to do.

1 Perhaps you could remind them, Madame Clerk.

2 MR. BUCHANAN: I have one thing. Can I
3 approach?

4 THE COURT: Yes, certainly.

5 (Whereupon there is a bench conference off the
6 record in the presence of the jury panel but out of the
7 hearing of the jury panel).

8 THE COURT: Madame Clerk.

9 CLERK: As we did yesterday, when I call your
10 name, come and stand in front of the podium and face
11 back in the direction you came from until I tell you to
12 have a seat in the jury box or return to your seat.

13 Number 55, James Evans.

14 (The juror, a white male, comes forward).

15 CLERK: What say you for the State?

16 MS. PATTERSON: Please present Mr. Evans.

17 CLERK: What say you for the defense?

18 MR. BUCHANAN: Please seat Mr. Evans.

19 CLERK: Have a seat in the jury box, please,
20 sir.

21 Number 181, William Wilson.

22 (The juror, a white male, comes forward).

23 CLERK: What say you for the State?

24 MS. PATTERSON: Please present Mr. Wilson.

25 CLERK: What say you for the defense?

1 MR. BUCHANAN: Please seat Mr. Wilson.
2 CLERK: Have a seat in the jury box, sir.
3 Number 142, John Safko.
4 (The juror, a white male, comes forward).
5 CLERK: What say you for the State?
6 MS. PATTERSON: Please present Mr. Safko.
7 CLERK: What say you for the defense?
8 MR. BUCHANAN: Please excuse Mr. Safko from
9 the trial of this case.
10 CLERK: Return to your seat, please, sir.
11 Number 95, Buddy Lindler.
12 (The juror, a white male, comes forward).
13 CLERK: What say you for the State?
14 MS. PATTERSON: Please present Mr. Lindler.
15 CLERK: What say you for the defense?
16 MR. BUCHANAN: Please seat Mr. Lindler.
17 CLERK: Have a seat in the jury box, please,
18 sir.
19 Number 163, Gary Stewart.
20 (The juror, a white male, comes forward).
21 CLERK: What say you for the State?
22 MS. PATTERSON: Please present Mr. Stewart.
23 CLERK: What say you for the defense?
24 MR. BUCHANAN: Please seat Mr. Stewart.
25 CLERK: Have a seat in the jury box, sir.

1 Number 31, Newton Chism.

2 (The juror, a white male, comes forward).

3 CLERK: What say you for the State?

4 MS. PATTERSON: Please excuse Mr. Chism.

5 CLERK: Return to your seat, please, sir.

6 Number 116, Lynn Moore.

7 (The juror, a white female, comes forward).

8 CLERK: What say you for the State?

9 MS. PATTERSON: Please present Ms. Moore.

10 CLERK: What say you for the defense?

11 MR. BUCHANAN: Please seat Ms. Moore.

12 CLERK: Have a seat in the jury box, ma'am.

13 Number 76, Betty Hill.

14 (The juror, a white female, comes forward).

15 CLERK: What say you for the State?

16 MS. PATTERSON: Please present Ms. Hill.

17 CLERK: What say you for the defense?

18 MR. BUCHANAN: Please excuse Ms. Hill from the
19 trial of this case.

20 CLERK: Return to your seat, please, ma'am.

21 Number 74, John Hellams.

22 (The juror, a white male, comes forward).

23 CLERK: What say you for the State?

24 MS. PATTERSON: Please present Mr. Hellams.

25 CLERK: What say you for the defense?

1 MR. BUCHANAN: Please seat Mr. Hellams.
2 CLERK: Have a seat in the jury box, please,
3 sir.
4 Number 46, Diane Davis.
5 (The juror, a black female, comes forward).
6 CLERK: What say you for the State?
7 MS. PATTERSON: Please present Ms. Davis.
8 CLERK: What say you for the defense?
9 MR. BUCHANAN: Please seat Ms. Davis.
10 CLERK: Have a seat in the jury box, ma'am.
11 Number 171, Henry Timms.
12 (The juror, a white male, comes forward).
13 CLERK: What say you for the State?
14 MS. PATTERSON: Please present Mr. Timms.
15 CLERK: What say you for the defense?
16 MR. BUCHANAN: Please seat Mr. Timms.
17 CLERK: Have a seat in the jury box, sir.
18 Number 109, Melissa McVey.
19 (The juror, a white female, comes forward).
20 CLERK: What say you for the State?
21 MS. PATTERSON: Please present Ms. McVey.
22 CLERK: What say you for the defense?
23 MR. BUCHANAN: Please excuse Ms. McVey from
24 the trial of this case.
25 CLERK: Return to your seat, please, ma'am.

1 Number 175, Adrien Voisine.

2 (The juror, a white male, comes forward).

3 CLERK: What say you for the State?

4 MS. PATTERSON: Please present Mr. Voisine.

5 CLERK: What say you for the defense?

6 MR. BUCHANAN: Please seat Mr. Voisine.

7 CLERK: Have a seat in the jury box, sir.

8 Number 16, Sandra Branham.

9 (The juror, a white female, comes forward).

10 CLERK: What say you for the State?

11 MS. PATTERSON: Please present Ms. Branham.

12 CLERK: What say you for the defense?

13 MR. BUCHANAN: Please seat Ms. Branham.

14 CLERK: Have a seat in the jury box, please,

15 ma'am.

16 Number 121, Barbara Nix.

17 (The juror, a white female, comes forward).

18 CLERK: What say you for the State?

19 MS. PATTERSON: Please present Ms. Nix.

20 CLERK: What say you for the defense?

21 MR. BUCHANAN: Please excuse Ms. Nix from the

22 trial of this case.

23 CLERK: Return to your seat, please, ma'am.

24 Number 37, Diane Cook.

25 (The juror, a white female, comes forward).

1 CLERK: What say you for the State?
2 MS. PATTERSON: Please present Ms. Cook.
3 CLERK: What say you for the defense?
4 MR. BUCHANAN: Please seat Ms. Cook.
5 CLERK: Have a seat in the jury box, ma'am.
6 Number 165, Jan Stotts.
7 (The juror, a white female, comes forward).
8 CLERK: What say you for the State?
9 MS. PATTERSON: Please present Ms. Stotts.
10 CLERK: What say you for the defense?
11 MR. BUCHANAN: Please excuse Ms. Stotts from
12 the trial of this case.
13 CLERK: Return to your seat, please, ma'am.
14 Number 120, Wilford Nienberg.
15 (The juror, a white male, comes forward).
16 CLERK: What say you for the State?
17 MS. PATTERSON: Please present Mr. Nienberg.
18 CLERK: What say you for the defense?
19 MR. BUCHANAN: Please seat Mr. Nienberg.
20 CLERK: Have a seat in the jury box, please,
21 sir.
22 Alternates, Your Honor?
23 THE COURT: Yes, one, please. The strikes are
24 one and two.
25 CLERK: Number 28, Lesa Celeste.

1 (The juror, a white female, comes forward).

2 CLERK: What say you for the State?

3 MS. PATTERSON: Please present Ms. Celeste.

4 CLERK: What say you for the defense?

5 MR. BUCHANAN: Please seat Ms. Celeste.

6 CLERK: Have a seat in the jury box, please,
7 ma'am.

8 (The jury is impaneled at 12:22 p.m.)

9 THE COURT: Any motions regarding the jury
10 selection process from the State?

11 MS. PATTERSON: Nothing from the State.

12 THE COURT: From the defense?

13 MR. BUCHANAN: Nothing from the defense, Your
14 Honor.

15 THE COURT: Thank you very much. Solicitor,
16 any pretrial motions?

17 MS. PATTERSON: None from the State, Your
18 Honor.

19 THE COURT: Step up here just a moment.

20 (Whereupon there is a bench conference off the
21 record in the presence of the jury but out of the
22 hearing of the jury).

23 THE COURT: Ladies and gentlemen of the jury
24 panel that were selected for the trial of this case, I
25 am going to in a moment allow you to go for the lunch

1 break. I have another jury panel out and they know how
2 to write.

3 They have bombarded me with questions. I need
4 to bring them out and talk to them a few minutes. That
5 may take us to 1:00 o'clock anyway. I think what I will
6 do is just send y'all on to lunch anyway and allow y'all
7 to go to lunch.

8 I remind you during this luncheon recess and
9 throughout the trial of this case, you are not
10 authorized to discuss this case with anyone. That
11 includes your fellow jurors, your lunch mates, family,
12 friends, anyone else.

13 If anyone tries to talk with you about the
14 case, please let me know immediately. Remember to keep
15 an open mind about the case and do not begin your
16 deliberations until you have heard all the evidence in
17 the case, the closing arguments by the attorneys, and
18 the instruction on the law by the Court, and then and
19 only then instructed to begin your deliberations with
20 your fellow jurors in the jury room.

21 Ms. Davis, I will ask you if you would serve
22 as the foreperson of this jury. You will be the jury's
23 spokesperson in the courtroom, and you will also be
24 responsible for writing the verdict. I will explain
25 more to you about that later. If you would always

1 maintain that seat.

2 Also, Ms. Celeste, right now you are in the
3 status of our alternate. If you would also always
4 maintain the seat you are now in. I need to keep up
5 with you two, our foreperson and alternate, and then
6 just numbers. The rest of you can sit wherever you want
7 in the jury box.

8 I am doing a study on how territorial some
9 jurors are. Some of them like their own seats. Some of
10 them move. You can sit wherever you want when you come
11 back in and out.

12 Mr. Corley will show you to the third floor
13 jury room where you are to return after lunch at 2:30.
14 We may make other arrangements after that. If you would
15 please go with your bailiff.

16 Mr. Corley, if you will show them where they
17 are to report before they are excused for lunch. Thank
18 you very much. I hope you have a pleasant lunch.

19 (The jury is excused for lunch at 12:27 p.m.)

20 (Whereupon there is a recess in these
21 proceedings).

22 THE COURT: Mr. Buchanan, you have a motion;
23 is that correct?

24 MR. BUCHANAN: That is correct, Your Honor.

25 THE COURT: Your motion?

1 MR. BUCHANAN: Your Honor, I'm objecting
2 pursuant to Gentry before the jury is sworn regarding
3 the language of the indictment. Actually, I apologize,
4 Your Honor. I don't have a copy of the indictment
5 before me so I am operating off of memory.

6 THE COURT: Would you make a copy of the
7 indictment?

8 CLERK: Yes, sir.

9 MR. BUCHANAN: While that is being done, I
10 will specify that it has been placed on notice that
11 Mr. Golston, at least the caption, states that
12 Mr. Golston is being placed under the charge of criminal
13 domestic violence of a high and aggravated nature.

14 But the affidavit portion -- essentially the
15 law of criminal domestic violence is under Section
16 16-25-20. So therefore pursuant to Mr. Golston's right
17 to due process and his right to a fair trial, we would
18 object to the criminal domestic violence of a high and
19 aggravated nature contained within the warrant, and we
20 are prepared to go forward if the State wishes to go
21 forward with the criminal domestic violence.

22 THE COURT: Tell me why you say this
23 indictment specifies 16-25-20 and not 16-25-65.

24 MR. BUCHANAN: The language in the affidavit
25 is actually listed verbatim under 16-25-20 (a)(1). It

1 says -- 16-25-20 Subsection (a), it is unlawful to --
2 and this is where we have the mirrored language in the
3 indictment -- cause physical harm or injury to -- I
4 guess it's close -- but it says to a family or household
5 family.

6 The law says cause physical harm or injury to
7 a person's own household member. In Section (2) from
8 the statute, it says: Offer or attempt to cause
9 physical harm or injury to a person's own household
10 member with apparent present ability under circumstances
11 reasonably creating fear of imminent peril.

12 Section (2) under the indictment says: Offer
13 or attempt to cause physical harm to a family or
14 household member with apparent present ability under
15 circumstances reasonably creating fear of imminent
16 peril. Then there is the to wit language in the
17 indictment.

18 Therefore, the language would be defective as
19 to a charge of C.D.V. high and aggravated, as 16-25-65
20 includes that language, and then it goes beyond. It
21 specifies what makes the C.D.V. high and aggravated
22 without that information in the language of the
23 indictment. Therefore the language is defective for
24 C.D.V.H.A.N. and definitely sufficient for a C.D.V.

25 THE COURT: Thank you. Solicitor.

1 MS. PATTERSON: Thank you, your Honor. It is
2 our position that the indictment is still sufficient
3 with respect to a criminal domestic violence of a high
4 and aggravated nature charge.

5 The language in the body of the indictment is
6 complete, beginning after the to wit section, Your
7 Honor. It substantially goes over a reference to
8 criminal domestic violence, the elements of a criminal
9 domestic violence of a high and aggravated nature
10 charge.

11 Additionally, Your Honor, the statute,
12 16-25-65, is referenced in the body of the indictment,
13 Your Honor. Mr. Golston is aware of what we intend to
14 prove in this case.

15 That makes him aware of the charge that is
16 presented before you today, Your Honor. The language is
17 basically the same, Your Honor. It apprises him of what
18 he is being charged with today, Your Honor.

19 THE COURT: Thank you.

20 MS. PATTERSON: That case is Browning v.
21 State, Your Honor. It contains the necessary elements
22 of the offense intended to be charged. Code Section
23 17-19-20 talks about the plain language so that it's
24 easily understood. They can read that indictment and
25 easily understand what we are charging today.

1 THE COURT: Anything further, Mr. Buchanan?

2 MR. BUCHANAN: Your Honor, I would like to
3 respond as to the -- Your Honor, I passed up my only
4 copy of 16-25-65. Do you mind if I retrieve that?

5 THE COURT: I have my copy. You can have
6 yours if my law clerk can find it.

7 MR. BUCHANAN: Your Honor, I would state that
8 the State's position is incorrect in that the language
9 of the C.D.V. high and aggravated statute uses various
10 terms of art, such as, use of a deadly weapon, serious
11 bodily injury, as well as Section (2), a person to fear
12 imminent serious bodily injury or death.

13 That language there is not contained within
14 the indictment, which again that being a term of art,
15 and using the language so closely in relation to the
16 C.D.V. statute under 16-25-20. Therefore, I would say
17 that Mr. Golston's -- the language is defective as to
18 the charge of C.D.V.H.A.N., and his right to due process
19 would be violated.

20 THE COURT: Thank you. Solicitor, the case
21 you cited was Browning versus State; is that correct?

22 MS. PATTERSON: Yes, sir, Your Honor, 320 S.C.
23 366, a 1995 case.

24 THE COURT: I am reviewing this based on State
25 versus Gentry, 610 S.E.2d 494, and State versus Means,

1 626 S.E.2d 348, which cites, of course, State versus
2 Gentry.

3 State versus Means holds that an indictment
4 shall be deemed and judged sufficient and good in law
5 which, in addition to allegations as to time and place
6 as required by law, charges the crime substantially in
7 the language of the common law or of the statute
8 prohibiting the crime or so plainly that the nature of,
9 the offense charged may be easily understood and if the
10 offense be a statutory one, that the offense be alleged
11 to be contrary to the statutes in such case made and
12 provided.

13 Thus, an indictment passes legal muster when
14 it charges the crime substantially in the language of
15 the statute prohibiting the crime or so plainly that the
16 nature of the offense charged may be easily understood.

17 In determining whether an indictment meets the
18 sufficiency standard, the Court must look at the
19 indictment with a practical eye in view of all the
20 surrounding circumstances.

21 Further, whether the indictment could be more
22 definite or certain is irrelevant. All the surrounding
23 circumstances must be weighed to make an accurate
24 determination of whether the Defendant was prejudiced by
25 a lack of notice or an insufficient indictment.

1 When I look at the indictment, 09-GS-32-05027,
2 the front of the indictment is for criminal domestic
3 violence of a high and aggravated nature, Section
4 16-25-0065.

5 The caption and the body of the indictment is
6 criminal domestic violence of a high and aggravated
7 nature, 16-25-0065, which is further cited again in the
8 third line from the bottom:

9 In violation of Section 16-25-65 of the Code
10 of Laws of South Carolina as amended against the peace
11 and dignity of the State and contrary to the statute in
12 such case made and provided.

13 Although there is some language in there that
14 tracks 16-25-20, once you get to the body of the
15 language where it states namely Myrtle Johnson, by
16 striking the victim an undetermined amount of time with
17 closed fists and a wooden log approximately 18 inches in
18 length and 3 feet in diameter and used a hatchet to rub
19 on the victim's arms and threaten her.

20 Then when I look at 16-25-65, Subsection (a)
21 states: A person who violates 16-25-20 (a) is guilty of
22 the offense of criminal domestic violence of a high and
23 aggravated nature when one of the following occurs.

24 So 16-25-65 refers back to 16-25-20 (a) --
25 that makes it part of Subsection 65 -- is guilty of

1 criminal domestic violence of a high and aggravated
2 nature when one of the following occurs:

3 The person commits, number one, an assault and
4 battery which involves the use of a deadly weapon or
5 results in serious bodily injury to the victim or an
6 assault with or without an accompanying battery which
7 would reasonably cause a person to fear imminent serious
8 bodily injury or death.

9 It appears to me when you look at this
10 indictment with a practical eye, when it talks about an
11 undetermined amount of time with a closed fist, wooden
12 log 18 inches in length, or a foot and a half in length
13 and 3 feet in diameter, and a hatchet.

14 Practically it meets the requirements of
15 notice, particularly given the fact that on the
16 indictment 16-25-65 is cited three times. As we all
17 know, the indictment is a notice document and puts the
18 defense on notice of what he is being charged with and
19 places the Court on notice of what sentence should be
20 imposed should the Defendant be found guilty.

21 So I would deny your motion under State versus
22 Gentry, State versus Means, and not considering in any
23 manner Browning versus State. Any other motions,
24 Mr. Buchanan?

25 MR. BUCHANAN: Yes, sir.

1 THE COURT: Yes, sir, Mr. Mauldin.

2 MR. MAULDIN: Thank you, Your Honor. I
3 believe that we may have some Fourth Amendment concerns.
4 From the discovery they mentioned a hatchet that was
5 seized. The discovery mentions it was an abandoned
6 house.

7 When the State told us which house it was, we
8 asked Mr. Golston about it. He said he actually lived
9 in the house that the hatchet was found in. From our
10 understanding of that discovery, there was no search
11 warrant for them to search the house for a hatchet.

12 We do have the Fourth Amendment concerns
13 regarding that. The officer that actually found the
14 hatchet is not due to be here until this afternoon. So
15 we would like to have a pretrial hearing about the
16 situation under which this hatchet was found and seized
17 and be able to make any pretrial Fourth Amendment
18 objections before it is brought up in front of the jury.

19 THE COURT: You can handle that, can't you,
20 Solicitor?

21 MS. PATTERSON: Yes, sir.

22 THE COURT: As far as your scheduling.

23 MS. PATTERSON: Yes, sir, we can handle it.

24 THE COURT: Anything further? Any other
25 motions?

1 MR. BUCHANAN: No, Your Honor.

2 THE COURT: Solicitor, any other motions?

3 MS. PATTERSON: No motions by the State.

4 THE COURT: Thank you. In our previous case,
5 they want to hear Officer Ackerman's testimony of
6 May 12, and they want to hear Officer Popenhagen's
7 testimony of May 12. I guess they want to rehear this
8 case. When you find that, please let me know. We will
9 be standing by in this matter until we deal with those
10 issues.

11 (Whereupon there is a recess in the
12 proceedings).

13 THE COURT: Before I go to the next motion, I
14 do want to put in the record I read over the break State
15 versus McLeod, which is 579 S.E.2d 534, which is a case
16 concerning the sufficiency of an indictment for criminal
17 domestic violence of a high and aggravated nature.

18 In that case the Defendant argued the
19 indictment failed to specify circumstances of
20 aggravation necessary to establish C.D.V.H.A.N. It did
21 cite the statute, as did the indictment in this case.

22 In the McLeod case, the Court stated, among
23 other things: The indictment alleged that McLeod struck
24 the victim in the case with his closed fist, hit her in
25 the head, pulled her hair, and scratched her neck.

1 Furthermore, the arrest warrant -- and I have
2 not seen the arrest warrant in this case, but I would
3 like to see it -- contained an affidavit stating the
4 victim suffered swelling and bruising to her right eye
5 and had to seek medical attention.

6 Finally, it is apparent from the indictment
7 that there was a difference in gender between McLeod and
8 Golden, the victim, as evidenced by the allegation that
9 McLeod committed an act of violence against Golden by
10 striking her in the face with his closed fist.

11 These averments of the indictment, when
12 considered in the surrounding circumstance that has
13 surfaced before the commencement of this trial, were
14 sufficient to notify McLeod that he was charged with
15 causing serious bodily injury to the individual.

16 Of course, in this case we have allegations
17 that the victim was struck an undetermined amount of
18 times with closed fists and a wooden log approximately
19 18 inches in length and 3 inches in diameter and used a
20 hammer to rub on the victim's arm to threaten her. So
21 we do have a difference in the sexes, the genders.

22 The arrest warrant that is filed in the case,
23 J-846375, alleges that on the same date, 3/22/08,
24 approximately 00:01 hours, while at
25 in the Lexington County area of Lexington County, the

1 Defendant did assault the victim about the head, neck,
2 and shoulders.

3 The Defendant struck the victim an
4 undetermined amount of times with a closed fist and a
5 wooden log approximately 18 inches in length, 3 inches
6 in diameter. The Defendant also used a hatchet to hit
7 the victim on the arms.

8 The affiant, the affiant being K. Blake -- I
9 believe that is one of the officers involved -- observed
10 multiple abrasions and bruising to the head, neck, and
11 arms of the victim. The victim's face was swollen to
12 the extent that the family members and friends did not
13 recognize her immediately.

14 The Defendant and the victim have been in a
15 relationship for approximately five years and lived
16 together at the incident location. The warrant is
17 entitled criminal domestic violence of a high and
18 aggravated nature.

19 Again, as we all know and to reiterate, the
20 indictment is a notice document. I think it is
21 sufficient. My prelunch ruling indicates further there
22 is no prejudice to the Defendant from the date the
23 warrant was issued, 3/22/08, the date of the incident.
24 Bail was set 3/23/08. So I assumed it was served on the
25 22 or 3rd.

1 It appears that there was a preliminary
2 hearing, 6/27/08, and it was bound over for the grand
3 jury. I fail to see how there could be any prejudice to
4 the Defendant going forward with criminal domestic
5 violence of a high and aggravated nature and reaffirm
6 the sufficiency of the indictment.

7 Mr. Buchanan, you have another motion?

8 MR. BUCHANAN: Your Honor, I certainly
9 understand and I accept the Court's ruling. The only
10 thing I would take objection to is the characterization
11 about the difference in the genders as an element of
12 criminal domestic violence high and aggravated.

13 I believe that the law was changed back in
14 2005 to the statute as we have read into the record and
15 discussed those things. I believe prior to that the
16 statute did take the elements of assault and battery of
17 a high and aggravated nature and apply that to the
18 criminal domestic violence statute. I think that law
19 has since changed, and now there is no longer a
20 difference in genders.

21 THE COURT: I was making a point that -- I
22 would agree the statute was changed -- but I was making
23 the point concerning resulting in serious bodily injury
24 to the victim.

25 Of course, I was reading from McLeod. The

1 McLeod case indicates there was a difference between the
2 genders of the victim in McLeod -- excuse me -- the
3 Defendant and McLeod, but your point is on the record.

4 MR. BUCHANAN: Thank you, Your Honor.

5 THE COURT: Thank you. Anything further in
6 that regard, Solicitor?

7 MS. PATTERSON: Nothing from the State, Your
8 Honor.

9 THE COURT: You have another motion; is that
10 correct, Mr. Mauldin?

11 MR. MAULDIN: Yes, sir, Your Honor. As I
12 stated before, there is a certain hatchet that the State
13 intends to introduce into evidence that was seized from
14 a building that my client asserts is his house.

15 It is my understanding from the State it was
16 seized by Deputy Merck, and we wish to question him
17 regarding the circumstances surrounding that seizure by
18 him.

19 We believe that the building he seized the
20 hatchet from was actually the residence of Mr. Golston,
21 and the hatchet was seized in violation of his Fourth
22 Amendment rights and due process right under the State
23 Constitution.

24 THE COURT: Thank you. Mr. Mauldin.
25 Solicitor.

1 MS. PATTERSON: Thank you, Your Honor. We do
2 have Master Deputy Merck here if Your Honor wishes to
3 hear any testimony from him. It is our position that
4 the location where the hatchet was discovered, Your
5 Honor, was an abandoned structure, Your Honor. It was
6 not a residence.

7 In order for there to be a search, there must
8 be an expectation of privacy. When officers received a
9 tip that the Defendant may be hiding in this structure,
10 Your Honor, they went there. They noticed the condition
11 of it.

12 They reasonably determined that no one could
13 possibly live there where there would be an expectation
14 of privacy. However, they did announce their presence
15 there, and they went in to search for the Defendant.

16 It will be Officer Merck's testimony that
17 while they were searching for him, they did uncover a
18 mattress where they did find the hatchet that the victim
19 had described that had been used to assault her the
20 previous night.

21 THE COURT: Well, I believe the State would
22 have to present testimony concerning the circumstances
23 surrounding the search of the location and the seizure
24 of the item. Solicitor, I would be glad to hear your
25 first witness.

1 MS. PATTERSON: Thank you, Your Honor. The
2 State will call Master Deputy Merck to the stand. I'm
3 sorry, it's Merckle.

4 MICHAEL SAMUEL MERCKLE, being
5 first duly sworn, testifies as follows:

6 CLERK: State your full, name spelling your
7 last.

8 THE WITNESS: My name is Michael Samuel
9 Merckle, M-E-R-C-K-L-E.

10 IN CAMERA EXAMINATION

11 BY MS. PATTERSON:

12 Q Master Deputy Merckle.

13 A Yes.

14 Q Where are you employed?

15 A Lexington County Sheriff's Department.

16 Q In what capacity are you employed with the
17 Lexington County Sheriff's Department?

18 A I'm a road deputy supervisor.

19 Q And how long have you been a road deputy
20 supervisor?

21 A Approximately a year and a half.

22 Q What are some of your duties as a road deputy
23 supervisor?

24 A Answer calls, answer complaints, follow-up, check
25 reports, make sure things are done properly on the

1 road, as well as just your average call-taking
2 deputy.

3 Q Do you remember receiving a call on March 22, 2008,
4 on ?

5 A Yes, ma'am, I do.

6 Q What county is that in?

7 A That's in County.

8 Q Do you remember what you observed when you got at
9 the scene?

10 A I do.

11 Q What did you observe?

12 A I observed the victim, Myrtle Johnson, was laying
13 in a bed in her residence in a fetal position,
14 extremely -- her face was extremely swollen, very
15 swallow breathing. She was medically in bad shape
16 in my opinion. She needed medical attention.

17 Q Did you find out what had happened to her.

18 A I did. She indicated that the Defendant, Bennie
19 Golston, her and he had an argument earlier that
20 evening which led to him assaulting her, not only
21 with his hands but also apparently a log outside,
22 as well as a hatchet.

23 Q Did she describe the hatchet to you?

24 A She did. She said it was just your average hatchet
25 with a wooden handle.

1 Q Did she tell you what color it was?

2 A I believe it was a brown wooden handle.

3 Q Was Mr. Golston at the scene when you got there?

4 A No, ma'am, he was not.

5 Q Did you eventually see Mr. Golston?

6 A Yes, ma'am, we did.

7 Q Did you talk to any other witnesses on the scene?

8 A I did. I spoke with the complainant, who was Gail
9 Mack Jones. She was a neighbor. She had actually
10 gone over there at the request of some movers who
11 was moving items, I believe, into the residence.

12 They were unable to get the victim to the
13 door, at which point they contacted her. She was a
14 point of contact. She went in and found the victim
15 laying in her bed.

16 Q Were there any other officers at the scene?

17 A There was.

18 Q And did you guys work together to try to locate the
19 Defendant?

20 A We did.

21 Q What were some of the steps you took in trying to
22 locate him?

23 A Well, we spoke to the neighbors in that area. Most
24 everybody knows everybody, and just about everybody
25 in that area knew Mr. Golston. A little while

1 later on that day, we received another call that he
2 was actually sitting on a porch of a residence near
3 the incident location.

4 We responded there, spoke to the owner of that
5 residence, who said, Yes, I saw him. He walked off
6 towards the woods, at which point we summoned our
7 K-9 tracking dogs. Deputy Blake actually
8 spotted -- he was spotted by the witness actually
9 running into the wood line. It was a cut-over
10 area.

11 Q So the canine unit came out?

12 A Yes.

13 Q To assist you?

14 A Yes, he did.

15 Q Were you a part of that team?

16 A I was. I actually ran with Deputy Radford, Shannon
17 Radford, who has his canine partner, Barut.

18 Q That's the dog?

19 A Yes. We went to the last known place where he
20 actually was physically seen. The dog did pick up
21 his scent. I, along with Master Deputy Radford,
22 following the dog, who was following the
23 Defendant's scent, actually led us to this place he
24 is claiming to be his residence, the abandoned
25 shack or house.

1 Q I will show you six pictures that have been labeled
2 but not marked as State's Exhibits and ask if you
3 recognize that, those pictures.

4 A Yes, ma'am, I do.

5 Q Is that the place that the dog led y'all to?

6 A It is. He actually tracked to the rear of this
7 abandoned property right up to the back door, which
8 was ajar and open.

9 Q When you got in there, what condition did you
10 notice the structure to be in?

11 A The structure was completely dilapidated,
12 unliveable, no power, no water. All the windows
13 were broken out. The door was unable to be
14 secured. The back porch had actually fallen in.

15 There were just very small, two by six boards,
16 that we had to cross over to get to the door. In
17 fact, once looking inside with the door being
18 opened and announcing, Sheriff's Department, we
19 have a canine dog, trying to alert anybody who
20 would be in there to come out, we determined that
21 the interior was so hazardous that the dog couldn't
22 make it through there without being injured.

23 Q Was it your belief that someone lived in this
24 structure?

25 A No, ma'am.

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1 Q What did you do when you -- were you able to get
2 inside?

3 A Yes, ma'am.

4 Q What did you do once you got inside?

5 A We actually secured the dog. Another deputy, I
6 believe it was Deputy Blake, came over, assisted us
7 with securing the dog so it didn't come in with us.
8 Myself and Deputy Radford, we went into the
9 residence after announcing very loudly multiple
10 times, Lexington County Sheriff's Department. Come
11 out, those type things.

12 We entered the residence and slowly searched
13 for Mr. Golston, being that the dog had directed us
14 right onto the back of the residence or the
15 abandoned building rather.

16 Q Were you able to locate the Defendant in this
17 dwelling?

18 A No, ma'am, we were not.

19 Q Were you able to locate -- where did you look
20 inside for him?

21 A We looked all over the interior of the structure,
22 upstairs and downstairs. It was actually a bilevel
23 structure. To get to the upper level, another
24 deputy showed up, and Master Deputy Blake came in
25 to assist us as well. There was a second level to

1 the residence.

2 It was barely accessible. He had to climb up
3 some boards that actually did haven't steps on them
4 anymore. It was so dilapidated, very dangerous,
5 but we still had to check up there. We actually
6 checked everywhere an actual person could hide.

7 We have found people hiding in closets,
8 underneath beds, in between mattresses, underneath
9 piles of clothes, trash, this, that, and the other.
10 So it's a very common place -- where I found the
11 hatchet in between the mattresses is a very common
12 place to actually hide from us.

13 Q So you did look in several places throughout this
14 structure for the Defendant?

15 A Yes, ma'am, I did.

16 Q And it's customary for you to do this when looking
17 for a suspect?

18 A Yes, ma'am, it is, due to the exigent circumstances
19 with the dog leading us. From the last known
20 location where the Defendant was standing at, the
21 dog is highly trained, certified tracking dog, and
22 tracked the suspect to the residence or what he
23 claimed to be the residence, the abandoned
24 building.

25 With the building being open, the exigent

1 circumstances of actually tracking him there, it
2 gave us enough to actually go in to search just for
3 him.

4 Q When you pulled the mattress up, did you find him?

5 A No, ma'am, I did not.

6 Q Did you find anything?

7 A I did. I found a hatchet which had previously been
8 described by the victim as being used in the
9 assault earlier.

10 Q What did you do with the hatchet?

11 A I secured it. We brought it back out. After
12 securing the residence and found nobody in there, I
13 brought it back out. It was Deputy Blake, Master
14 Deputy Blake, who was writing the report. It was
15 given to him.

16 He was right there with me. When it was
17 discovered, I actually did lay my hand on it and
18 hand it to him. Due to the interior being in such
19 bad shape, we went in and did what we had to do to
20 get out of there so nobody got hurt.

21 Q Let me show you -- it has not yet been marked.

22 (State's Exhibit Number 1 is marked for
23 identification).

24 BY MS. PATTERSON:

25 Q It has been marked as State's Exhibit 1 for

1 identification purposes only and I ask you if
2 recognize it.

3 A Yes, ma'am, I do.

4 Q What is that?

5 A It's your average standard hatchet, the same
6 hatchet I located in between the mattress in the
7 abandoned shack.

8 Q Has this hatchet been altered or changed in any way
9 since you handed it over to Deputy Blake?

10 A No, ma'am, other than the tag, the evidence tag
11 being placed on it.

12 Q Thank you.

13 MS. PATTERSON: Beg the Court's indulgence.

14 THE COURT: Yes, ma'am.

15 (Pause).

16 BY MS. PATTERSON:

17 Q Please answer any questions the defense has.

18 A Sure.

19 THE COURT: Thank you, Solicitor.

20 Mr. Mauldin.

21 MR. MAULDIN: Thank you, Your Honor.

22 THE COURT: Yes, sir.

23 IN CAMERA EXAMINATION

24 BY MR. MAULDIN:

25 Q Is it deputy or master deputy?

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1 A Whichever you feel.

2 Q It's easier to say deputy.

3 A Deputy is fine.

4 Q It's less than a mouthful.

5 A Sure.

6 Q I am going to hand you what has been marked as
7 Defendant's Exhibit 1. Do you recognize that as
8 the same house that you were shown in the other
9 pictures?

10 A Yes, sir, I do.

11 Q The same building?

12 A Yes, sir.

13 Q That's the same house that you searched for
14 Mr. Golston and eventually found this hatchet; is
15 that correct?

16 A Yes, sir.

17 MR. MAULDIN: Your Honor, we move to introduce
18 that in evidence for purposes of this hearing or
19 introduce it for the record.

20 THE COURT: Any objection?

21 MS. PATTERSON: Yes, sir, Your Honor, I have
22 not seen it.

23 MR. MAULDIN: It's one you gave us.

24 MS. PATTERSON: No objection.

25 THE COURT: Defendant's 1.

1 (Defendant's Exhibit Number 1 is marked for
2 identification).

3 BY MR. MAULDIN:

4 Q Where is that house located in relation to
5 Ms. Myrtle Johnson's house?

6 A It's several houses down on the same side of the
7 road, I would say less than a block away.

8 Q Would it be fair to say that it's actually across
9 like a gravel drive --

10 A Yes, sir.

11 Q -- from her house?

12 A Right.

13 Q When you spoke -- and Ms. Johnson, Ms. Myrtle
14 Johnson, is the victim and Gale Jones is the
15 witness; is that correct?

16 A Right.

17 Q Actually isn't it true that Ms. Jones, the witness'
18 house, is immediately across from the victim's, yet
19 in front of this structure here; is that correct?

20 A I would have to take your word for it. I don't
21 quite remember where her residence is. I never
22 went to her residence.

23 Q Hopefully this will clear it up for you.

24 A Okay.

25 Q I show you what has been marked as Defense Exhibit

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1 2. Does that help you any? Do you recognize
2 that?

3 A (Pause). I recognize I and the
4 location, but from the aerial shot -- this is the
5 first time I have seen an aerial view of that area.

6 Q All right. So you were called out early in the day
7 to Ms. Myrtle Johnson's residence; is that correct?
8 That was about 10 in the a.m.?

9 A Yes, sir, we arrived at 10:00 o'clock a.m. I
10 arrived with Deputy Blake to assist.

11 Q You took her information. Did she tell you where
12 Mr. Golston lived?

13 A She said that they had been living together there
14 at that incident location.

15 Q When you talked to Ms. Gail Jones, did she tell you
16 where Mr. Golston lived?

17 A I believe she said he stayed with her, but he
18 bounced around everywhere, other people's
19 residences. I believe his mother actually lived in
20 the area as well. He would pop in over there and
21 stay from time to time.

22 Q And you got, I guess, a call later on that he had
23 been seen in that area; is that correct?

24 A Yes, sir.

25 Q And what time of day was that?

1 A I'm not exactly sure. I know it was in the
2 afternoon about probably five, 5:00 o'clock, almost
3 at the end of the shift.

4 Q So you had responded to the initial call around ten
5 in the morning?

6 A Correct.

7 Q And you took information regarding the incident.
8 It probably happened around midnight the night
9 before; is that correct?

10 A According to the victim, yes, sir. According to
11 her it was throughout the evening. So I'm not sure
12 actually when the incident ended and we showed up
13 on the scene. I just know we got there at ten in
14 the morning.

15 Q And when you arrived there in the afternoon, did
16 you see Mr. Golston at all?

17 A I did not.

18 Q And who had provided you the information that he
19 was in the area?

20 A I didn't get his name. One of the neighbors that
21 was just out on his porch. Everybody sits in the
22 area. He explained that Mr. Golston had actually
23 been sitting on the porch and showed us the spot
24 where he had seen him walking.

25 Q Was it on the porch of the house that's in

1 Defendant's Exhibit 1?

2 A No, sir.

3 Q Was it another house in that area?

4 A Yes, sir.

5 Q And you don't know which house it was in that area?

6 A It was close to this residence or this abandoned
7 property. I couldn't tell you what the numbers
8 are. I want to say if you are facing the abandoned
9 property, it was to the right.

10 Q How long before you arrived there did he say he saw
11 Mr. Golston?

12 A I believe it was about ten minutes or so before we
13 showed up that he had walked off into the woods.

14 Q Was a search done of the surrounding area before
15 you entered into this building?

16 A We immediately set up a perimeter and called in
17 other deputies to come in their patrol cars. They
18 typically stay in their cars with the car shut off
19 to cut off any escape avenues to the best of our
20 ability when we put the dog on the ground to
21 actually track the Defendant's scent. So the
22 search of the surrounding area actually took place
23 with the dog, myself, and Deputy Radford and Deputy
24 Blake.

25 Q So the dog tracked to the house in Defendant's

1 Exhibit 1; is that correct?

2 A Correct.

3 Q And at that time you know the dog had tracked
4 there, and you know that he had been there due to
5 the dog tracking there; is that correct?

6 A Correct.

7 Q But at that time you didn't have any reason to
8 believe that he was in the residence at that time
9 or in the house at that time?

10 A With the door being open and it being an abandoned
11 residence, we were fairly confident that he was
12 going to be in there hiding from us.

13 Q But you had no idea as far as how long he had been
14 there before you arrived?

15 A No, sir.

16 Q And whether or not he would actually be inside when
17 you went there?

18 A No, sir, I didn't. All I knew is from point A.
19 where the dog located his scent, which wasn't next
20 to the residence, was away from it, actually
21 tracked us to the back of this residence up onto
22 the back porch where the back door was open.

23 Q You say you found the hatchet between two
24 mattresses; is that correct?

25 A Yes, sir.

1 Q Were these mattresses on top of a frame of any sort
2 or were they on the floor?

3 A They were on the floor. There was a lot of debris
4 piled around. They were stacked on top of each
5 another.

6 Q Was it a normal mattress on top of a box spring?

7 A It appeared to be -- I'm not sure whether the
8 bottom was a box spring or not. They both looked
9 like normal mattresses.

10 Q And they were laying there flat on the floor; is
11 that correct?

12 A Correct.

13 Q There was no large lump. The mattress wasn't
14 humped up any?

15 A Not that I could see. Depending on what you do to
16 a mattress depends on if you can hide under it or
17 not. I have located, in my ten years of law
18 enforcement, I have located lots of peoples hiding
19 in between mattress.

20 Q When you lifted the mattress, I guess from the
21 lower mattress, was the hatchet immediately
22 apparent? Did you see it right away or did you
23 have to lift the whole mattress off?

24 A No, sir, it was immediately apparent. It was right
25 there.

1 MR. MAULDIN: Beg the Court's indulgence.

2 THE COURT: Yes, sir.

3 (Pause).

4 BY MR. MAULDIN:

5 Q How many mattresses were in there, just those two?

6 A Yes, sir, those were the only two I found.

7 Q Describe the structure. Isn't it like a brick
8 structure, at least the bottom level around the
9 trailer or something?

10 A No, sir. I mean it's a block of brick on the
11 bottom and wood on the top. It's almost like a
12 structure built over a garage.

13 Q And there was some building behind the actual house
14 as well?

15 A Yes.

16 Q Did you go into that building?

17 A Yes, sir, we did.

18 Q What was in that building?

19 A Just more debris, trash, miscellaneous tools, and
20 items, just a bunch of piled up, in my opinion,
21 junk.

22 Q I am going to show you what had been marked for
23 I.D. as State's 1, the hatchet, I guess; is that
24 right?

25 A Yes, sir.

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1 Q In looking at the hatchet, it looks like the handle
2 is a rubber handle; is that correct?

3 A Yes, sir.

4 Q Do you know what this material is up here that is
5 painted yellow?

6 A I do not.

7 Q And you had testified earlier that Ms. Myrtle
8 Johnson had described Mr. Golston as having a
9 hatchet with a wooden handle; is that correct?

10 A Correct.

11 MR. MAULDIN: I have no further questions for
12 this witness, Your Honor.

13 THE COURT: Thank you. Anything in redirect,
14 Solicitor?

15 MS. PATTERSON: No, sir, Your Honor.

16 THE COURT: Thank you, Deputy Merckle. You
17 may step down.

18 THE WITNESS: Thank you, Your Honor.

19 (Witness leaves the witness stand).

20 THE COURT: Solicitor, you may call your next
21 witness.

22 MS. PATTERSON: We call Master Deputy Kevin
23 Blake.

24 KEVIN NEAL BLAKE, being
25 first duly sworn, testifies as follows:

1 CLERK: State your full name, spelling your
2 last, please.

3 THE WITNESS: Kevin Neal Blake, B-L-A-K-E.

4 IN CAMERA EXAMINATION

5 BY MS. PATTERSON:

6 Q Master Deputy Blake, where are you employed?

7 A Lexington County Sheriff's Department.

8 Q How long have you been employed at Lexington County
9 Sheriff's Department?

10 A July 1 will be three years.

11 Q Where were you employed prior to that?

12 A Charleston City Police.

13 Q And how long were you there?

14 A Four years.

15 Q So you have been in law enforcement about?

16 A Just almost seven years.

17 Q Almost seven years. What was your position before
18 you were a master deputy?

19 A I was a road deputy.

20 Q And what are some of your duties as a road deputy?

21 A Responding to calls for service, 9-1-1 calls, any
22 type of call that come across through the dispatch.

23 Q Would that include domestic calls?

24 A Yes, it would.

25 Q Were you dispatched to a location on

1 on March 22, 2008?

2 A I was.

3 Q Would this have been -- what address, do you
4 remember?

5 A

6 Q What time did you receive that call?

7 A Approximately 9:40 in the morning.

8 Q How long did it take you to arrive at that
9 location?

10 A About 20 minutes. I got there about 10:00 o'clock.

11 Q When you arrived at the location, who did you
12 observe to be there?

13 A Immediately outside the residence was a moving
14 truck. The initial call was for a possible assault
15 victim. There was a moving truck outside. Then I
16 approached the house and Ms. Gail Jones was there.

17 Q Was Ms. Jones the victim in the case?

18 A No, she was not.

19 Q Did you locate the victim in the case?

20 A We did, Ms. Johnson. She was located in a bedroom
21 as you enter the residence down a hallway to the
22 right. She was in the bedroom there.

23 Q Anything you observed about Ms. Johnson when you
24 found her in the bedroom?

25 A Well, the end of July it was really hot already,

1 and she was lying in the bed covered with multiple
2 blankets. There was a heater running in the room.
3 She was complaining about being very cold.

4 When we pulled the edge of the blanket back,
5 we saw that her face was completely swollen. Ms.
6 Jones, when we were there, even said she didn't
7 even recognize her when she walked in to the
8 bedroom. The swelling was so bad.

9 Q This was in March, right?

10 A I'm sorry?

11 Q What date did this happen?

12 A March 22.

13 Q Was she able to talk to you, Ms. Johnson?

14 A I would have to ask the same questions a few times,
15 but she was able to speak some, yes.

16 Q Did she tell you what happened to her?

17 A Initially, immediately you want to ascertain, is
18 there somebody else possibly injured. We asked
19 what happened. Can you tell us who hit you?
20 Because somebody obviously did it just upon initial
21 observation of her injuries. She kept saying
22 Bennie, Bennie did it. We indicated again, when
23 did it happen? She said last night.

24 I wasn't used to working that area of the
25 county. I was assigned to a different area at that

1 time. I was responding to a call there to help
2 out. So I wasn't familiar with everyone in the
3 area. Ms. Jones had actually indicated that it
4 would be Bennie Golston who Ms. Johnson knew.

5 Q Did she describe to you how he had assaulted her?

6 A She indicated that during the course of an argument
7 while they were both at her residence, their
8 residence, that he had picked up a hatchet and
9 placed it against her arm and held it up at one
10 point.

11 She tried to get out of the residence, and he
12 pushed her to the ground and pulled her back into
13 the residence. Then there is a stack of firewood
14 right by the front door. He used a piece of that
15 firewood to hit her about the head and also used
16 his fists.

17 Q Did you find any evidence of this?

18 A We did.

19 Q What did you find?

20 A We found an area outside on the ground that was
21 freshly disturbed that would indicate there might
22 have been a scuffle. Pieces of Ms. Johnson's hair
23 were found in close proximity of that area on the
24 ground.

25 A piece of firewood was located away from

1 where the rest of the firewood was at the
2 residence. Some of it actually had hair on it,
3 embedded in it, and that's what we found actually
4 at the residence.

5 Q Was anything else located?

6 A At that time?

7 Q At that time.

8 A Not that I can recall, not at that time.

9 Q Was the Defendant still at the location when you
10 arrived there?

11 A No, he was not.

12 Q Did you receive information as to where he may have
13 been?

14 A We did. We received information that he may be in
15 the area. Family members live in the area. So we
16 had multiple officers due to the type of incident
17 that happened, trying to set up a perimeter and set
18 up any type of containment.

19 They would ask neighbors if they had seen
20 Mr. Golston. We were directed to a wooded area,
21 as well as the abandoned structure behind the
22 house.

23 Q What directed your attention to the abandoned
24 structure behind the house?

25 A For one, Ms. Jones actually indicated to us that he

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1 was known to go there when he was in trouble or
2 things like that.

3 Q Let me show you six photographs.

4 COURT REPORTER: Excuse me one second, Judge.

5 THE COURT: Yes, ma'am.

6 (State's Exhibits Number 2-8 are marked for
7 identification).

8 Q Let me show you what has been marked for
9 identification purposes only as State's 3 through 8
10 and ask you if you recognize them.

11 A I do.

12 THE COURT: Solicitor, can I ask a question?
13 When was the arrest warrant issued for Mr. Golston?

14 MS. PATTERSON: I am thinking the same day,
15 Your Honor.

16 THE COURT: Was it before or after they went
17 into the residence and located the hatchet?

18 MS. PATTERSON: After.

19 THE COURT: After?

20 MS. PATTERSON: Yes, sir.

21 THE COURT: So at the time they went in the
22 residence and searched, the dog led them to that
23 residence, the arrest warrant had not been issued?

24 MS. PATTERSON: Not at that time, is that
25 correct?

1 THE WITNESS: Can I see the report?

2 THE COURT: I have a copy of the arrest
3 warrant.

4 MS. PATTERSON: May I see it?

5 THE COURT: I have whatever is filed.

6 CLERK: The judge signed it on 12/8/04.

7 THE COURT: Twenty-two March of '08. If you
8 are on '04, you are on the last case.

9 CLERK: I'm in the wrong one.

10 THE COURT: But you are in the right decade.
11 (Pause).

12 THE COURT: Do we know if that warrant was
13 issued before the officers went into the residence where
14 they located the hatchet?

15 MS. PATTERSON: Beg the Court's indulgence.

16 THE COURT: Do you have it?

17 THE WITNESS: If I can get my file.

18 THE COURT: If you don't mind doing that for
19 me.

20 (Pause).

21 THE WITNESS: This was prior to where they
22 switched over the bond court request for warrants to
23 e-mail. This is where we hand delivered them. So I was
24 hoping -- this was right there around that time. I was
25 hoping there was an e-mail time stamped on there, but

1 there is not.

2 THE COURT: So the answer is right now we
3 don't know if the warrant had been issued before or
4 after the officers went into this location?

5 MS. PATTERSON: Right, Your Honor.

6 THE COURT: Thank you, Solicitor. You may
7 continue.

8 MS. PATTERSON: Thank you.

9 BY MS. PATTERSON:

10 Q Did you go into this structure?

11 A Not to the -- can I show you the picture?

12 Q Yes.

13 A The part of the structure I went into, there is a
14 two-car bay here (indicating), and what used to be
15 a set of stairs. There was only the three
16 stringers that go up that the riser set on. That
17 was all that was left.

18 There is an open area up here (indicating).
19 There is rotted-out floors, holes in the roof,
20 things of that nature. To get up there to make
21 sure no one was hiding, I was able to balance my
22 way up and look around the open area up top while
23 the other units were in the other part.

24 Q When you initially got to the structure, what did
25 you observe about it?

1 A It was pretty dangerous to go into, trying to
2 figure out how to even get into -- we could see
3 that the windows were broken out. The back door
4 was open.

5 But when you are checking a structure, it's
6 always a good idea to not leave yourself open to
7 one side or the other. So I opted to go to the
8 area above the garage to get up there. There was
9 no real floor to speak of, holes in the roof,
10 windows were broken out.

11 Q Did you think anybody was living at this place?

12 A No.

13 Q Was there any electricity?

14 A No.

15 Q Any water?

16 A No.

17 Q Did you find the Defendant in this place?

18 A Not at that time, no.

19 Q Do you know if any other officers found anything
20 when they went inside?

21 A Master Deputy Merckle located a hatchet.

22 Q I am going to show you what has been marked as
23 State's Exhibit 1 and ask you if you recognize it.

24 A I do.

25 Q Can you tell me what it is?

1 A It's a normal, average hatchet.

2 Q Is that the hatchet -- has that hatchet been under
3 your care and custody since you were given the
4 hatchet by Master Deputy Merckle?

5 A Per our policy at the Sheriff's Department, all
6 evidence was turned in prior to the end of my shift
7 that day. So I turned everything in, logged it
8 into evidence, and it was tagged by our evidence
9 custodians. I retrieved it from their lockers this
10 morning.

11 Q And you brought it over to the courthouse?

12 A Yes.

13 Q Has it been altered or changed in any way?

14 A Not that I can tell.

15 Q Was anything -- was your attention drawn to that
16 hatchet for any particular reason?

17 A Upon initially receiving it?

18 Q Yes.

19 A Yes.

20 Q What drew your attention to it?

21 A Upon arriving at the residence initially where
22 the site of the scuffle was, there was observed and
23 also on Ms. Johnson in her hair, there were gray
24 colored braids. There was hair located on the back
25 of the hatchet that was also consistent with that

1 same hair.

2 Q Is that hair still attached to the hatchet?

3 A It's been under that tape for a year. There is a
4 very fine line under the tape, but honestly now
5 after a year, it could be her hair but...

6 Q That's why you taped it?

7 A Correct, that's why the tape is on the back.

8 MS. PATTERSON: Beg the Court's indulgence.

9 (Pause).

10 BY MS. PATTERSON:

11 Q Was Ms. Johnson able to describe the hatchet to
12 you?

13 A She advised it had a metal head, of course, and a
14 dark colored handle is my recollection.

15 Q Thank you. Answer any questions the defense may
16 have.

17 THE COURT: Thank you, Solicitor.

18 Mr. Mauldin.

19 MR. MAULDIN: Thank you, Your Honor.

20 IN CAMERA EXAMINATION

21 BY MR. MAULDIN:

22 Q Did you turn any water taps on while you were in
23 the house?

24 A The area of the house that I was in?

25 Q The white house in Defense Exhibit 1, the one you

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1 were showed pictures of, did you turn on any of the
2 water taps?

3 A The area of the house I was in, there was no
4 plumbing.

5 Q Do you know if there was plumbing in any other
6 areas of the house?

7 A I do not.

8 Q Did you flip any light switches?

9 A The area of the house I was in, there were no light
10 switches.

11 MR. MAULDIN: No further questions for this
12 witness, Your Honor.

13 THE COURT: Thank you. Redirect, Solicitor?

14 MS. PATTERSON: Nothing on redirect, Your
15 Honor.

16 THE COURT: Thank you very much, Deputy Blake.
17 You may step down.

18 THE WITNESS: Thank you, Your Honor.

19 (Witness leaves the witness stand).

20 THE COURT: You can call your next witness,
21 Solicitor?

22 MS. PATTERSON: No further witnesses, Your
23 Honor.

24 THE COURT: Thank you. Mr. Mauldin, do you
25 care to offer any testimony in this regard?

1 MR. MAULDIN: I do, Your Honor. The defense
2 would call Gail Jones to the stand.

3 THE COURT: Ms. Jones, if you would come
4 around, please, and be sworn. How long is this going to
5 take?

6 MR. MAULDIN: Probably three witnesses for me,
7 Your Honor.

8 THE COURT: I tell you what, let me take this
9 verdict in this last case.

10 MR. MAULDIN: Yes, sir.

11 (Whereupon there is a recess in the
12 proceedings).

13 THE COURT: Thank you. Ms. Jones, if you
14 would come back around for us, please, and be sworn.

15 GAIL M. JONES, being
16 first duly sworn, testifies as follows:

17 CLERK: State your full name spelling your
18 last.

19 THE WITNESS: Gail M. Jones, J-O-N-E-S.

20 IN CAMERA EXAMINATION

21 BY MR. MAULDIN:

22 Q Ms. Jones, you are the one that called the police
23 in this case initially; is that correct?

24 A Yes.

25 Q What relationship are you, if any, to Mr. Golston?

1 A Bennie Golston is my uncle.

2 Q And I will show you what has been marked as
3 Defendant's Exhibit 1. Do you recognize the house
4 in that picture?

5 A I do.

6 Q Whose house is that?

7 A Bennie Golston.

8 Q Does he actually live in that house?

9 A Yes, he does.

10 Q How long has he lived there?

11 A I'm 49. So as long as I have known him, 49 years.

12 Q Would you describe it as a nice house?

13 A No.

14 Q But you are stating that he did live in it?

15 A Most definitely.

16 Q And where is that house in relationship to your
17 house?

18 A My mother lives in front of him, and I'm a
19 caregiver for her, and he lives directly behind
20 her.

21 Q When you called the police, they came and talked to
22 you; right?

23 A Yes.

24 Q Did you tell them where he lived?

25 A Yes, I did.

1 Q Where did you tell him that he lived?

2 A Directly behind my mother's house.

3 Q Did you point out that house there?

4 A Most certainly.

5 MR. MAULDIN: No further questions.

6 THE COURT: Thank you, Mr. Mauldin.

7 Solicitor.

8 MS. PATTERSON: No questions, Your Honor.

9 THE COURT: Thank you. Thank you very much,
10 Ms. Jones. You may step down.

11 (Witness leaves the witness stand).

12 MR. MAULDIN: Your Honor, the defense would
13 call Bambi Gray.

14 THE COURT: Ms. Gray, come around for us,
15 please.

16 BAMBI L. GRAY, being
17 first duly sworn, testifies as follows:

18 CLERK: State your full name, spelling your
19 last.

20 THE WITNESS: Bambi L. Gray, G-R-A-Y.

21 **IN CAMERA EXAMINATION**

22 BY MR. MAULDIN:

23 Q Thank you, Ms. Gray. Where do you live?

24 A I live at here in

25 THE COURT: Say that again for me.

1 THE WITNESS:

2 BY MR. MAULDIN:

3 Q That is here in ; is that correct?

4 A Correct.

5 Q What relationship are you to Mr. Golston, Bennie
6 Golston?

7 A Bennie is my uncle.

8 Q And how long have you known him?

9 A Twenty-nine years.

10 MR. MAULDIN: Your Honor, do you have the
11 photograph?

12 THE COURT: I do, yes.

13 BY MR. MAULDIN:

14 Q You are being shown what has been marked as Defense
15 Exhibit 1. Do you recognize the house in that
16 picture?

17 A Yes.

18 Q Whose house is it?

19 A Bennie Golston.

20 Q And how long have you known him to be living in
21 that house?

22 A All my life, 29 years.

23 Q And have you been in that house yourself?

24 A It's been a while.

25 Q But when is the most recent time you have been in

1 there?

2 A Probably about -- maybe about five years ago.

3 Q Was he living in there on or about March of last
4 year?

5 A Yes.

6 MR. MAULDIN: No further questions.

7 THE COURT: Solicitor.

8 IN CAMERA EXAMINATION

9 BY MS. PATTERSON:

10 Q Ms. Gray, you say you last visited the Defendant in
11 that house about five years ago?

12 A (Witness nods). (Indicating affirmative response).

13 Q Why has it been so long?

14 A Because I am only at that area on the weekends. I
15 live here in Lexington, and I hardly ever see
16 Bennie, hardly ever.

17 Q How do you know he was living in that structure on
18 March 22, 2008?

19 A Because that's where he has always lived.

20 Q Do you know personally that he was living there?

21 A Yes.

22 Q Did you see him go in and out of that house?

23 A Yes.

24 Q Do you know that he was sleeping there?

25 A Yes.

1 Q Have you seen him sleeping there?

2 A I haven't seen him sleeping there, but I know he
3 was sleeping there.

4 Q How do you know this?

5 A Because we always so concerned about him sleeping
6 in there because of the fact that his lights got
7 turned off, and I always heard my grandmother, who
8 is his mother, saying that she didn't want him
9 living there. He would be like back and forth to
10 my grandmother's house, but Bennie lived there.

11 Q So he would stay at different places?

12 A When you say different places, like I said, he
13 would be there and my grandmother's house, but
14 anywhere else I don't know.

15 Q Thank you.

16 A You're welcome.

17 THE COURT: Redirect, Mr. Mauldin?

18 MR. MAULDIN: No, Your Honor.

19 THE COURT: Thank you very much, Ms. Gray.
20 You may step down.

21 (Witness leaves the witness stand).

22 THE COURT: You may call your next witness.

23 MR. MAULDIN: Your Honor, we would call Bennie
24 Golston for the purpose of this hearing only.

25 THE COURT: Mr. Golston, please come around

1 and be sworn.

2 BENNIE GOLSTON, being
3 first duly sworn, testifies as follows:

4 CLERK: State your full name, spelling your
5 last on the record.

6 THE WITNESS: My full name is Bennie Golston.

7 **IN CAMERA EXAMINATION**

8 BY MR. MAULDIN:

9 Q Mr. Golston, I am going to hand you what has been
10 marked as Defendant's Exhibit 1. Do you recognize
11 the building in that picture?

12 A Yeah, that's my building.

13 Q When you say it's your building, what do you mean
14 by that?

15 A That's where I work and stay.

16 Q How long have you been staying there?

17 A Thirty years.

18 Q Did the building always look like that?

19 A No, the storm tore it up.

20 Q Can you describe the building for me. What sort of
21 building it is where you live in it?

22 A It's a '69 Honey B. mobile home built into that
23 perimeter.

24 Q What do you mean by that?

25 A It's a mobile home, but I built all around it.

BENNIE GOLSTON -- IN CAMERA -- MS. PATTERSON

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1 Q What did you build around it?

2 A Years ago.

3 Q And what did you build around it?

4 A I bricked it, put all the house roof on it, put a
5 garage on it, and put the two story on it.

6 Q And were you living there March of last year, March
7 22nd of last year?

8 A Right.

9 MR. MAULDIN: No further questions.

10 THE COURT: Thank you, Mr. Mauldin.

11 Solicitor.

12 MS. PATTERSON: Beg the Court's indulgence.

13 (Pause).

14 IN CAMERA EXAMINATION

15 BY MS. PATTERSON:

16 Q Mr. Golston, what kind of work did you do in that
17 building?

18 A What do you mean?

19 Q You said you worked and you stayed in that
20 building. What kind of work did you do?

21 A I do brick work. I build buildings.

22 Q When did you put the roof on and add the garage?

23 A Probably 15 years ago.

24 Q When was the storm that tore it up? When was that?

25 A We had three or four different storms. Some of

1 them, Hugo, some of them, some storm when I got
2 locked up. I ain't been home in 13 months. I
3 don't know which one really tore it all the way
4 up.

5 Q When were your lights cut off?

6 A I don't know, five or six years ago.

7 Q So you haven't had any lights since?

8 A No.

9 Q What do you do at nighttime?

10 A Go to sleep.

11 Q Do you have any water in that building?

12 A Yeah, I have water.

13 Q You had your clothes in that building?

14 A Yeah.

15 Q Have you ever lived with Myrtle Johnson?

16 A Not permanently. She never lived there herself.
17 She just move here.

18 Q When you say not permanently, did you ever live
19 there?

20 A Not live there. We was having a relationship if
21 that's what you mean.

22 Q Did you sleep there?

23 A Sometimes.

24 Q Did you have your clothes there?

25 A No.

BENNIE GOLSTON -- IN CAMERA -- MS. PATTERSON

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1 Q Brush your teeth there?

2 A Sometimes.

3 Q You ate there?

4 A Sometimes.

5 Q And you did sleep there?

6 A I slept a bunch of places.

7 Q Thank you.

8 MS. PATTERSON: No further questions, Your
9 Honor.

10 THE COURT: Redirect, Mr. Mauldin?

11 MR. MAULDIN: No, Your Honor.

12 THE COURT: Thank you, Mr. Golston. You may
13 step down.

14 (Witness leaves the witness stand).

15 THE COURT: You may call your next witness.

16 MR. MAULDIN: That's all the witness we have.

17 THE COURT: Thank you very much. Anything
18 further, Solicitor?

19 MS. PATTERSON: Do you want to hear my
20 argument now?

21 THE COURT: I didn't know if you had any
22 further witnesses or any further testimony.

23 MS. PATTERSON: No, sir, Your Honor.

24 THE COURT: Yes, ma'am, I would be glad to
25 hear from you.

1 MS. PATTERSON: Thank you, Your Honor. You've
2 heard testimony from my officers who arrived at the
3 scene and received this tip that Mr. Golston may have
4 been hiding in this building.

5 We were able to ascertain, Your Honor, from
6 the officers that when they went back the second time,
7 they did have an arrest warrant for him at this time.
8 Due to Ms. Johnson's injuries and everything, Deputy
9 Blake rushed over and got an arrest warrant. They went
10 back to the location --

11 THE COURT: Let me track that now. What are
12 you telling me about the arrest warrant, Solicitor?

13 MS. PATTERSON: They did have it. I was able
14 to talk to the officers, and they were able to ascertain
15 they did, in fact, have the arrest warrant when they
16 went back the second time.

17 THE COURT: I haven't heard that testimony,
18 Solicitor.

19 MS. PATTERSON: Okay. I apologize, Your
20 Honor. I know you asked me about it.

21 THE COURT: If you have further testimony you
22 think you need to present, you may do so. All I'm
23 saying is I can't take into account facts that are not
24 in the record.

25 MS. PATTERSON: I would, in fact, like to

KEVIN BLAKE -- IN CAMERA -- MS. PATTERSON

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1 recall one of my officers, Your Honor.

2 THE COURT: All right. Mr. Mauldin?

3 MR. MAULDIN: Well, Your Honor, it's my
4 understanding -- it depends on which officer it is --
5 it's my understanding Officer Blake testified that he
6 wasn't sure whether it was obtained before or after the
7 hatchet -- the arrest warrant.

8 THE COURT: I don't know which officer it is.
9 Of course, whichever officer it is, you can cross
10 examine him in that regard, if it is Officer Blake. You
11 may call your witness.

12 MS. PATTERSON: I will recall Officer Blake.

13 THE COURT: You may recall Officer Blake to
14 the stand.

15 CLERK: Still under oath?

16 THE COURT: Yes, sir. You are still under
17 oath.

18 THE WITNESS: Yes, Your Honor.

19 KEVIN NEAL BLAKE, having been
20 previously duly sworn, resumes the witness stand and
21 testifies as follows:

22 IN CAMERA EXAMINATION

23 BY MS. PATTERSON:

24 Q Deputy Blake, I believe your testimony was you went
25 out to the incident location and then you went back

1 out there later on?

2 A Correct.

3 Q When you were at the incident location the first
4 time, what did you do when you left there?

5 A I conferred with the master deputy on the scene,
6 which was Master Deputy Merckle, and made a
7 determination that there was enough right there on
8 scene to go ahead and obtain a warrant based on the
9 injuries and evidence we had on scene.

10 So I left the area from the
11 perimeter and things that were going on there and
12 went to bond court and met with Judge Jeffcoat to
13 obtain a warrant.

14 Q Did you, in fact, obtain a warrant from Judge
15 Jeffcoat?

16 A Yes.

17 Q Was this warrant for Bennie Golston?

18 A Yes, it was.

19 Q What charge was on the warrant?

20 A C.D.V. high and aggravated.

21 Q What did you do after you obtained the warrant?

22 A I was going back to the area of , and
23 we actually received a call indicating that the
24 Defendant had been seen in the area.

25 Q And did you make it to that area?

KEVIN BLAKE -- IN CAMERA -- MS. PATTERSON

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1 A I did.

2 Q Did you have backup?

3 A A lot of the same officers that were there the
4 first time worked that area and again responded to
5 the area.

6 Q When you got there, were you notified regarding the
7 area that the Defendant was last spotted in?

8 A Correct. There was the small -- I guess it's a
9 wooded area -- and there had been a lot of clear
10 cutting way at the other end close to the
11 interstate side of towards the house.
12 There was a small stand of brush and trees and
13 whatnot around in that area, which is where our
14 witness said he was last seen going to, and that is
15 where the dog initially sat up.

16 Q Did the dog track his scent from this area?

17 A To the structure that was nearby.

18 Q Did y'all go into that structure to look for the
19 Defendant?

20 A We did.

21 Q Did y'all find him in there?

22 A No, we did not.

23 Q Was anything else found in there?

24 A A hatchet was found by Deputy Merckle and later
25 turned over to me.

1 Q Did y'all, in fact, go in that structure looking
2 for the Defendant to serve the arrest warrant?

3 A We did.

4 Q Please answer any questions the defense attorney
5 has.

6 THE COURT: Thank you, Solicitor.
7 Mr. Mauldin.

8 MR. MAULDIN: Thank you, Your Honor.

9 IN CAMERA EXAMINATION

10 BY MR. MAULDIN:

11 Q Deputy Blake, didn't you testify earlier that you
12 were unsure as to whether or not the arrest warrant
13 had been obtained before y'all entered that
14 structure?

15 A I believe I indicated I didn't know the exact time.
16 I think we were looking for an exact time stamp on
17 the warrant and the affidavit.

18 Q I believe the questions that were posed was, was it
19 obtained before y'all went into that house or
20 after, and you didn't have an answer to that
21 question, I guess, about a half hour ago?

22 A If I may, part of our procedure with logging
23 evidence, initially it was 10:30 in the morning
24 when I collected hair and the firewood and things
25 of that nature. I left after that.

1 When I returned -- and that's when I got the
2 arrest warrant. By our evidence documents, I
3 obtained the hatchet from Master Deputy Merckle at
4 3:30 in the afternoon. By that time I already had
5 an arrest warrant in hand because it was signed by
6 the judge before I left his chambers.

7 Q My question was earlier you were asked if you had
8 the warrant before you went in the house or after,
9 and you said that you didn't remember?

10 A Yes, sir. But based on these documents, after
11 looking through my notes during the break, I was
12 able to then again refresh my memory and obtain
13 those times.

14 Q So those notes refreshed your memory?

15 A Correct.

16 Q So you looked at a piece of paper talking about the
17 time when you collected the initial evidence from
18 the scene when you responded to the call?

19 A Correct.

20 Q And then another piece of paper saying you received
21 the hatchet from Master Deputy Merckle at 3:30; is
22 that correct?

23 A After I responded to the scene the second time with
24 warrant in hand, yes, back to that area.

25 Q How come you didn't know about 30 minutes ago that

1 you had the warrant in hand before y'all went to
2 the house? What about those papers is so special?
3 If you had a warrant in hand, I don't see how that
4 refreshes your memory.

5 A Well, would you like to see them? I can show them
6 to you. We are required to document date obtained
7 and time taken.

8 MR. MAULDIN: Can I get these marked as
9 Court's exhibits, Your Honor?

10 THE COURT: You don't have any objection to
11 that, Solicitor?

12 MS. PATTERSON: No, sir.

13 (Court's Exhibit Number 1-2 are marked for
14 purposes of the record).

15 BY MR. MAULDIN:

16 Q If you could continue.

17 A This is the initial one where I was out on the
18 scene. At 10:30 in the morning, I collected this
19 evidence. Approximately half a hour later or so, I
20 left the scene with this evidence in my custody.
21 That's a definite time. I have to be sure of that
22 time.

23 When I left the scene the initial time with
24 this evidence, I went to obtain a warrant for
25 Mr. Golston for the C.D.V. high and aggravated.

1 After arriving -- one, after the witness phone call
2 saying that they had spotted Mr. Golston, which put
3 us in the direct area of the woods and later
4 retracted to the house, where is where we received
5 this.

6 At 3:30 in the afternoon, I obtained the
7 hatchet from Master Deputy Merckle. By the time I
8 obtained this evidence, I had arrest warrant in
9 hand, valid in my car in my possession.

10 Q But, I mean, you testified a while back that you
11 had the evidence in your hand; is that correct?
12 You had gotten the hatchet from Deputy Merckle.
13 You testified that to that previously; is that
14 correct?

15 A I don't recall specifying to a time that I had that
16 in my possession.

17 Q But it was later in the day when you were called
18 out the second time; is that correct?

19 A Correct, after obtaining the arrest warrant.

20 Q But back then you didn't remember that you had
21 obtained the arrested warrant before being called
22 out the second time?

23 A We were looking for an exact time.

24 MR. MAULDIN: No further questions, Your
25 Honor.

1 THE COURT: Thank you. Redirect, Solicitor?

2 MS. PATTERSON: No, sir, Your Honor.

3 THE COURT: Thank you. Thank you, Deputy.

4 (Witness leaves the witness stand).

5 THE COURT: Any other witnesses you care to
6 offer, Solicitor?

7 MS. PATTERSON: No, sir Your Honor.

8 THE COURT: Mr. Mauldin, anything you would
9 care to offer in sur-reply?

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

11 THE COURT: Thank you. Solicitor, I would be
12 glad to hear from you.

13 MS. PATTERSON: Thank you, Your Honor. As I
14 stated before, a search occurs when there is a
15 reasonable expectation of privacy, one that society is
16 prepared to consider reasonable.

17 It is our position that this building, there
18 was no reasonable expectation of privacy with regards
19 to -- what the Defendant referred to himself as this
20 building.

21 When the officers received the tip that
22 Mr. Golston may have, in fact, been hiding out in this
23 place, they went there. They observed that the place
24 was unliveable, Your Honor. No one could be living
25 there. They did think maybe he was hiding out there.

1 They viewed the conditions. They called out,
2 "Police," for identification, Your Honor. They went in.
3 They searched the area for the Defendant. There was
4 testimony from one of the officers that they have found
5 people hiding under clothing, under mattresses. It was
6 something reasonable they did in looking for a suspect,
7 Your Honor.

8 Furthermore, when they flipped it over, they
9 just happened to find the hatchet that the victim had
10 described to them. It was clearly something that was
11 being hidden, to keep it away from someone, Your Honor,
12 being that it was under mattresses, Your Honor.

13 We feel like there is no Fourth Amendment
14 violation here, Your Honor. There was no reasonable
15 expectation of privacy; therefore, we don't think that a
16 search warrant was needed in this circumstance.

17 THE COURT: You think it's abandoned property?

18 MS. PATTERSON: I think it could be considered
19 abandoned property, Your Honor. I actually looked at
20 that case. I wasn't really sure. I didn't know if that
21 was just like items that were thrown aside, Your Honor.

22 But I do think this building had been
23 abandoned. I know the Defendant said he slept there,
24 but he also said he slept in a lot of places. I mean,
25 does he have a reasonable expectation for those places?

1 THE COURT: Do you think he has no expectation
2 of privacy because of the condition of the building?

3 MS. PATTERSON: Yes, sir, Your Honor. There
4 was testimony that it was open. There was no windows.
5 The roof was caving in, Your Honor. We have the
6 pictures.

7 Several witnesses were able to identify that
8 this was the condition the house was in when they went
9 inside, the floors. No one could live there, Your
10 Honor. It was an abandoned building.

11 THE COURT: What if somebody couldn't afford
12 windows?

13 MS. PATTERSON: I understand that, Your Honor,
14 but still I don't feel like the Defendant was living
15 there.

16 THE COURT: Thank you. Thank you, Solicitor.
17 Mr. Mauldin?

18 MR. MAULDIN: Thank you, Your Honor. First, I
19 believe that we have established that Mr. Golston had a
20 reasonable expectation of privacy in that building.
21 Through his testimony, the testimony of the actual
22 complaining witness for the State in the case, the one
23 that called the police originally, from Ms. Jones, and
24 from his other niece, Ms. Gray, that he had been living
25 there for a long period of time.

1 The police just went up and basically from
2 their testimony, they just made a random -- not
3 random -- but they just immediately determined it was
4 abandoned and went in without checking.

5 There was testimony from Ms. Jones that she
6 had pointed out that residence or that house as
7 Mr. Golston's residence earlier to the police when she
8 initially called them, and they came out and she told
9 them that's where he lived.

10 So we believe that we have shown that he did
11 live there, Your Honor, and had a reasonable expectation
12 of privacy. Secondly is the issue of whether or not the
13 arrest warrant was obtained before or after the entry.

14 I find it interesting that the memory of when
15 the arrest warrant was obtained, the memory of it comes
16 a lot better after Your Honor had made an issue of it.
17 First, he did not remember. But then by looking at two
18 sheets that have times on them, he suddenly remembers he
19 had the warrant before and not after.

20 We would say that they have not necessarily
21 proved that they had gotten the warrant beforehand, and
22 therefore violated his right against unreasonable search
23 and seizures under the Fourth Amendment to the U.S.
24 Constitution, and Article 1, Section 10 of the South
25 Carolina Constitution and his right to due process under

1 the Fifth and Fourteenth Amendments of the Federal
2 Constitution and Article 1, Section 3 of the State
3 Constitution.

4 THE COURT: You may need to slow down for our
5 court reporter, Mr. Mauldin.

6 MR. MAULDIN: Yes, sir. So it's our position
7 from the evidence shown that they did not show that they
8 had obtained the arrest warrant before as would be
9 required.

10 I think that line of cases is Payton versus
11 New York. That's a Supreme Court case, 445 U.S. 573.
12 If Your Honor finds that they had gotten the arrest
13 warrant beforehand, we would state that the police had
14 no reason to believe that he was actually in the
15 residence at the time they entered.

16 They testified that the dog tracked up to the
17 residence, but they testified that they did not know how
18 long he had been there prior and whether or not he would
19 actually be inside. They just went inside.

20 I think there is a case, State v. Loftin, 276
21 S.C. 48, which mentions the Payton case. Even if they
22 have the arrest warrant, they need to have a reasonable
23 belief that the Defendant is actually in his residence
24 before they can just go in.

25 Furthermore, Your Honor, the testimony was

1 that they looked between two mattresses. The testimony
2 is the mattresses were flat. They weren't hunched up or
3 humped up like -- I used the word hunched up -- but I
4 guess if there was a hump in the middle as if a person
5 was hiding. There is testimony they were flat.

6 He says he has had experience with people
7 hiding under mattresses, but his description of the
8 mattress and the situation they were in did not lead one
9 to believe that one person could actually be hiding
10 underneath it.

11 Basically if they have an arrest warrant and
12 they are going in somebody's house, they can only look
13 for places a person can hide, and I don't believe the
14 description of these mattresses, even though he said he
15 has found people under mattresses, his description of
16 these particular mattresses was not one where a person
17 could hide.

18 Obviously if they have an arrest warrant and
19 they believe that the person is inside the house,
20 reasonably believe, they can go in and search the house
21 for them, but they can't go into drawers or jewelry
22 boxes where a person could hide.

23 Finally, Your Honor, I don't believe that the
24 hatchet was an obvious instrument of the crime. Master
25 Deputy Merckle described that the hatchet described by

1 the victim had a wooden handle, and I believe the
2 hatchet entered into evidence has a rubber handle on it,
3 a rubber black handle.

4 THE COURT: So it's not relevant?

5 MR. MAULDIN: Correct.

6 THE COURT: After all this, the objection is
7 it's not relevant because it's not the right hatchet?

8 MR. MAULDIN: Well, Your Honor, I know I kind
9 of spat out a lot of grounds, Your Honor, but those are
10 the bases, I guess, of my objection to the hatchet
11 coming into evidence, again violating his right to
12 unreasonable search and seizure under the Federal and
13 State Constitutions and his right to due process under
14 the Federal and State Constitutions.

15 THE COURT: It's under a kind of catch 18.
16 Some people say catch 22. If you go back and read
17 Mr. Heller and why he named that book Catch 22, he just
18 made up the number 22. It could be catch 18.

19 My point in asking the question concerning the
20 arrest warrant was I think it shifts the focus that the
21 arrest warrant was issued before the officers entered
22 the residence versus if the officers entered without a
23 warrant.

24 Because if the officers entered without a
25 warrant, then you have to hit one of the exceptions to

1 the warrant requirement. Y'all all know the seven kind
2 of classic exceptions, one of which is abandoned
3 property.

4 So if we say the search warrant was issued,
5 and we look at Loftin and Asberry, which stand for the
6 proposition, as Mr. Mauldin says, specifically Loftin,
7 that the officers have to have a reason to believe the
8 suspect is within.

9 The lawfulness of entry into a private
10 residence by law enforcement officers rests solely upon
11 the information possessed by the officers at the time
12 entry is effected.

13 In Loftin the search was found to be unlawful
14 because no one appeared to be at home, no one answered
15 when the officers knocked on the door, and no sign of
16 the Defendant was perceived, despite an hour and a half
17 stake out.

18 Significantly, one officer who was familiar
19 with Loftin's blue van testified the vehicle was not in
20 the parking area of Loftin's apartment. Clearly no
21 basis existed for a reasonable belief that Loftin was at
22 home.

23 When I look at Defense Exhibit 1, wherever it
24 may be, the picture of the residence, quite frankly it
25 may be highly unlikely that anyone would ever believe

1 anyone was at home at that residence from looking at its
2 condition.

3 You can see from this photograph holes in the
4 roof, no windows, unkempt, appears to be an automobile
5 under the building. It does not appear to these old
6 eyes to have a current license tag on it.

7 Then going from Loftin, you have United States
8 versus Louter, L-O-U-T-E-R -- and I found this
9 interesting -- the Federal Court of Appeals held
10 officers had reason to believe the Defendant was present
11 in his apartment based upon information perceived from a
12 confidential informant that the Defendant had moved into
13 the windowless apartment during the weekend, that he was
14 unemployed, and that he typically slept late. Louter
15 was found asleep inside the apartment.

16 I am reading all this, of course, from the
17 Asberry decision. It appears the officers had a warrant
18 for Asberry. The officers had learned from neighbors
19 that Asberry came home late at night and left early in
20 the morning.

21 The testimony revealed the officers with the
22 arrest warrants and commitments in their possession
23 knocked on the door of Asberry's residence, announced
24 themselves as officers, and called Asberry's name. A
25 light was seen inside.

1 The testimony obviously is you will not see a
2 light inside the residence depicted in Defendant's 1.
3 But no activity was noticed and they received no
4 responses from within. The officers entered Asberry's
5 residence through an open kitchen window.

6 Asberry was not at home; however, in searching
7 for him, the officers observed in plain view an electric
8 blanket with a male plug, but from which the electrical
9 cord had been removed. That plug, of course, had been
10 used, that electrical cord had been used to cause death
11 by asphyxiation of the victim at the victim's residence.

12 So I guess the first thing I have to determine
13 is was this property of Mr. Golston's for which he had a
14 reasonable expectation of privacy. I think he did. I
15 think it was.

16 I mean, I think the testimony from Ms. Jones
17 and Ms. Gray and from the Defendant himself is correct,
18 it was his property. I find it to be credible that he
19 has an expectation of privacy.

20 The officers respond back to the scene. He is
21 seen sitting on another porch. The officers are
22 directed by different individuals, I take it, in the
23 community, that he ran into a certain wood line. They
24 have a dog, which I cannot recall the name, but I will
25 call Balto, for lack of a better name right now, who

1 tracks to that residence.

2 There are no warrants, arrest warrant. If you
3 take Ms. Jones' testimony, they are at the Defendant's
4 residence. Who better than a tracking dog, who is
5 probably more credible than a confidential informant,
6 was present.

7 Obviously I think the officers can execute the
8 arrest warrant at the residence where they have the
9 belief, the reasonable believe that the person is
10 therein.

11 Here is another catch 18 at this point. The
12 officers don't think it is his residence. But the
13 Defendant can't have it both ways. Either it is or it
14 isn't his residence.

15 They can certainly execute the search warrant.
16 They have a search warrant for the felony. So where
17 does all this leave us? I don't think the property is
18 abandoned, but I do think the officers can validly
19 execute the search warrant in the residence.

20 MR. MAULDIN: The arrest warrant?

21 THE COURT: The arrest warrant, yes, sir.
22 Thank you. I think it's reasonable for the officers to
23 search, particularly given the condition of the
24 residence as it was described by the officers within;
25 clothes, debris, no lights, no running water, stairs.

1 It was such a dangerous condition the dog couldn't even
2 be sent into it. So the bottom line is the hatchet is
3 admissible.

4 Any other motions, Mr. Mauldin, Mr. Buchanan?

5 MR. BUCHANAN: None at the present time, Your
6 Honor.

7 MR. MAULDIN: No, sir.

8 THE COURT: Solicitor?

9 MS. PATTERSON: Nothing from the State.

10 THE COURT: If you would bring us our jury,
11 please.

12 (The jury returns to the courtroom at
13 4:33 p.m.)

14 THE COURT: Is it 2:30 yet? Madame Clerk,
15 would you swear our jury, please.

16 CLERK: Yes, sir, Your Honor.

17 (The jury is duly sworn).

18 THE COURT: Good afternoon, ladies and
19 gentlemen. I apologize for the delay. Many times it's
20 not unusual that I have to hear pretrial motions, and
21 it's very hard to determine how long they may take.
22 Generally it's not the fault of the parties that they
23 take longer sometimes than expected.

24 As I say, I apologize to you for that. You
25 will find that I think sometimes it's a characteristic

1 of a judge -- I hope of a good judge -- they don't seem
2 to be able to keep time very well.

3 Your time is very important to me. I am very
4 attuned to it. Again, many time these things can't be
5 delayed, and hopefully that will help the trial move
6 along more efficiently.

7 Ladies and gentlemen, the case we are about to
8 try is the case of the State versus Bennie Golston, the
9 Defendant. What I will now say is intended to serve as
10 an introduction to the trial.

11 These remarks are not a charge on the law in
12 the case. I will instruct you on the law at the end of
13 the trial before you retire to consider your verdict.
14 This is merely an explanation of the procedure we will
15 follow in the trial of this case so that you may better
16 understand what may be happening.

17 The Defendant is charged by indictment filed
18 in this court with criminal domestic violence of a high
19 and aggravated nature, the elements of which will be
20 explained to you later.

21 Again, this indictment is simply the charge by
22 which the case is brought into court, and it is not in
23 any sense evidence of any of the allegations contained
24 therein. It is the formal notice document.

25 The Defendant has pled not guilty to this

1 indictment. The State therefore has the burden of
2 proving each of the elements of the indictment beyond a
3 reasonable doubt.

4 It will be your duty, ladies and gentlemen, to
5 decide whether the State has met that burden. Your
6 purposes as jurors is to find and determine the facts.
7 You are the sole judge of the facts.

8 If at any time I make any comment regarding
9 the facts, you must disregard it. You are to determine
10 the facts from the testimony you hear and any other
11 evidence introduced into court.

12 It is up to you to determine the inferences
13 which you feel may be properly drawn from the evidence.
14 It is especially important that you perform your duty of
15 determining the facts diligently and conscientiously
16 because ordinarily there is no way to correct an
17 erroneous determination of the facts by a jury.

18 On the other hand and with equal emphasis, the
19 same law that makes you the judges of the facts makes me
20 the judge of the law. The law as given by the Court is
21 the only law you may consider. You must accept and
22 follow it even though you may disagree with me.

23 I cannot tell you what the facts are, and you
24 cannot disagree with me about what the law is or should
25 be. Your job is to take the facts -- excuse me -- take

1 the law as I give it to you and apply it to the facts as
2 you find them from the testimony of the witnesses and
3 any other evidence that is introduced.

4 After doing that you will render your verdict,
5 a true and just verdict, under the solemn oath you have
6 just taken. It will be your solemn responsibility to
7 determine the guilt or innocence of the Defendant, and
8 your verdict must be based solely on the evidence as it
9 is presented to you in this trial and on the law as I
10 instruct you during and at the close of the trial.

11 In just a moment, the solicitor will make what
12 is called an opening statement in which the solicitor
13 will explain to you the issues in the case or at least
14 what the solicitor thinks the issues are in the case.

15 Mr. Buchanan or Mr. Mauldin, the attorneys for
16 the Defendant may also make an opening statement,
17 although they are not required to do so. What the
18 attorneys tell you during their opening statements is
19 not evidence.

20 It is only their contention as to what the
21 issues are. The evidence will be presented to you by
22 the testimony of the sworn witnesses from this witness
23 stand and/or by exhibits that may be introduced into
24 evidence.

25 Now, from time to time during the trial, you

1 may hear one of the lawyers say something like, Your
2 Honor, I believe we have a question of law or a matter
3 of law to discuss with you or, Your Honor, may we
4 approach the bench? Or sometimes I myself might find it
5 necessary to excuse you from the courtroom for a short
6 while so the attorneys and I can discuss a matter of
7 law.

8 The reason for this is because you are the
9 judges of the facts, and sometimes when I am discussing
10 a matter of law with the attorneys, it may be necessary
11 for me to make some comment as to the facts in
12 connection with ruling whether a particular law applies
13 or not.

14 I am not supposed to tell you what I think the
15 facts are. So I will excuse you from the courtroom
16 while these discussions take place so that in no way
17 will you be influenced by anything I might say or do in
18 connection with the facts.

19 In determining what the true facts are in this
20 case, you must determine and decide whether or not the
21 testimony of the witnesses is believable. It will be my
22 responsibility to rule as a matter of law as to whether
23 certain testimony is admissible at all or not, but once
24 the testimony is admitted, whether or not you believe it
25 is solely for you to determine.

1 In deciding whether to believe a particular
2 witness, using your good judgment and your common sense,
3 you have a right to consider the interest of any
4 witness, the bias of any witness, the prejudice of any
5 witness, the opportunity for the witness to have seen
6 the matters and things about which the witness may
7 testify, and the way the witness acts on the witness
8 stand.

9 You have a right to consider anything that is
10 in the record that will help you evaluate the testimony
11 of the witnesses. That means it will be your duty to
12 pay close attention to the witnesses, to observe the
13 witnesses, to listen to the witnesses, and to pay close
14 attention to the attorneys and to the Court.

15 Do not let your thoughts wander, but give
16 strict attention to the testimony in the case so that at
17 the end of all the evidence, after the arguments of
18 counsel, and the charge on the law by the Court, you
19 will then be in a position to determine what the true
20 facts are and to apply the law to those facts and thus
21 render a true and just verdict.

22 Madame Forelady, it will be your added
23 responsibility to preside in the jury room and to be the
24 jury's spokesperson here in court. It will also be your
25 duty to write the verdict, but I will give you further

1 instructions about that at the conclusion of the trial.

2 Just a couple of administrative issues, ladies
3 and gentlemen. As you see, we do have a speaker or
4 sound system in the courtroom. However, those of you
5 further away from the witness stand, if you can't hear a
6 witness, just please get my attention, the attention of
7 one of the fine bailiffs. We will have then speak up.

8 Also I don't know what may be offered. It
9 could be photographs, diagrams, charts, such as that
10 nature. Many times they may be passed to the forelady
11 and then passed amongst the jury while you are out here
12 in the jury box.

13 You may look at those items. Take all the
14 time you want to look at those items. Please remember
15 if I allow it into evidence, at the time of your
16 deliberations, you will have all those items in the jury
17 room with you.

18 The point I am making is out here in the
19 courtroom will not be the only opportunity you will get
20 to see those items of evidence. Again, look at them as
21 long as you want to, but keeping in mind that won't be
22 the only opportunity you have to view those items.

23 One final thing. As I tell jurors week to
24 week, whenever I want to take a break, we take a break.
25 Well, it's not some type of judicial marathon. You will

1 find, at least I have found doing this week to week, if
2 you sit out here too long and you listen and you focus,
3 after a while you get to squirming in your seat, and
4 your thoughts may wander.

5 If at any time any of you need a break, please
6 raise your hand. Y'all will take y'all's break. We
7 will take our break. I have absolutely no problem
8 whatsoever. These attorneys will have plenty of time to
9 present their case. As I say, any time any of you need
10 a break, just please raise your hand and we will take a
11 break.

12 During your breaks if you have any questions
13 or people have commitments or afternoon picking up
14 children or commitments in the evening that they need to
15 get out of here at a certain time, just let me know.
16 Just write out a note for me, Madame Forelady, knock on
17 the door, and give it to the bailiff. I will try to
18 respond timely.

19 With that being said, any objections to
20 anything I have told the jury, Solicitor?

21 MS. PATTERSON: Nothing from the State, Your
22 Honor.

23 THE COURT: Mr. Buchanan?

24 MR. BUCHANAN: Nothing, Your Honor.

25 THE COURT: We are going to try to press on,

1 maybe 45 minutes or an hour today. We will see how far
2 we get.

3 Solicitor, you may address the jury.

4 MS. PATTERSON: Thank you, Your Honor. May it
5 please the Court and opposing counsel.

6 THE COURT: Yes, ma'am.

7 **OPENING STATEMENT**

8 MS. PATTERSON: Jealousy is the dragon that
9 slays love under the pressure of keeping it alive.
10 Jealousy is one of the most destructive emotions there
11 is, and jealousy is what the caused the victim, Myrtle
12 Johnson, to be brutally assaulted by the Defendant,
13 Bennie Golston, on March 22, 2008.

14 Bennie Golston is charged with criminal
15 domestic violence of a high and aggravated nature.
16 That is defined as an assault and battery which
17 involves the use of a deadly weapon or results in
18 serious bodily injury to the victim or an assault with
19 or without an accompanying battery which would
20 reasonably cause a person to fear imminent serious
21 bodily injury or death.

22 Now, the judge later on will instruct you more
23 in-depth about the definition of criminal domestic
24 violence of a high and aggravated nature. He will also
25 instruct you that the State has the burden of proving

1 this beyond a reasonable doubt that the Defendant
2 committed this crime. This is a burden that we gladly
3 accept, and this is a burden that we are certain we will
4 meet.

5 Now, you are going to hear testimony from
6 different people, law enforcement, neighbors, the victim
7 herself, her son. You are going to hear a lot of
8 testimony. You are going to hear about what people
9 observed on this day and what their reactions were
10 because of what they observed.

11 You are going to see photographs of the
12 victim. You are going to see other evidence. We are
13 certain that all of this together is going to point to
14 the Defendant committing the crime of criminal domestic
15 violence of a high and aggravated nature.

16 Now, this is not going to be a long trial, but
17 this is going to be an important trial. I just ask that
18 you listen carefully, use your common sense, and I am
19 certain that you will come back with a verdict of guilty
20 for the Defendant, Bennie Golston. Thank you.

21 THE COURT: Thank you, Solicitor.
22 Mr. Buchanan.

23 MR. BUCHANAN: Thank you, Your Honor. May it
24 please the Court.

25 THE COURT: Yes, sir.

1 **OPENING STATEMENT**

2 MR. BUCHANAN: Opposing counsel, ladies and
3 gentlemen of the jury. Again, my name is Matt Buchanan.
4 I represent Bennie Golston. Well, ladies and gentlemen,
5 we are about to start up something that our founding
6 fathers came up with well over 200 years ago when they
7 broke away from the Crown of England.

8 They had a large number of grievances with the
9 Crown, and one of those was how the justice system was
10 being dealt with. There were star chambers, people were
11 just being taken and disappearing. There was a lot of
12 mistrust in the way the government prosecuted crimes.

13 So what the founding fathers decided was to
14 take ordinary citizens and place them as a barrier
15 between the powers of the State, that has the power of
16 the police, has the power of drafting indictments, and
17 bringing people to court to face accusations.

18 Then the Defendant himself, who is an ordinary
19 citizen, doesn't usually have the kind of resources and
20 very many times has no resources, to bring in his or her
21 defense.

22 So we are following that same tradition that
23 was developed, and it's the best we have got. It's the
24 best there is on this planet. I don't think anyone here
25 in this courtroom would disagree with that.

1 So what I would like to convey here in this
2 time I'm talking with you is that to keep that pride in
3 what kind of system that we do have here. Keep that.
4 Because what you are here to do is to put the State to
5 the test, not Mr. Golston.

6 Mr. Golston is the accused. He is right now
7 innocent. He is presumed innocent, and the State has
8 that burden, that full burden, that she explained. You
9 will hear the judge explain that further.

10 The State has to prove each and every element
11 of this crime, criminal domestic violence high and
12 aggravated, beyond a reasonable doubt. That is going to
13 be something that the judge will explain to you.

14 The judge has to explain it to you. He
15 determines what the law is. He is going to instruct you
16 what the law is. He will tell you what reasonable doubt
17 is. If he is different than me, go with him.

18 But reasonable doubt is whether or not you are
19 firmly convinced. If you have a doubt about whether or
20 not the State has really proved its case, the benefit
21 goes to Mr. Golston.

22 That's our system. That's what the founding
23 fathers put in place. The State has to make you firmly
24 convinced that the Defendant is guilty. That's what is
25 the test that you are -- you have sworn an oath to put

1 that test to the State, to the solicitors, the police
2 officers. They are the ones who are bringing the
3 charge, so they are the ones who bear that burden.

4 Now, one of the things that they put in place,
5 the founders, is that the law -- each crime is going to
6 broken down into elements. You heard that word before,
7 elements. It kind of like the various ingredients in a
8 recipe or breaking things down into its fundamental
9 components.

10 That is where the State bears the burden of
11 proof on each one of those elements. If one of those
12 elements is not proven beyond a reasonable doubt, even
13 if they prove one or two of the others, it is not
14 proven.

15 Basically if the law lists a requirement that
16 the State does not prove, they haven't proven their
17 case. So when you are thinking about this case, this
18 case of criminal domestic violence, the solicitor
19 mentioned many of the elements.

20 But I submit to you, ladies and gentlemen,
21 wait until you hear the law at the end. I will throw
22 out one more that I don't believe the State mentioned,
23 but it's going to be part of the law, and that is that
24 this is domestic violence, that there is an actual
25 household or family or some sort of relationship.

1 That is well defined in the law. The judge
2 will rule on that, and the judge is going to explain to
3 you how the State can prove that, and you put that to
4 the test as well.

5 So there is more to it than just was there an
6 assault, was she afraid for her life, or some of those
7 other elements that the solicitor rattled off. One of
8 those things is it has to be a domestic situation
9 between the two parties.

10 There are going to be others. There are going
11 to be other questions that you might have as this case
12 goes through, and some of those things will cause
13 doubts. Those are the doubts that you are supposed to
14 give the Defendant the benefit of.

15 So, again, ladies and gentlemen, Your Honor, I
16 look forward to being in front of you for this trial. I
17 anticipate that when the facts are finally presented and
18 the judge gives you the law, you will find that they
19 have got a recipe missing, a couple of key ingredients.
20 Thank you.

21 THE COURT: Thank you. Thank you,
22 Mr. Buchanan.

23 Solicitor, you may call your first witness.

24 MS. PATTERSON: Thank you, Your Honor. The
25 State calls Myrtle Johnson.

MYRTLE JOHNSON -- DIRECT -- MS. PATTERSON

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1 THE COURT: Ms. Johnson, if would come around
2 and be sworn, please.

3 MS. PATTERSON: Your Honor, Ms. Johnson may
4 need some help walking to the stand.

5 THE COURT: All right.

6 MYRTLE JOHNSON, being
7 first duly sworn, testifies as follows:

8 CLERK: State your name, spelling your last
9 for me, please. .

10 THE WITNESS: My name is Myrtle Johnson,
11 J-O-H-N-S-O-N. I'm a little bit nervous.

12 DIRECT EXAMINATION

13 BY MS. PATTERSON:

14 Q Thank you, Ms. Johnson.

15 A Okay.

16 Q I am going to start asking you questions. If you
17 are a little nervous, just take your time.

18 A Yes, ma'am.

19 Q Ms. Johnson, where do you live?

20 A

21 THE COURT: Ms. Johnson, you don't have to
22 speak quite so loud. Me and you have got about the same
23 tone. You did very well.

24 THE WITNESS: Thank you.

25 THE COURT: Yes, ma'am.

1 BY MS. PATTERSON:

2 Q And Ms. Johnson, , what county is
3 that in?

4 A

5 Q How long have you lived at ?

6 A Since about '89, off and on.

7 Q And, Ms. Johnson, I know a lady is not supposed to
8 tell, but how old are you?

9 A I'm 70.

10 Q Do you have any children?

11 A Yes, I have three. I have a son 54, 34, and a
12 daughter 32, I think.

13 Q I'm sure she'll appreciate you telling her age.
14 Did your children ever reside with you at
15 ?

16 A Yes, ma'am, they did at different times.

17 Q Different times. Do you know Bennie Golston?

18 A Yes, I do.

19 Q Do you see him here in the courtroom today?

20 A Yes, ma'am, I do.

21 Q Where is he seated?

22 A He is right there (indicating) with the red shirt.

23 MS. PATTERSON: Your Honor, would the record
24 reflect she has pointed to the Defendant, Bennie
25 Golston.

MYRTLE JOHNSON -- DIRECT -- MS. PATTERSON

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1 THE COURT: Yes, ma'am, so reflected.

2 BY MS. PATTERSON:

3 Q How do you know Bennie Golston?

4 A I was involved intimately with him for about five
5 years.

6 Q How did y'all meet?

7 A He was in my front yard helping my son repair his
8 car.

9 Q And did you guys become friends instantly?

10 A Yes.

11 Q And how long did you say you were in a romantic
12 relationship with him?

13 A Approximately five years, maybe a little more.

14 Q And you loved him during this time?

15 A Very, very much.

16 Q Was there ever a time when he moved in with you?

17 A Off and on. On his good days, yes, ma'am.

18 Q About how many days a week did he reside with you?

19 A Sometimes all of them, sometimes two of them. It
20 would vary.

21 Q Did he have personal belongings at your house?

22 A Oh, yes.

23 Q What type of personal belongings did he have at
24 your house?

25 A Well, clothing, toothbrush, shoes, shirts,

1 clothing, like you live on a daily day.

2 Q Did he eat at your house?

3 A Oh, yes, and cooked.

4 Q So he cooked sometimes?

5 A Yes.

6 Q Did he take a bath at your house?

7 A Yes.

8 Q Did he sleep at your house?

9 A Yes.

10 Q When he slept at your house, where did he sleep?

11 A With me.

12 Q Do you remember an incident on March 22, 2008,
13 involving the Defendant, Mr. Golston?

14 A Yes.

15 Q Let's just go back to earlier in that day. What
16 was going on at your house that day?

17 A I was trying to prepare my house to receive my
18 mother's furniture that I was moving from New
19 Jersey to my house. So I was having it painted,
20 moving things around, to make room for her
21 belongings.

22 Q Who was there to help you out to do these things?

23 A A very old friend of mine. I had been friends with
24 he and his wife about 14, 15 years, but they were
25 younger than I were, but they were still friends of

- 1 mine.
- 2 Q So they were over at your house earlier to help you
- 3 out?
- 4 A Yes, different times. Sometimes his wife would
- 5 come with him, but most times he came by his self
- 6 to work.
- 7 Q And what were they doing at your house?
- 8 A Painting, fixing different things, moving things
- 9 from the house to the garage to make room.
- 10 Q Were you helping in any way?
- 11 A Well, the best I could do with telling them where I
- 12 wanted what.
- 13 Q Was the Defendant there?
- 14 A Yes.
- 15 Q Was he there all day with you?
- 16 A Most of the time or he would go out periodically
- 17 and then return.
- 18 Q Was he helping?
- 19 A Sometimes.
- 20 Q And this friend, what was his name?
- 21 A Alfred Hunter.
- 22 Q How long -- about what time did Mr. Hunter and his
- 23 wife leave your house?
- 24 A That particular night you are speaking of?
- 25 Q Yes.

1 A It was good and dark, maybe ten-ish, maybe
2 10:00 o'clock.

3 Q When they left who was at your house with you?

4 A I was alone.

5 Q And what did you do after they left?

6 A Get ready for bed.

7 Q Did the Defendant ever return that night?

8 A Oh, yes, yes.

9 Q Do you remember, did he say anything when he came
10 into the house?

11 A I didn't pay really much attention, just the usual.
12 I didn't know what condition he was in. I was, you
13 know, like really involved in getting ready for
14 bed. I didn't know he was upset or angry until he
15 began to talk.

16 Q When he began to talk, what did he say to you?

17 A That he should beat me up for bringing that man in
18 our home.

19 Q And what was your response when he said this?

20 A I brought Alfred to do things that he should have
21 done. But after I realized he was angry, I didn't
22 say anything else to antagonize him because I
23 realized he had been drinking.

24 Q Was the Defendant jealous of you?

25 A Yes, ma'am.

1 Q How did you know that he had been drinking?

2 A I could smell it.

3 Q So you just tried to ignore him?

4 A I tried to talk calmly and, you know, not agitate
5 him.

6 Q Were you successful in talking calmly to him?

7 A No, I wasn't. I didn't realize how upset he was
8 until he hit me the first time. Then he hit me
9 again, and by that time I realized I was in
10 trouble, and I got to the door.

11 I managed to get out the door and get to my
12 car, but I couldn't get it closed and the car
13 ignition turned on quick enough. So he opened the
14 door and drug me out and continued to beat me on
15 the ground, straddled me.

16 Q Let me stop you for one minute. You said he hit
17 you the first time. What did he hit you with?

18 A His fist. My head and my face, nowhere but my
19 face.

20 Q How many times did he hit you?

21 A Many, many, many times.

22 Q And after that first time, were you able to get
23 away?

24 A I got to the car, but I couldn't get it started.

25 Q How were you able to get away from him at this

1 point?

2 A How did I get away from him? I didn't. When I got
3 to the car and he pulled me out, I was on the
4 ground and he straddled me.

5 Q How did he pull you out the car? Did he pull you
6 by your arm?

7 A Yes, ma'am, by my arm.

8 Q Where were you laying when he straddled you?

9 A On the ground on my back.

10 Q Did he hit you again at this point?

11 A Many, many times.

12 Q Do you know where he was hitting -- what he was
13 hitting you with?

14 A At first I did because my eyes wasn't closed. I
15 could see images. I saw enough to see the hatchet
16 when that was over my head, but a lot of the
17 sequence I can't tell you because I got hit so
18 quickly and so many times. I can't tell you
19 verbatim the way it was. I can just tell you what
20 I remember, and there are things I remembered days
21 later that I didn't remember right then.

22 Q That's fine. Was he saying anything to you while
23 he was hitting you?

24 A Yes, ma'am. He told me I disrespected him by
25 bringing this man into the house and that he should

1 kill me.

2 Q Were you saying anything to him?

3 A I was trying to get through the alcohol because I
4 knew -- he didn't know what he was doing. I would
5 say, Ben, you are hurting me. Ben, you are hurting
6 me. Ben, please don't hit me with that hatchet.
7 Please, don't hit me. Just over and over and over
8 again, I was trying to get through to him.

9 Q Did he hit you with the hatchet?

10 A No, ma'am. What he did was he raised it, and then
11 he brought it down slowly. I had no sleeves on,
12 and he would rub the steel all over my skin. I
13 could feel the cold steel, and then he took it over
14 his head, but he never came down with it. I would
15 have been cut up.

16 Q When he was rubbing the steel over your body, did
17 he say anything to you?

18 A That he should kill me, yes, ma'am.

19 Q How did you get him to stop hitting you?

20 A I just kept repeating, Ben, you are hurting me.
21 Ben, you are hurting me. Please don't hit me. You
22 are right. I shouldn't have brought that man in.
23 I agreed with whatever he said. I was trying to
24 cool him out, you know. I agreed with him. I
25 didn't give him no hard time.

1 Q Did this work?

2 A Ma'am?

3 Q Did this subsequently work?

4 A Finally, yes. When he raised the hammer, that was
5 the time that he took it down and through my -- my
6 vision was then blurred. I could see Gail's
7 lights, my cousins that live there. I could see
8 their house and my house was on the side back here,
9 but he dropped the hammer and walked away. Then I
10 was confused about which way was home.

11 I tried to slide because I couldn't get up on
12 all fours and crawl. So I slid to the street,
13 which is pavement, and that is when I realized I
14 couldn't crawl across the pavement. I would tear up
15 my knees. So then I crawled back around the
16 other -- I have a horseshoe driveway.

17 I went to the other end to go to Gail's house.
18 She lives on this side (indicating), but I ran into
19 the same thing, the gravel. I couldn't crawl on
20 the gravel. I couldn't slide on the gravel. So I
21 came back home, and my door key that I had asked
22 Alfred to get me -- because he was putting a lock
23 on my door. I said I want my extra key from Ben
24 because he will walk in and out all night.

25 So the key was in the door. I didn't know

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1 whether he used it to let himself in. When I got
2 to the door, I could reach the doorknob and feel
3 the key.

4 That's when I unlocked the door. I crawled in
5 my house where a mattress -- we were painting, so
6 that mattress was on the floor. I covered myself
7 up and I don't remember anything until I heard
8 Gail's voice because my eyes both were completely
9 shut.

10 Q Did you try to call for help or did you --

11 A I couldn't. I didn't know where no phone was. My
12 pocketbook, my medicine, all that stuff was outside
13 on the ground. That's why the movers wouldn't come
14 in that morning. They knew something was wrong.
15 My front door was ajar, and my pocketbook and all
16 my belongings was spread out because I had put them
17 in the car.

18 Q Did the Defendant try to help you up?

19 A I begged him to put me the house and not to leave
20 me on the ground, but by then I couldn't stand up
21 on my own legs. While he tried once or twice to
22 pull me up, he just got disgusted and pushed me
23 back down and continued to walk away.

24 Q So you do remember -- who is Gail Jones?

25 A Beg your pardon?

- 1 Q Who is Gail Jones?
- 2 A That's his niece.
- 3 Q When you say his?
- 4 A Ben's niece. Her mother and I were great friends.
- 5 Q Do you remember her coming into your house?
- 6 A I remember her calling my name.
- 7 Q Were you able to respond back to her?
- 8 A Yes, ma'am, I think I said something, but I could
- 9 not see her. She called my children, I think.
- 10 Q Do you have any idea what time this was when she
- 11 came into your house?
- 12 A I'd say it was nine-ish, maybe after nine, maybe
- 13 9:30. It was early morning but I had been asleep.
- 14 I did go to sleep and she woke me up.
- 15 Q Do you remember -- let's go back just for a second.
- 16 Do you remember what time it was when Bennie
- 17 started assaulting you?
- 18 A About 11 to 12, somewhere between 11 and 12,
- 19 because there were no people out. I was screaming
- 20 help, you know, for somebody to help me, but the
- 21 houses were dark, like everybody was settled for
- 22 the evening.
- 23 Q So when Ms. Jones came to your house, you were able
- 24 to talk to her, correct?
- 25 A That morning, yes, ma'am.

1 Q Did you tell her what had happened to you?

2 A I told her Ben. As far as I remember, I told her
3 Ben had did this.

4 Q Did she call for help?

5 A Yes, she called my son or my daughter, I'm not sure
6 which. Then I think she called the police or
7 either one of them called the police. Then they
8 came me and took me to the trauma center.

9 Q Do you remember talking to any of the officers?

10 A Yes, ma'am, but I don't remember what sequence it
11 was in. I don't know. I think it was right before
12 they moved me, put me on the stretcher and moved me
13 out.

14 But it was a lot of things that I was not
15 really clear about how or what succession they
16 happened in because I was just out of it, like
17 another lick would kill me.

18 I just put my hand up to protect my head
19 because I got most licks in my head and my face,
20 and both eyes were swollen shut. I couldn't see.
21 My daughter had took care of me and fed me and put
22 me in the tub and bathed me.

23 Q Were you transported to the hospital?

24 A Yes, I was.

25 Q Do you know how you got there?

1 A I remember them putting me on a stretcher.

2 Q Do you remember what hospital you went to?

3 A I had asked to go to Lexington, but my face was so
4 severely battered that they said Palmetto Richland
5 had a better trauma center. So the officers -- I
6 said I agreed, you know. I said wherever you think
7 is best, and that's where they took me.

8 Q So when you got to the hospital, the doctors and
9 nurses examined you?

10 A Yes, and did C.A.T. scans, I think, just a lot of
11 things.

12 Q So they ran different tests on you?

13 A Yes.

14 Q Do you know the results of the tests?

15 A How do you mean?

16 Q Did you have anything broken?

17 A Oh. After they did tests, the doctor came in and
18 he was very surprised that he didn't have to do
19 bone work. He thought some bones in my face was
20 broken, but nothing was broken, but he could not
21 get my eyes open to look in them to see what I
22 possibly could see.

23 So I had to wait, but they sent me to Palmetto
24 Eye Institute a couple of days later, and there
25 they couldn't get my eyes open. It hurt too bad

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1 and I couldn't stand them to put any light in.

2 So he sent me back home. Then when I came
3 back the next time, one of them had opened. They
4 did not know how much sight I would ever have
5 again, but everybody was surprised that I wasn't
6 hurt much worse.

7 Q Do you know how long you stayed at Palmetto
8 Richland?

9 A The trauma center?

10 Q Yes, ma'am.

11 A They came and got me that morning after Gail came
12 in. I stayed all day and then they were going to
13 keep me overnight, but after the pictures and
14 things they took, he said the medication that was
15 brought to my daughter, who is a therapist, could
16 handle that if I wanted to go home. I told him,
17 Yeah, I think I will be fine. She and my son took
18 me to her house, I think.

19 Q When you got to your daughter's house, were you
20 able to walk?

21 A Not without help.

22 Q Were you able to talk?

23 A I could communicate, yes, ma'am. It wouldn't be
24 plain talk, but I would get my idea over to her.
25 She had to feed me and I couldn't drink, like a

1 glass of water down. It was like I was losing my
2 breath. I would have to take a swallow and tell
3 her to move it, you know. I couldn't just --
4 couldn't do anything.

5 Q So you said your eyes were still swollen shut at
6 this time?

7 A Oh, yes.

8 Q So you wasn't able to see anything?

9 A No, ma'am. I couldn't see television. About the
10 end of the first week, she came into my room, and I
11 said, Look at me, I am watching television with one
12 eye. Then the other one opened because I think
13 this (indicating) was the worse one.

14 Q So one eye opened after about one week?

15 A Just about, maybe a day or so less, but the other
16 one took much longer. Because Ben is right handed,
17 and this was where I -- that one (indicating) was
18 bad.

19 Q Do you know about how long it took the left eye to
20 open?

21 A About a week and a half at least. I had been to
22 the trauma center -- the eye doctor a couple of
23 times.

24 Q Were you in any pain?

25 A Yes, extremely. It was like I couldn't breathe. I

1 couldn't breathe. I couldn't drink like a half
2 glass of water down. I would have no breath.

3 Q So how did you eat and drink?

4 A My daughter fed me and held the glass while I took
5 little sips, and she put cold compresses all over
6 my face periodically. She would put that ice on
7 me.

8 Q Were you able to bathe yourself?

9 A No, ma'am. She put me in the tub and washed me
10 like a baby.

11 Q You said you had to receive follow-up treatment for
12 your eyes?

13 A Yes, ma'am, to Palmetto -- the eye center. I had
14 sight. I was very lucky I had sight. I knew that
15 I could see, you know. I didn't wear glasses
16 before, and I didn't feel -- neither did they --
17 that glasses was going to necessarily help, but
18 that was about all they could do, you know. They
19 dilated my eyes and all that.

20 Q Who do you live with now?

21 A My daughter most times. I come down to the house.
22 I have about nine cats. So I try to feed them
23 every two to three days and straighten up the house
24 a little bit. I do pretty good.

25 Q Do you ever spend the night by yourself?

1 A Yes, ma'am, but it's not that comfortable. I do
2 sometimes to give my daughter a little space.

3 Q And you say you loved Bennie?

4 A Very, very much.

5 Q Do you still want to be with him?

6 A No, ma'am. I can't take anymore beatings, no,
7 ma'am.

8 Q Are you ever afraid to stay by yourself?

9 A Yes. Noises frighten me. I have a two-door garage
10 that wants to bang when the wind blows, you know.
11 I put some cement blocks behind it to keep it from
12 rocking because it sounds like somebody is breaking
13 in.

14 MS. PATTERSON: Beg the Court's indulgence.

15 (Pause).

16 BY MS. PATTERSON:

17 Q Ms. Johnson, when Bennie was hitting you, did it
18 hurt?

19 A Very much. I thought each lick would be the last
20 that I would recall.

21 Q And before this incident were you ever -- are you
22 afraid of Bennie?

23 A Oh, yes.

24 Q Before this incident, were you ever afraid of
25 Bennie?

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1 A No, no. We had a -- other than that, we had a good
2 relationship. We laughed. We had fun. I was
3 never, never afraid of him.

4 Q Before this incident were you ever afraid to stay
5 by yourself?

6 A No.

7 Q When Bennie was hitting you, did you think you were
8 seriously injured?

9 A Yes, I thought he was going to kill me.

10 Q When Bennie was hitting you -- I apologize. When
11 Bennie was hitting you, you thought you were going
12 to die?

13 A Beg your pardon?

14 Q When Bennie was hitting you, you thought you were
15 going to die?

16 A Yes, ma'am, surely.

17 Q Please answer any questions the defense attorney
18 may have for you.

19 A Yes, I will.

20 THE COURT: Thank you, Solicitor.

21 Mr. Buchanan.

22 CROSS EXAMINATION

23 BY MR. BUCHANAN:

24 Q Thank you, Ms. Johnson. My name is Matt Buchanan.
25 I represent Mr. Golston.

1 A Yes, sir.

2 Q So you said you lived in that area since 1989,
3 correct? So you know that neighborhood pretty
4 well?

5 A Yes. My father built his home there. I lived in
6 it.

7 Q So you knew that Bennie Golston had his own place?

8 A Yes.

9 Q Was that a building that he lived in all the time?
10 He got his mail there, correct?

11 A He had a mailbox.

12 Q So he didn't receive mail at your place?

13 A I think once or twice he got a letter. I can't
14 think of the reason, but he used his box.

15 Q You said that he never stayed for very long at your
16 place because he moved?

17 A No, I meant long periods, like two weeks or three
18 week and so forth. He would go out every day and
19 come back every night. Some nights he may go spend
20 the night at his house, but most nights -- you
21 could look at his house and look at my house.
22 Which one would you rather go to?

23 Q He also had a mother living by, too. Didn't he
24 stay there?

25 A Well, if you can't say something good, you don't

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1 want to say anything bad about anybody's momma. So
2 if it's all right, I prefer not to answer that.

3 Q Do you know that he --

4 THE COURT: Listen to his question. I guess
5 his question was, did he ever stay at his mother's
6 house?

7 THE WITNESS: Did he ever stay there? Not
8 while he was with me.

9 THE COURT: Thank you. You may ask your next
10 question.

11 BY MR. BUCHANAN:

12 Q You said you lived there off and on, correct?

13 A Now I do since I been hurt.

14 Q But didn't you have to leave to go up to -- was it
15 New Jersey?

16 A My father died the 22nd of December. I had taken
17 care of him. He had Parkers (sic). My mother died
18 a year or so before. She has Alzheimer's,
19 diabetic, and I took care of her. I would go up
20 there, stay periodically, and then come back to my
21 house and stay periodically. At no time was that
22 my address. My address was . I

23 took care of my parents. I buried four parents.

24 Q So then while you were there, you let Mr. Golston
25 house watch; correct? Did he watch your house?

1 A Do you mean did he have a key and go in and out my
2 house?

3 Q Yes.

4 A No.

5 Q So he never had a key?

6 A Oh, yes, he has had keys. At different times he
7 had different keys, but I never trusted him. I
8 didn't -- once I did and it was a mistake, and I
9 never did that. So when I wasn't there, he wasn't
10 there.

11 MR. BUCHANAN: Beg the Court's indulgence.

12 THE COURT: Yes, sir.

13 (Pause).

14 BY MR. BUCHANAN:

15 Q On the night of the 22nd, you never told the
16 deputies that you got to the car, correct?

17 A I don't know.

18 Q And also you mentioned a hammer during your direct
19 testimony. You never mentioned a hammer before?

20 A Yes. Oh, yes, I was very aware of the hammer.

21 Q Did you ever tell officers about a hammer?

22 A I'm sure I did. That's not a part I would forget.
23 But where and when, you know, I can't testify to
24 that. But yes, I was very aware of that hammer
25 over my head and possibly could come down.

1 Q So you said when you made it back to the house, you
2 said there was keys hanging out of the door?

3 A There was a key in my doorknob, yes.

4 Q Who had the keys?

5 A All I know, I took a key from him. Now, possibly
6 that was my key. It was two keys. He had one and
7 I had one. But how that one got there, I don't
8 know how it got there or whose key it was, but
9 that's how I got back in the house.

10 Q Did Alfred ever have a key to the house?

11 A He's the one that put the lock in the door. He's
12 the one gave me a key. He's the one took a key
13 from Ben.

14 Q Oh, he took the key --

15 A That's some of what he was so angry about because I
16 had asked him to leave. I did not want him to have
17 to a key.

18 Q So Alfred ending up having a key, right, and took a
19 key from Ben?

20 A Alfred put a lock in the door. The new key he gave
21 me one automatically. Ben wanted the other one.
22 Before Alfred left I asked him to please ask Ben
23 for my key because he wasn't going to give it to
24 me.

25 Q So who locked the door while Mr. Golston allegedly

1 assaulted you?

2 A Can you rephrase that now?

3 Q You said the door was locked --

4 A Right.

5 Q -- outside, but you didn't lock the door. Who
6 locked the door?

7 A The key was in the door. That's what I know. I
8 turned the key to get in the house, but whether the
9 door was locked, I can't tell you. I can just tell
10 you that the key was in the door.

11 I used the key to get in, but it could have
12 already been left and sticking in there because Ben
13 could have let himself in and then take it out. I
14 don't know.

15 Q Did you attack Bennie on that night?

16 A Attack Bennie? Nobody attacks Ben, sir, no.

17 MR. BUCHANAN: Beg the Court's indulgence.

18 (Pause).

19 BY MR. BUCHANAN:

20 Q You had testified that Alfred left the house about
21 ten-ish, leaving you alone in the house; correct?

22 A Uh-huh. (Indicating affirmative response).

23 Q And you were getting ready for bed?

24 A Uh-huh. (Indicating affirmative response).

25 Q And that's when Mr. Golston showed up?

1 A Uh-huh. (Indicating affirmative response).

2 Q How did he get into your house without a key?

3 A I don't know whether I had the door locked because
4 we all live in a neighborhood. You don't always
5 lock doors. I mean, I know it sounds outrageous,
6 but a lot of times we don't lock our doors with
7 each other.

8 But at night I would. If there had come a
9 point where I had been there by myself, I would
10 have locked the door, but all this happened. So I
11 can't swear to that, sir.

12 Q But when you went to bed that night, did you leave
13 the key in the door lock?

14 A Mister, I had just got hit numerous times in the
15 head and the face. I was sliding because I could
16 not get up and crawl. I don't know.

17 Q Had you yourself been drinking that night or taking
18 anything that would affect your thinking?

19 A No.

20 MS. PATTERSON: Objection, Your Honor.

21 THE COURT: I will overrule the objection.

22 She had answered the question.

23 A No.

24 Q Ms. Johnson, I know you testified to this. I want
25 to get a little more specific. So you knew

1 Mr. Golston. You were involved intimately for five
2 years, but at no point did he change his residence,
3 correct, his mailing address?

4 A No.

5 Q And he never spent, what, longer than a week at
6 your residence before going to some other place?

7 A I don't think you can add it up like that. If we
8 were lovey-dovey, he was there. You know, when he
9 got upset with me or upset about something or drank
10 too much, he would go home. So I can't put it in a
11 definite time frame.

12 Q Thank you.

13 A You're welcome, sir.

14 THE COURT: Thank you, Mr. Buchanan. Anything
15 in redirect, Solicitor?

16 MS. PATTERSON: Just briefly.

17 REDIRECT EXAMINATION

18 BY MS. PATTERSON:

19 Q Ms. Johnson, you mentioned a hammer. Could this
20 have been a hatchet?

21 A I'm calling it a --

22 MR. BUCHANAN: Objection.

23 THE COURT: Overruled.

24 A I'm saying hammer but it's a hatchet.

25 Q Thank you.

1 THE COURT: Recross, Mr. Buchanan?

2 MR. BUCHANAN: Nothing, Your Honor.

3 THE COURT: Thank you. Thank you very much,
4 Ms. Johnson.

5 THE WITNESS: Thank you, sir.

6 THE COURT: You may step down.

7 (Witness leaves the witness stand).

8 THE COURT: Perhaps now would be a good time
9 for us to allow our jury to take their evening recess.

10 Madame Forelady, ladies and gentlemen of the
11 jury, I remind you that during this recess you are not
12 to discuss this case with anyone. That includes your
13 fellow jurors, your family, friends or anyone else.

14 I tell jurors all the time. If your home is
15 anything like my home used to be, when you get home in
16 the evening, the first thing the chaps would say is,
17 What did you do today, daddy, or what did you do today,
18 momma?

19 Of course, those days are way in the rear-view
20 mirror. They are no longer at home and they are off the
21 payroll. That is always a good thing. You can
22 certainly tell your family, your spouses, that you are a
23 member of the jury, but you cannot discuss the case.

24 Also, do not do any investigation of the case
25 on your own or any investigation on the internet or

1 anything of that nature. Remember to keep an open mind
2 about the case and do not begin your deliberations until
3 you are directed to do so by the Court, and then only
4 and then in your jury room with your fellow jurors.

5 I would ask you to please be back at 9:30 in
6 the morning in your new temporary home, your jury room.
7 Hopefully we can get started very promptly thereafter.
8 I hope y'all have a pleasant evening. See you at 9:30
9 in the morning. Thank you very much.

10 (The jury is excused for the day at 5:36 p.m.)

11 THE COURT: One more thing for the record. On
12 the issue that was brought up pretrial concerning the
13 search, to make sure I have got it clear, I considered
14 Mr. Mauldin's argument concerning the hump or, I guess
15 you would say, the lack of hump in the mattress.

16 I take it the inference would be could a
17 person be hiding under that mattress if there wasn't a
18 hump. Originally in the direct examination of the
19 officer, Deputy Merckle, I believe, I took that
20 testimony a little bit to be whether or not you could
21 even see a hump, for example of the hatchet itself, as
22 some type of outline, I didn't address that.

23 I think given the fact that they were
24 searching for an individual that had a felony charge
25 against him and the condition of the residence, the

1 structure as it has been described in the record before
2 the Court, they could move items, including the
3 mattresses.

4 A person would be able to hide or conceal
5 themselves under or between a mattress. You may not
6 have a hump. You could have a hump but if that hump is
7 completely horizontal, you wouldn't know it until you
8 look under that mattress.

9 The other point that Mr. Mauldin brought up,
10 of course, is still the issue of relevance under 401. I
11 haven't addressed that yet. Obviously if that issue is
12 brought up at the time in which the object is attempted
13 to be introduced, I would address that then. I did not
14 rule on that.

15 Also, on the issue overruling your objection
16 concerning the hammer, Ms. Johnson testified more than
17 once that it was a hatchet. Further on in her
18 testimony, she later testified it was a hammer. I think
19 under my discretion under Rule 611, I can control the
20 manner in which testimony is presented.

21 Although it's a leading question -- I don't
22 disagree with that. That may have been the basis of
23 your objection or your objections -- I think that's an
24 appropriate question in that regard.

25 MR. BUCHANAN: For the record the objection

1 was for leading.

2 THE COURT: It clears up also whether there
3 were two weapons, a hammer and a hatchet, which, of
4 course, could be prejudicial to your client, two objects
5 that were there. Be that as it may, if you want to
6 cross examine Ms. Johnson in that regard, I will allow
7 you to do so.

8 Anything further before we break for the
9 evening, Solicitor?

10 MS. PATTERSON: Nothing from the State.

11 THE COURT: Mr. Buchanan?

12 MR. BUCHANAN: Nothing, Your Honor.

13 THE COURT: Thank you very much. See you
14 promptly at 9:30.

15 (Whereupon the proceedings were concluded for
16 May 13, 2009).

17 (The following proceedings were reported on
18 May 14, 2009).

19 THE COURT: Anything, Solicitor, before we
20 bring in our jury?

21 MS. PATTERSON: Nothing from the State, Your
22 Honor.

23 THE COURT: Mr. Buchanan?

24 MR. BUCHANAN: Nothing from the defense, Your
25 Honor.

1 THE COURT: If you will bring our jury,
2 please.

3 (The jury returns to the courtroom at
4 9:31 a.m.)

5 THE COURT: Good morning, ladies and gentlemen
6 of the jury panel. I hope y'all had a pleasant evening.
7 As you recall, we are continuing the trial of the case
8 by the presentation of testimony by the State. Thank
9 you for your continued focus and attention.

10 With that being said, Solicitor, you may call
11 your next witness.

12 MS. PATTERSON: Thank you, Your Honor. The
13 State calls Ms. Gail Jones.

14 THE COURT: Ms. Jones, if you would come
15 around and be sworn, please.

16 GAIL JONES, being
17 first duly sworn, testifies as follows:

18 CLERK: Speak up loud and clear stating your
19 name, spelling your last.

20 THE WITNESS: My name is Gail Jones,
21 J-O-N-E-S.

22 DIRECT EXAMINATION

23 BY MS. PATTERSON:

24 Q Ms. Jones, do you know the Defendant, Bennie
25 Golston?

- 1 A Yes.
- 2 Q How do you know Mr. Golston?
- 3 A She lives near my mother.
- 4 Q How do you know Bennie Golston?
- 5 A Bennie Golston is my uncle.
- 6 Q And do you know Myrtle Johnson?
- 7 A Yes, I do.
- 8 Q How do you know her?
- 9 A She lives beside my mother.
- 10 Q What is your mother's address?
- 11 A
- 12 Q And were you at your mother's house on the morning
- 13 of March 22, 2008?
- 14 A Yes.
- 15 Q And did someone come over to your mother's house?
- 16 A Yes.
- 17 Q Who came over there?
- 18 A That particular morning the movers, the movers for
- 19 Ms. Johnson.
- 20 Q Why did the movers come over to your mother's
- 21 house?
- 22 A They were concerned that no one was answering the
- 23 door at Myrtle's house.
- 24 Q And did you go over to her house to try to help
- 25 them?

- 1 A I believe I told them that Myrtle's car is there.
2 If her car is there, she should be there.
- 3 Q Did you eventually go over to her house?
- 4 A Well, what happened I have two parents that are
5 terminally ill. I explained to the movers that my
6 mother has Alzheimer's, advanced Alzheimer's, that
7 I could go over there, but someone would have to
8 stay with her. He agreed, so I left and went to
9 Myrtle house.
- 10 Q When you went there, did you see anything
11 suspicious?
- 12 A No, not when I arrived at her door I didn't.
- 13 Q Did you talk -- did you see her when you first
14 arrived?
- 15 A When I first went inside the door, her purse was
16 beside the door, and I started calling -- first I
17 knocked. Then I started calling to her. She
18 didn't answer.
- 19 Q Did you find her?
- 20 A Yes, I did.
- 21 Q Where did you find her?
- 22 A In bed.
- 23 Q How did she look when you found her?
- 24 A Her face was swollen. The heat was on in the room,
25 and she was under covers.

1 Q Did you think she needed some help?

2 A Most certainly.

3 Q Did you call for help?

4 A I asked Myrtle what happened first.

5 Q Did she tell you?

6 A Yes, she did.

7 Q And did you call for some help for her?

8 A I asked if I could call someone in her family, did
9 she have any numbers. She said yes. She was very
10 coherent. She gave me her son's phone number,
11 Tarik. I told her I would be right back, I was
12 going to call him, and I was going to call for an
13 ambulance to come out.

14 (State's Exhibit Number 9 is marked for
15 identification).

16 Q I am going to show you what has been marked as
17 State's Exhibit 9 for identification purposes only
18 and ask if you recognize this.

19 MR. BUCHANAN: Judge?

20 THE COURT: Sir?

21 MR. BUCHANAN: Objection, Your Honor.

22 THE COURT: Objection to her showing it to see
23 if she can recognize it?

24 MR. BUCHANAN: It's hearsay, Your Honor.

25 THE COURT: The question to this witness is,

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1 Can you recognize this tape? I will allow her to answer
2 that question if she knows the answer.

3 BY MS. PATTERSON:

4 Q Do you recognize that tape?

5 A It appears to be the tape that you presented to me,
6 yes.

7 Q Besides Ms. Johnson's son, who else did you call?

8 A I called 9-1-1.

9 Q Did you talk to a dispatcher?

10 A Yes, I did.

11 Q And the tape I showed you, you say you recognized
12 it?

13 A Most certainly.

14 Q Have I allowed you to listen to this tape?

15 A Yes, you have.

16 MS. PATTERSON: Your Honor, at this time I
17 would like to publish the tape.

18 THE COURT: Mr. Foreman, ladies and gentlemen
19 of the jury, step momentarily to your jury room. I have
20 a matter to take up. Do not discuss the case during
21 this brief recess.

22 (The jury retires to the jury room).

23 THE COURT: Solicitor, what is this tape?

24 MS. PATTERSON: This is the 9-1-1 tape that
25 Ms. Jones called dispatch when she found Ms. Johnson in

1 the bed swollen and bruised. She called 9-1-1.

2 THE COURT: Your objection, Mr. Buchanan?

3 MR. BUCHANAN: Your Honor, objecting on the
4 basis that it's merely bolstering basically prior
5 consistent statements as already given by the witness,
6 Myrtle Johnson. It's therefore impermissible hearsay
7 and also hearsay of this witness. She has testified she
8 called 9-1-1.

9 THE COURT: Solicitor.

10 MS. PATTERSON: Your Honor, this is a business
11 record. Ms. Jones is here. If he wants to cross
12 examine her on anything, she is here. Ms. Jones
13 testified to the condition she found her in, but she
14 didn't testify with regards to what Ms. Johnson told her
15 about what happened.

16 She is merely calling for emergency
17 assistance. She saw Ms. Johnson. She figured she
18 needed some help. This is not anything to report that a
19 crime took place. She is calling for help.

20 THE COURT: I am going to overrule your
21 objection, Mr. Buchanan. This is the individual that
22 called the 9-1-1 upon locating the victim, Ms. Johnson,
23 on the morning of March 23, 2008, in her residence and
24 called as a result of that. I think it would be
25 permissible. Anything further before we bring our jury

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1 back in?

2 MR. BUCHANAN: Just, Your Honor, we would
3 reiterate the objection is just bolstering a prior
4 consistent statement and therefore inadmissible hearsay.

5 THE COURT: Yes, sir, I heard your objection
6 the first time I ruled on it. I don't mind you putting
7 whatever you want to in the record you think you need to
8 protect your client's interest on the record, but I
9 ruled on those issues. Thank you. Bring us our jury,
10 please.

11 (The jury returns to the courtroom).

12 THE COURT: Thank you. Thank you very much,
13 Mr. Buchanan, Solicitor. You may proceed.

14 MS. PATTERSON: Thank you, Your Honor.

15 THE COURT: Are you offering it in evidence,
16 Madame Solicitor?

17 MS. PATTERSON: Yes, sir, I was going to allow
18 her to listen to it.

19 THE COURT: State's 9 is in evidence subject
20 to previous objection.

21 (State's Exhibit Number 9 is received into
22 evidence).

23 (State's Exhibit Number 9 is played for the
24 jury).

25 (During the playing of the videotape, State's

1 Exhibit Number 9, the following was reported).

2 THE COURT: Would you stop it just a moment.
3 Would y'all step outside. Do not discuss the case.

4 (The jury retires to the jury room).

5 THE COURT: Solicitor, that didn't sound like
6 the beginning of a 9-1-1 tape. I wanted to see if we
7 could get it straight or you could get it straight
8 technically. How long is the tape?

9 MS. PATTERSON: It's not even ten minutes,
10 Your Honor. It's really short.

11 THE COURT: Let's get it to the point of it
12 and play a little bit of the beginning of it to see if
13 this is the same tape Ms. Jones said she listened to.

14 MS. PATTERSON: Your Honor, we have got it set
15 where it picks up where Ms. Jones is giving the address
16 where she is calling from. The ring part is very faint,
17 where the phone is ringing, but then it picks up when
18 she gives the address.

19 THE COURT: Play a little bit of it and let me
20 ask Ms. Jones if that is the tape she heard.

21 (State's Exhibit Number 9 is played for the
22 Court).

23 THE COURT: You can stop it and ask Ms. Jones
24 for an authentication.

25 MS. PATTERSON: Yes, sir.

1 IN CAMERA EXAMINATION

2 BY MS. PATTERSON:

3 Q Ms. Jones, is that the tape you listened to?

4 A Yes, it is.

5 Q Is that the conversation you had with the
6 dispatcher on that date?

7 A Yes, it is.

8 Q Has this conversation been changed in any way?

9 A No, it hasn't.

10 Q Thank you.

11 THE COURT: All right. Bring us our jury,
12 please. Get it back to the beginning, please.

13 (The jury returns to the courtroom).

14 THE COURT: Solicitor, you may proceed.

15 MS. PATTERSON: Thank you, Your Honor. I'm
16 going to play the tape.17 (State's Exhibit Number 9 is played for the
18 jury).

19 DIRECT EXAMINATION

20 BY MS. PATTERSON:

21 Q Ms. Jones, this is the conversation you had with
22 the 9-1-1 dispatcher?

23 A Yes, it is.

24 Q Has it been changed in any way?

25 A I don't think so.

1 MS. PATTERSON: I would move that State's
2 Exhibit 9 be admitted into evidence.

3 THE COURT: It is in evidence.

4 MR. BUCHANAN: Note my objection.

5 THE COURT: Subject to previous objection.

6 MS. PATTERSON: Thank you, Ms. Jones. Answer
7 any questions the defense may have.

8 THE COURT: Thank you, Solicitor.
9 Mr. Buchanan.

10 CROSS EXAMINATION

11 BY MR. BUCHANAN:

12 Q Ms. Jones, Matt Buchanan for the defense. How long
13 have you lived in the area?

14 A I was raised in the area. I'm 49 years old. I
15 only moved back because of my parents both being
16 terminally ill.

17 Q So you knew Mr. Golston right?

18 A Mr. Golston?

19 Q Yes, Mr. Bennie Golston.

20 A Yes, I know him.

21 Q Where does he live?

22 A He lives at directly behind my
23 mother.

24 Q That's in kind of a white house that has been built
25 up around the trailer?

1 A Yes. Originally it was a small mobile home. He
2 has built around it.

3 Q And you know that he lived there; isn't that
4 correct?

5 A Most definitely.

6 Q Did you ever know him to live with Ms. Johnson?

7 A No, not to live with her.

8 Q Do you remember that night, the night before the
9 day of March 22, 2008?

10 A Do I remember that night?

11 Q Yes.

12 A Yes, I do.

13 Q Was it cold or hot that night?

14 A It was cold.

15 Q You said you found her keys in her door?

16 A Yes, they were.

17 Q And her pocketbook was outside her house, correct?

18 A The movers brought the driver's license and some
19 other personal items when they came to the door,
20 and they gave them to me, and I secured them and
21 brought them back to the house after I dialed
22 9-1-1.

23 Q And did Ms. Johnson tell you anything about the
24 night?

25 A Yes, she did. I asked her what happened. I said

1 to her, Myrtle, what happened? This is not normal
2 for Ben to do something like this to you. She
3 said, He beat me up.

4 I said, What was going on? I don't know what
5 y'all been doing all that day. I said I know Ben
6 drank, but I have never seen him exhibit this type
7 of behavior with you. I said I know you were doing
8 something more than drinking. She said, Yes, we
9 were.

10 MR. BUCHANAN: Beg the Court's indulgence,
11 Your Honor.

12 THE COURT: Yes, sir.

13 (Pause).

14 BY MR. BUCHANAN:

15 Q Ms. Jones, do you recognize this bag?

16 A Yes, this is the bag that his mother gave me.

17 Q He gave that to you yesterday, right?

18 A Yes, he did. His mother gave me this bag right
19 here.

20 Q And there has what in it?

21 A Bennie Golston's mail and all his name is on it.

22 Q What address does it -- pick out a couple of pieces
23 at random. What address does it show?

24 A

25 Q You mentioned on the 9-1-1 tape that there was

1 someone else that went around Ms. Johnson's house.

2 Do you know who that person was?

3 A Well, that whole week she had someone doing some
4 type of work to her home, a guy that drives a blue
5 car, a dark-skinned black male. He had been in and
6 out all that week, and Ben had been going over
7 there along with him.

8 That Friday I observed him there all that day,
9 and Saturday I observed Myrtle being -- the guy
10 driving the blue car there. That was Friday, and
11 Saturday they were there together as well.

12 Q And had you ever seen anybody coming there at her
13 place late at night?

14 A Yes, late in the evenings I see cars coming in and
15 going out of her yard.

16 MS. PATTERSON: Objection, Your Honor,
17 relevance. People can come and visit her.

18 THE COURT: What time frame are we talking
19 about? She has visitors come to her house. Is that
20 what you are saying?

21 MR. BUCHANAN: I am kind of building. My next
22 question was going to be, was this around a year ago to
23 establish...

24 THE COURT: Was this around a year ago, which
25 would have been May 14, '08?

1 MR. BUCHANAN: I guess around March 22, 2008.

2 THE COURT: Ask her about March 22, 2008. She
3 say she remembered that cold night.

4 BY MR. BUCHANAN:

5 Q Did you see anyone coming around Ms. Johnson's
6 house?

7 A All the time.

8 MS. PATTERSON: Objection, Your Honor.

9 THE COURT: Not all the time. All the time is
10 not relevant. I sustain that objection, but if it's
11 focused on 22 May of '08.

12 THE WITNESS: Yes.

13 MR. BUCHANAN: Thank you. Beg the Court's
14 indulgence.

15 THE COURT: Yes, sir, Mr. Buchanan.

16 (Pause).

17 MR. BUCHANAN: Thank you so much, Your Honor.

18 THE COURT: Thank you. Redirect, Solicitor?

19 MS. PATTERSON: Thank you, Your Honor.

20 REDIRECT EXAMINATION

21 BY MS. PATTERSON:

22 Q Ms. Jones, you say you just recently moved back
23 into the area?

24 A Approximately three years ago.

25 Q And you say you definitely know that Bennie lives

1 at ?

2 A Yes, I do.

3 Q How do you definitely know that?

4 A I was raised in the house my mother lives in. I
5 was raised there. My mother has Alzheimer's,
6 advanced Alzheimer's, and she's real close with
7 Ben. So he is often there visiting with her or
8 sitting with her.

9 Q I will show you what has been marked as State's
10 Exhibit 3 through 8 for identification purposes
11 only and ask you to take a look at those pictures.

12 A Yes.

13 Q Do you recognize those?

14 A Yes, I do.

15 Q What is in those pictures?

16 A It's a structure. Within it is a mobile home. I
17 was there when they delivered the mobile home many,
18 many years ago. Ben lived in this home with his
19 first wife if I can recall, Juanita. He had since
20 built around the home, but I do know there is a
21 mobile home inside that structure there because I
22 have been there all my live.

23 Q Do you know the address of that structure?

24 A The address that Ben used is 357. I often get his
25 mail.

1 Q That's where you are saying he resided?

2 A I have picked him up from there many, many times.
3 I have seen him, when I get up and go running in
4 the morning, come from out of that structure right
5 there. I can truly say that he lives there.
6 Regardless of how bad it looks, he lived there.

7 Q Where is that structure in relation to
8 Ms. Johnson's house?

9 A Right across, right across. Really it's identical
10 across from Ms. Johnson house. The only thing
11 separating them was a road and a fence.

12 Q So about how long would it take to get from
13 Ms. Johnson's house to that structure?

14 A Two or three minutes, you know.

15 Q Thank you, Ms. Jones.

16 THE COURT: Recross, Mr. Buchanan?

17 MR. BUCHANAN: Nothing, Your Honor.

18 THE COURT: Thank you. Thank you very much,
19 Ms. Jones. You may step down.

20 (Witness leaves the witness stand).

21 MS. PATTERSON: Your Honor, I would ask that
22 the witness be excused.

23 THE COURT: Any objections, Mr. Buchanan?

24 MR. BUCHANAN: Actually, Your Honor, I would
25 object. I would ask that Miss Gail remain.

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1 THE COURT: Ms. Jones, you would have to stay
2 with us. You are still subject to subpoena under the
3 power of the Court.

4 With that being said, Solicitor, you may call
5 your next witness.

6 MS. PATTERSON: Thank you, Your Honor. At
7 this time the State calls Master Deputy Kevin Blake.

8 THE COURT: Deputy Blake, come around and be
9 sworn, please.

10 KEVIN NEAL BLAKE, being
11 first duly sworn, testifies as follows:

12 CLERK: State your full name, spelling your
13 last.

14 THE WITNESS: Kevin Neal Blake. Neal is
15 spelled N-E-A-L. The last name is B-L-A-K-E.

16 DIRECT EXAMINATION

17 BY MS. PATTERSON:

18 Q Deputy Blake, where are you employed?

19 A Lexington County Sheriff's Department.

20 Q How long have you been with Lexington County
21 Sheriff's Department?

22 A July of this year will make three years.

23 Q Where were you employed prior to being employed at
24 the Lexington County Sheriff's Department?

25 A Charleston City Police Department.

- 1 Q How long were you employed there?
- 2 A Four years.
- 3 Q So how many years of law enforcement experience do
- 4 you have?
- 5 A Just that seven.
- 6 Q In what capacity are you employed at the Lexington
- 7 County Sheriff's Department?
- 8 A Currently I am a master deputy, road supervisor.
- 9 Q And how long have you been a road supervisor?
- 10 A Approximately nine months.
- 11 Q What was your position prior to this current
- 12 position?
- 13 A I was a road deputy.
- 14 Q And what were some of your duties as a road deputy?
- 15 A Answering calls for service, be they suspicious
- 16 activity, criminal complaints, civil complaints,
- 17 just about anything that would come up.
- 18 Q Were you on duty the morning of March 22, 2008?
- 19 A I was.
- 20 Q And were you dispatched to a call on
- 21 ?
- 22 A I was.
- 23 Q Do you remember the address?
- 24 A
- 25 Q Do you remember what time you got the call?

- 1 A Approximately 9:40 in the morning.
- 2 Q Do you remember how long it took you to get to the
- 3 scene?
- 4 A I was a little away. It took me about 20 minutes.
- 5 I got there about 10:00 o'clock.
- 6 Q And when you got to the scene, what did you first
- 7 observe?
- 8 A When I first got to the scene, I observed a moving
- 9 truck parked roadside with some gentlemen standing
- 10 around. I tried to make contact with one of them,
- 11 and they directed me to a lady I learned was
- 12 Ms. Jones, and she is the one who initially called.
- 13 Q Were you able to locate her at the scene?
- 14 A I was.
- 15 Q Did you talk to her?
- 16 A I did.
- 17 Q Did she tell you what she had learned?
- 18 A She indicated to me that she had located
- 19 Ms. Johnson in the house after going to find her.
- 20 When the movers got there, they thought something
- 21 might have been suspicious or wrong.
- 22 Q Who is Ms. Johnson?
- 23 A Ms. Myrtle Johnson, the victim. She was the
- 24 homeowner, the resident.
- 25 Q Were you able to locate Ms. Johnson?

1 A I was.

2 Q Where did you find her?

3 A As you entered the house, I went down a hallway and
4 made a right. She was in a bedroom back in the
5 right portion of the house lying in bed.

6 Q Did you notice anything about Ms. Johnson?

7 A She was covered up with a couple of heavy blankets
8 and comforters. After pulling away one of them, I
9 saw her face was extremely swollen, eyes were
10 swollen shut. She could speak but it seemed to be
11 labored.

12 Q Did you notice anything else about her demeanor?

13 A Other than she was in pain.

14 Q How could you tell she was in pain?

15 A Groaning, moaning. We see lots of people with
16 injuries. It's part of our job, and she was in
17 pain.

18 Q Was she able to talk to you?

19 A She was. It took -- a lot of times we have to ask
20 people, especially if they are the victim of an
21 assault or some type of trauma, we ask them the
22 same questions, just to make sure we are clear to
23 them. After asking questions a few times, she was
24 able to give an indication of what happened.

25 Q So she did tell you what happened?

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1 A Yes.

2 Q Did she tell who did this to her?

3 A Yes.

4 Q Did she tell what he did to her?

5 A Yes.

6 Q And what did she say happened to her?

7 MR. BUCHANAN: Objection. Hearsay, Your
8 Honor.

9 THE COURT: Yes, I think that would be
10 hearsay, Solicitor.

11 MS. PATTERSON: Excited utterance, Your Honor,
12 State versus Sims.

13 THE COURT: Under 803(1)?

14 MS. PATTERSON: Yes, sir, Your Honor.

15 THE COURT: Well, my concern is the last three
16 words in 803(1). I would be glad to hear you on that
17 issue.

18 MS. PATTERSON: Can I --

19 THE COURT: Perhaps it's 803(2) you are
20 referring to.

21 MS. PATTERSON: Yes, sir, 803(2), excited
22 utterance. Can we take the matter up outside the
23 presence of the jury?

24 THE COURT: All right. Step to your jury room
25 momentarily, ladies and gentlemen. Do not discuss the

1 case.

2 (The jury retires to the jury room).

3 THE COURT: Tell me your objection again,
4 Mr. Buchanan.

5 MR. BUCHANAN: Your Honor, we would object
6 because what she would be saying would be hearsay.

7 THE COURT: Why wouldn't it meet that test of
8 803(1) or (2) and also this is enumerated under State
9 versus McFadden, 458 S.E.2d 61.

10 MR. BUCHANAN: I think the -- I don't have
11 McFadden directly in front of me. We've already had
12 Ms. Johnson testify that this event happened between 11
13 and 12 the evening prior.

14 Deputy Blake, by his testimony, arrived on the
15 scene at 10:00 a.m. and then making his way through to
16 the house to find Ms. Johnson. We are looking at an
17 11-hour time frame since the event.

18 Therefore, 803(1) describes immediately
19 thereafter while declarant was perceiving the event.
20 Under Subsection (2), the excited utterance, again, it
21 talks about the stress of the excitement caused by the
22 event.

23 Certainly we are not at all saying that this
24 alleged assault was not a startling event, but, again,
25 we are talking about hours later after she said she went

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1 to bed, slept. This would not fall under any sort of
2 excited utterance nor a present sense impression about
3 who was the cause of this.

4 THE COURT: Thank you, Mr. Buchanan. Yes
5 ma'am, Solicitor.

6 MS. PATTERSON: Thank you, Your Honor. In a
7 reading of State v. Sims, Your Honor, the passage of
8 time is not the only determining factor. Ms. Johnson
9 was 69 years old when this happened.

10 She was beaten severely, Your Honor. She had
11 to crawl inside her house, her eyes swollen shut. The
12 deputy testified that when he got there, she was moaning
13 and groaning. She was obviously in pain.

14 This was the first opportunity that she had to
15 report what happened to someone. She was surely still
16 under the stress of the excitement of what had happened
17 to her.

18 Due to age, demeanor, the severity of the
19 incident, Your Honor, we would argue that she was still
20 under the stress of the event and that the hearsay
21 exception of excited utterance should still exist, Your
22 Honor.

23 THE COURT: I tend to agree, Solicitor, under
24 803(2) and State versus McFadden. I am going to allow
25 it. Thank you. Bring us our jury, please.

1 (The jury returns to the courtroom).

2 THE COURT: Solicitor, you may proceed.

3 MS. PATTERSON: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MS. PATTERSON:

6 Q Deputy Blake, you were able to talk to Ms. Johnson?

7 A I was.

8 Q She was able to speak to you?

9 A She was.

10 Q Did she tell you what happened to her?

11 A Yes.

12 Q What did she tell you happened?

13 A She indicated that she and someone she called
14 Bennie had been in an argument earlier in the
15 evening, she figured some time probably around
16 midnight, give or take. She didn't have an exact
17 time, but she knew it was considerably earlier than
18 when I arrived.

19 She indicated that during their argument
20 inside the house that Mr. Golston hit her about the
21 face with his closed fist. She was able to run out
22 of the house to try and flee, at which time she was
23 pulled to the ground, wrestled to the ground, and
24 he assaulted her with a hatchet and a piece of wood
25 that was lying around. Eventually he stopped his

1 assault, and she crawled back into her home.

2 Q Were you able to identify this Bennie person?

3 A Yes, with the help of Ms. Jones who was actually in
4 the room with us when Ms. Johnson was giving me her
5 account.

6 Q Who did you determine this Bennie to be?

7 A Her boyfriend, somebody she was in an intimate
8 relationship with that was at the house.

9 Q Were you able to find out if he lived there?

10 A By all accounts we understand that he did live
11 there, yes.

12 MR. BUCHANAN: Objection.

13 THE COURT: What is the basis of the
14 objection?

15 MR. BUCHANAN: Hearsay, Your Honor.

16 THE COURT: There has got to be a foundation. I
17 would sustain that objection, there has to be a
18 foundation for that.

19 MR. BUCHANAN: Move to strike, Your Honor.

20 THE COURT: Pardon me?

21 MR. BUCHANAN: Move to strike his answer, Your
22 Honor.

23 THE COURT: I don't recall the answer. But as
24 far as the last question and the last response, Madame
25 Forelady, ladies and gentlemen of the jury, you may not

1 consider that. The defense attorney has moved to strike
2 that testimony. So it would not be part of your
3 deliberations in this matter. Thank you.

4 Solicitor, you may proceed.

5 MS. PATTERSON: Thank you, Your Honor.

6 BY MS. PATTERSON:

7 Q Were you able to collect any evidence from the
8 scene?

9 A I was.

10 Q And what were you able to locate?

11 A At the time of the incident, Ms. Johnson was
12 wearing -- had her gray braided hair. We found an
13 area of ground in front of the residence that had
14 been disturbed, indicating to us that there had
15 been some sort of scuffle on the ground.

16 Braids of Ms. Johnson's hair, I believe it was
17 four that I collected, were actually within three
18 to four feet of that disturbed area of the ground.
19 Just outside the door of the residence was a stick
20 of firewood about 18 inches in length, 3 inches in
21 diameter. There was actually a piece of
22 Ms. Johnson's, the same gray hair, was --

23 MR. BUCHANAN: Objection.

24 THE COURT: What is the objection?

25 MR. BUCHANAN: Your Honor, Deputy Blake has

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1 not been established as an expert in hair follicles.

2 THE COURT: I would sustain the objection in
3 that regard. He is not an expert, but he can certainly
4 testify to his observations and the descriptions of
5 items. I don't think it's being offered for scientific
6 reliability. I would sustain the objection in that
7 regard.

8 You may continue, solicitor.

9 MS. PATTERSON: Thank you, Your Honor.

10 BY MS. PATTERSON:

11 Q Where did you find this piece of wood?

12 A Just outside the front door.

13 Q Why did this piece of wood catch your attention?

14 A Everything outside the house seemed to appear in
15 order. To the left of the door, there is a slab
16 concrete porch. To the left of the door, there was
17 neatly stacked firewood, yet this piece was off to
18 the side, to the right-hand side of the porch near
19 the door.

20 (State's Exhibit Number 10 is marked for
21 identification).

22 BY MS. PATTERSON:

23 Q I am going to show you what has been marked as
24 State's Exhibit 10 for identification purposes only
25 and ask if you recognize this.

1 A I do.

2 Q And what is this?

3 A Gray colored braids of hair with grass from where
4 they were pulled off the ground.

5 Q Did you collect this from the scene?

6 A I did.

7 Q What did you do with this when you collected it
8 from the scene?

9 A It was actually placed in that envelope and tagged
10 and placed into our evidence section at
11 headquarters.

12 Q And has this been in the evidence locker since you
13 placed it there on March 22, 2008?

14 A It has.

15 Q And did you check it out of the evidence locker and
16 bring it up to the courthouse?

17 A Yes.

18 Q Did it look like this had been changed or altered
19 in any way?

20 A No.

21 MS. PATTERSON: Your Honor, I would move
22 State's Exhibit Number 10 into evidence.

23 THE COURT: Mr. Buchanan?

24 MR. BUCHANAN: May I see it.

25 (Pause).

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1 MR. BUCHANAN: No objection, Your Honor.

2 THE COURT: State's 10 in evidence without
3 objection.

4 (State's Exhibit Number 10 is received into
5 evidence).

6 BY MS. PATTERSON:

7 Q Deputy Blake, I am going to show you what has been
8 marked as State's Exhibit 2 for identification
9 purposes only and I will ask you if you recognize
10 this.

11 A I do.

12 Q What is that, Deputy Blake?

13 A This is the stick of firewood that was located by
14 myself on the front porch.

15 Q How are you able to determine that is what you
16 located on the front porch?

17 A I placed the tape around this section (indicating)
18 to be sure that I didn't lose a strand of hair. I
19 had this out of our latent lift out of the
20 fingerprint kit tape. I had it and wrapped it
21 around the log so that I would not lose the hair
22 embedded into the bark.

23 Q What did you do after you gathered that from the
24 scene?

25 A I placed it in a paper bag and again secured it in

1 our evidence section at headquarters.

2 Q Has it been in evidence secured since you placed it
3 there?

4 A It has.

5 Q Did you sign it out of the evidence area?

6 A Yes.

7 Q And brought it here to the courthouse today?

8 A Yes, I did.

9 Q And has this log been changed or altered in any
10 way?

11 A No.

12 MS. PATTERSON: Your Honor, I move that
13 State's Exhibit 2 be admitted into evidence.

14 THE COURT: Mr. Buchanan?

15 MR. BUCHANAN: Your Honor, I would object as
16 to the entry of this because the foundation for this log
17 would not have been clearly established.

18 THE COURT: Would you approach the bench. I'm
19 sorry. I can't quite hear you, Mr. Buchanan. Thank
20 you.

21 (Whereupon there is a bench conference off the
22 record in the presence of the jury but out of the
23 hearing of the jury).

24 THE COURT: State's 2 is in evidence subject
25 to objection.

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1 (State's Exhibit Number 2 is received into
2 evidence).

3 MS. PATTERSON: Your Honor, I will get these
4 marked, please.

5 THE COURT: Yes, ma'am.

6 (State's Exhibits Number 11-21 are marked for
7 identification).

8 BY MS. PATTERSON:

9 Q Deputy Blake, I will show you what has been marked
10 as State's Exhibits 11 through 21 for
11 identification purposes only and ask you if you
12 recognize these photos.

13 A (Pause). I do.

14 Q Who took those photos?

15 A I did.

16 Q What is in photo Number 11?

17 A Photo Number 11 --

18 MR. BUCHANAN: Objection, Your Honor. We
19 don't have a foundation yet.

20 THE COURT: Don't have a foundation?

21 MR. BUCHANAN: Yes, sir.

22 THE COURT: I don't know what we are talking
23 about. Would you hand them to me?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Mr. Buchanan, do you want to look

1 at these photographs. It appears -- do you want to look
2 at them and see if you have individual objections to
3 them, 11 through 21.

4 MR. BUCHANAN: Thank you, Your Honor.

5 THE COURT: All right. Do you have objections
6 based on foundation?

7 MS. PATTERSON: If so, I can lay one.

8 MR. BUCHANAN: A moment's indulgence, Your
9 Honor.

10 (Pause).

11 MR. BUCHANAN: Essentially he has not
12 described the where --

13 COURT REPORTER: I'm sorry, I couldn't hear
14 you.

15 THE COURT: Essentially what?

16 MR. BUCHANAN: He has not testified to the
17 where and when.

18 THE COURT: Solicitor, if you would lay the
19 foundation, please. I would sustain the objection at
20 this point.

21 MS. PATTERSON: Thank you, Your Honor.

22 BY MS. PATTERSON:

23 Q You did take those photographs?

24 A I did.

25 Q Where did you take those photographs?

1 A At the incident location,

2 Q And what day did you take those photographs?

3 A March 22, 2008.

4 Q So you took those photographs on the incident date?

5 A Yes.

6 Q And have those pictures remained in your custody
7 and control since you took the pictures?

8 A They were, again, with the other evidence
9 collected, signed into evidence section, and I
10 signed them out before court this morning.

11 Q Have they been altered in any way?

12 A No.

13 Q Do they fairly represent the photos that you took
14 on March 22, 2008, at the incident location?

15 A Yes.

16 MS. PATTERSON: Your Honor, I would move these
17 photos be admitted into evidence.

18 THE COURT: Mr. Buchanan.

19 MR. BUCHANAN: No objection, Your Honor.

20 THE COURT: State's 11 through 21 are in
21 evidence out objection.

22 (State's Exhibits Number 11-21 are received
23 into evidence).

24 BY MS. PATTERSON:

25 Q What does photo 11 show?

- 1 A It's an area directly in front of the
2 residence indicating the area of ground that
3 was disturbed and the proximity from that to where
4 the braids of hair were located.
- 5 Q What is in photo Number 12?
- 6 A The actual braids of hair before I collected them
7 and placed them in the bag.
- 8 Q And photo 13?
- 9 A Number 13 would be a photograph of Ms. Myrtle
10 Johnson in the bed where I located her in her
11 bedroom.
- 12 Q And that's the way she looked when you located her?
- 13 A Yes.
- 14 Q What about photo 14?
- 15 A Again, photo 14 is the area of disturbed ground
16 outside the residence.
- 17 Q Photo 15?
- 18 A Ms. Johnson again in the bed where I initially
19 located her, covered with multiple heavy
20 comforters.
- 21 Q And photo 16?
- 22 A A photograph, again, of Ms. Johnson and her
23 injuries to her face when she was lying in the bed.
- 24 Q Eighteen?
- 25 A Eighteen is the location of the firewood that was

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1 located to the right of the front door.

2 Q And photo 19?

3 MR. BUCHANAN: Your Honor, I have an objection
4 to the firewood picture based on our side bar
5 conference.

6 THE COURT: Subject to your previous
7 objection. What number was that, Officer?

8 THE WITNESS: The firewood is 18, Your Honor.

9 THE COURT: That would State's 18, subject to
10 your previous objection. Thank you.

11 You may continue, Solicitor.

12 MS. PATTERSON: Thank you, Your Honor.

13 BY MS. PATTERSON:

14 Q And photo 19?

15 A A braid of hair that was located on the front porch
16 in proximity to the firewood.

17 Q And photo 20?

18 A Indicates the stack of firewood that was neatly
19 stacked with a view of the screen door to the right
20 where I located the stick of firewood.

21 Q Photo 21?

22 A Twenty-one is, again, a photograph of the braids
23 near the disturbed area of ground in front of the
24 house.

25 Q Were you able to locate Bennie Golston?

1 A Not upon initially arriving on the scene, no.

2 Q Did you go out and try to look for him?

3 A We did. Other units had responded to the area, and
4 we were canvassing the area and around to see if we
5 could locate him.

6 Q Were you able to locate him at this time?

7 A No, we were not.

8 MS. PATTERSON: Beg the Court's indulgence.

9 (Pause).

10 MS. PATTERSON: Your Honor, I may need to
11 recall Deputy Blake, but at this time there's no further
12 questions.

13 THE COURT: All right, Solicitor. Thank you.
14 Mr. Buchanan.

15 **CROSS EXAMINATION**

16 BY MR. BUCHANAN:

17 Q Deputy Blake, you say you took these -- this
18 object, this log, directly into evidence. Did you
19 submit it for fingerprint testing?

20 A No.

21 Q And how about any scientific analysis regarding the
22 strand of hair that is allegedly taped to the log?

23 A No.

24 Q And you yourself are not an expert in identifying
25 hair follicles or stands, correct?

1 A As far as hair analysis, D.N.A., that type of
2 stuff, no.

3 MR. BUCHANAN: Beg the Court's indulgence.

4 THE COURT: Certainly.

5 (Pause).

6 MR. BUCHANAN: No further questions, Your
7 Honor.

8 THE COURT: Redirect, Solicitor?

9 MS. PATTERSON: Nothing on redirect, Your
10 Honor.

11 THE COURT: Thank you. Thank you, Deputy
12 Blake. You may step down, and you are subject to
13 recall.

14 (Witness leaves the witness stand).

15 THE COURT: Solicitor, you may call your next
16 witness.

17 MS. PATTERSON: The State would like to call
18 Master Deputy Mike Merckle.

19 MICHAEL SAMUEL MERCKLE, being
20 first duly sworn, testifies as follows:

21 CLERK: State your full name, spelling your
22 last.

23 THE WITNESS: My name is Michael Samuel
24 Merckle. The last name is spelled M-E-R-C-K-L-E.

25 THE COURT: Solicitor.

1 MS. PATTERSON: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MS. PATTERSON:

4 Q Deputy Merckle, where are you employed?

5 A Lexington County Sheriff's Department.

6 Q And how long have you been employed with the
7 Lexington County Sheriff's Department?

8 A Approximately five years.

9 Q And in what capacity are you employed with the
10 Lexington County Sheriff's Department?

11 A I'm a master deputy, road supervisor.

12 Q What are some of your duties as a master sergeant
13 road deputy.

14 A As a master deputy, basically I'm second in charge
15 of the shift. I respond to calls just like regular
16 deputies do, calls for service, criminal, traffic,
17 any type of law enforcement related call, as well
18 as answering civil complaints or complaints on
19 other deputies on my shift.

20 Q How long have you been in law enforcement?

21 A Ten years.

22 Q Where did you work before you worked with the
23 Lexington County?

24 A Forest Acres Police Department.

25 Q And were you on call the morning of March 22, 2008?

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1 A I was on duty, yes, ma'am.

2 Q Did you respond to a call at ?

3 A I did.

4 Q And was this in County?

5 A It is in County.

6 Q What was the reason that you responded to that
7 scene?

8 A Myself and Deputy Blake received a call from
9 dispatch, a call for service, about an assault.
10 The victim, Ms. Myrtle Johnson, was found in her
11 residence, apparently according to dispatch, had
12 been assaulted. It had been called in by a third
13 party.

14 Q Did y'all receive information regarding the
15 suspect?

16 A Once on scene we did.

17 Q And who was the suspect?

18 A It was indicated --

19 MR. BUCHANAN: Objection, Your Honor, hearsay.

20 THE COURT: I would sustain the objection.

21 MR. BUCHANAN: Thank you, Your Honor.

22 BY MS. PATTERSON:

23 Q When you got to the scene, were you able to talk to
24 the victim?

25 A I was.

1 Q Was she able to communicate with you?

2 A She was. She couldn't see us. We had to tell her
3 who we were, that we were law enforcement. We were
4 there to help her. E.M.S. was on the way to help
5 her since she couldn't see us. She could speak to
6 us briefly. It seemed labored, her breathing was
7 labored. She was in pretty bad shape.

8 Q Pretty bad shape. What was her condition like when
9 you saw her?

10 A A woman of her age I was actually shocked to see
11 her that swollen. Her face was swollen and
12 distorted. Her own son who showed up on scene
13 really didn't recognize her immediately as that was
14 his own mother he had known all her life. She
15 looked very bad.

16 Q And eventually you were able to talk to her?

17 A Yes, ma'am, I was.

18 Q Did she tell y'all what happened to her?

19 A She did briefly.

20 Q And what did she say to you?

21 MR. BUCHANAN: Objection.

22 MS. PATTERSON: Excited utterance.

23 THE COURT: Overruled. You may continue.

24 A She had indicated that her boyfriend, Bennie
25 Golston, the Defendant, had assaulted her earlier

1 in the evening or earlier in the evening before,
2 around midnight or so.

3 Q Was Bennie Golston on the scene?

4 A No, he was not.

5 Q Did y'all receive a tip as -- did y'all start
6 looking for him?

7 A We did. As a supervisor, I called other deputies
8 in the area that were not on calls, started
9 saturating. Bennie Golston is known to just kind
10 of wander around that particular neighbor in that
11 area. He grew up in that area. He is well known
12 by all the neighbors. Therefore, we kind of just
13 sent units out to try to canvas the area and talk
14 to the neighbors and try to find out where he might
15 be.

16 Q Where in particular did you go and look for him at
17 this time?

18 A There was no real one particular place. I do
19 believe we ventured over to his mother's residence.
20 Ms. Jones, Gail Jones, we spoke with her. She was
21 actually on scene when we got there. She said she
22 hadn't seen Bennie. He was not over there. We
23 went over there just to make sure.

24 Q Where did his mother live?

25 A Right there next to Ms. Myrtle Johnson's residence,

1 within several minutes of walking distance.

2 Q After you didn't find him there, did you look
3 anywhere else?

4 A Just drove up and down the roadway. We had to
5 answer other calls in between. Once she was
6 transported and we collected our evidence, just
7 initiated the original report and contacted major
8 crimes, we had other calls for service that we had
9 to handle. In the meantime while we were in that
10 area, we looked around and talked to neighbors,
11 generally looked.

12 Q Did you return to this area any time that day?

13 A We did.

14 Q Why did you return?

15 A We received a call, I believe it was from the son
16 of the victim, Myrtle Johnson's son. He indicated,
17 along with several other neighbors in the area,
18 that they had seen Bennie. He had actually been
19 sitting on a porch of another residence -- I'm not
20 sure which residence it was -- and that just prior
21 to our arrival, 10 or 15 minutes prior to our
22 arrival, he had walked off towards a wooded area.

23 Q And did y'all act on that tip?

24 A I did. I called in more units. We set up a
25 perimeter. As the supervisor, I called our dog

1 team to come out. Deputy Radford, and his canine
2 tracking dog that tracks human scent, showed up on
3 scene, and we began tracking from his last known
4 location.

5 Q And where was the scent tracked?

6 A We tracked through this wooded area and brought it
7 back out towards the roadway, and actually directly
8 behind, I believe, | which the
9 Defendant, Mr. Golston, claims to be his residence.

10 Q I am going to show you what has been marked as
11 State's Exhibits 3 through 8 and ask you to
12 identify what is in that picture.

13 A This is the residence or the building that we
14 tracked to with the canine while looking for
15 Mr. Golston.

16 Q Is that the way that building looked when y'all
17 went in there?

18 A Yes, ma'am.

19 Q Does it fairly and accurately represent the way
20 that building looked when you went in on March 22,
21 2008?

22 A It does.

23 Q Does it look like it has been changed?

24 A No, ma'am.

25 MS. PATTERSON: Your Honor at this time, I

1 move that State's Exhibit 3 through 8 be admitted into
2 evidence.

3 THE COURT: Mr. Buchanan.

4 MR. BUCHANAN: No objections, Your Honor.

5 THE COURT: All right. State's 3 through 8 is
6 in evidence without objection.

7 (State's Exhibits Number 3-8 are received into
8 evidence).

9 BY MS. PATTERSON:

10 Q Deputy Merckle, when y'all got to that building,
11 what did you immediately notice about it?

12 A It was a very unsafe structure. The roof was
13 caving in. All the windows had been broken out.
14 Actually the rear door which we had tracked to with
15 the dog, where the dog had tracked to rather, there
16 was a small porch leading to that, and the porch
17 was caved in. There was just beams of wood going
18 across it. We had to manipulate to actually get
19 into the residence itself.

20 Q Did it look like anybody was living there?

21 A No, ma'am. With the building being in the
22 condition it was, no, ma'am.

23 Q Was there any electricity?

24 A No, ma'am.

25 Q Were there any personal items laying around?

1 A Not that I could distinguish. There was lots of
2 debris and trash, again, pieces of the roof, wood,
3 nails, and everything just kind of scattered about.

4 Q And you actually went inside looking for the
5 Defendant?

6 A I did.

7 Q And when you got inside, did you find him?

8 A No, ma'am, we didn't find him.

9 Q Where did you look for him inside?

10 A I looked on the lower half. I guess it would be
11 the first floor. According to the Defendant, that
12 was a small trailer that he had built around. I
13 really couldn't tell at the time that's what it
14 was.

15 Like I said, the floors were caving in.
16 Myself and Deputy Radford actually went into a
17 back -- what appeared to be some type of bedroom.
18 It had mattress in it, a mattress set just laying
19 on the floor.

20 Deputy Blake went into the upper half, which
21 was access to the garage, from some dilapidated
22 steps, which actually the steps were not even
23 there. It was just boards coming down.

24 Q Now, that mattress that was laying in there on the
25 floor, was any linen on it?

1 A No. It was piles of trash and debris just kind of
2 scattered about all over the place, nothing that I
3 could distinguish as linen. I mean, there was old
4 clothing and just other, what appeared to be old
5 junk just laying around everywhere.

6 Q When y'all got there, did y'all announce yourself?

7 A We did at the doorway where the door was open. It
8 could not be secured back, but it was open when we
9 arrived there. We did, myself and Deputy Radford
10 made our presence known.

11 We announced loudly, gave many, multiple
12 verbal commands that we were there, that we had a
13 dog, a canine tracking dog, that did apprehension
14 work that does bite.

15 We were unable to actually bring the dog into
16 the residence because the interior of it was so
17 bad. The floor was busted out. There was, like I
18 said, nails and debris everywhere. We feared the
19 dog would actually be injured just walking inside,
20 his paws and stuff.

21 Q Did you locate anything -- when you saw the
22 mattress, what did you do with the mattress?

23 A Well, we were searching for a person. Therefore, I
24 was looking in any areas where a person can hide.
25 In my ten years of experience, I have found people

1 hiding in the most unbelievable places --
2 trashcans, underneath sinks, actually people have
3 been found in between mattresses, in between a box
4 spring and a mattress laying flat.

5 Q And did you look for the Defendant under this
6 mattress?

7 A I did. I raised the mattress up.

8 Q Did you find him there?

9 A I did not.

10 Q Did you find anything there?

11 A I did. I immediately noticed a hatchet.

12 MR. MAULDIN: Your Honor, I would renew our
13 objections based on the previous motion.

14 THE COURT: Yes, sir, objection so noted,
15 Mr. Mauldin.

16 MR. MAULDIN: Your Honor, do I have a ruling
17 on that?

18 THE COURT: Yes, I would affirm my pretrial
19 rulings in that regard.

20 MR. MAULDIN: Yes, sir.

21 BY MS. PATTERSON:

22 Q What did you find under the mattress?

23 A It was a hatchet.

24 Q And did this hatchet grab your attention?

25 A It did. Earlier when we spoke with the victim, it

1 was indicated that a hatchet may have been used in
2 the assault. Therefore, I suspected that to be
3 evidence in that crime.

4 Q I will show you what has been marked as State's
5 Exhibit 1 for identification purposes only and ask
6 if you recognize this.

7 A Yes, ma'am, I do. This is a --

8 MR. MAULDIN: I apologize, but I will have to
9 renew the grounds of the objection on relevance. I
10 don't believe this hatchet has been identified by
11 Ms. Johnson.

12 THE COURT: Well, that wouldn't be relevance,
13 I don't think, but I agree with your characterization.
14 I would overrule your objection. Thank you.

15 BY MS. PATTERSON:

16 Q I apologize. What is this exhibit? What is this?

17 A It looks like a standard hatchet used for
18 multiple -- cutting wood and stuff like that.

19 Q Is this the hatchet that you found under the
20 mattress?

21 A It is the hatchet.

22 Q When you got this hatchet from under the mattress,
23 what did you do with it?

24 A I secured it, walked out with it, and immediately
25 handed it to Master Deputy Blake, who was securing

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1 all evidence because he was actually doing the
2 report. So I handed it over to Deputy Blake.

3 Q Does this hatchet fairly represent the hatchet that
4 you got under that mattress on March 22?

5 A It does.

6 Q Is it altered in any way?

7 A No, ma'am, other than the tag that has been placed
8 on it.

9 MS. PATTERSON: Beg the Court's indulgence.

10 (Pause).

11 BY MS. PATTERSON:

12 Q Thank you, Deputy Merckle. Please answer any
13 questions the defense may.

14 A Certainly.

15 THE COURT: Mr. Mauldin.

16 MR. MAULDIN: Thank you, Your Honor.

17 CROSS EXAMINATION

18 BY MR. MAULDIN:

19 Q Deputy Merckle, you testified at the prior hearing
20 that Ms. Johnson had described the hatchet used in
21 the assault as one having a brown wooden handle; is
22 that correct?

23 A Yes, sir.

24 MR. MAULDIN: No further questions.

25 THE COURT: Redirect?

1 MS. PATTERSON: No further questions.

2 THE COURT: Thank you. Thank you very much,
3 Deputy Merckle. You may step down.

4 (Witness leaves the witness stand).

5 THE COURT: Perhaps this would be a good time
6 to take our brief morning recess.

7 Madame Forelady, ladies and gentlemen, we will
8 take about a 15-minute recess. I remind you during the
9 recess, do not discuss the case amongst yourselves.
10 Remember to keep an open mind. Do not begin your
11 deliberations until I instruct you to do so. You may
12 now go with the bailiff.

13 (The jury retires to the jury room).

14 THE COURT: Mr. Buchanan, anything?

15 MR. BUCHANAN: Your Honor, I would like to
16 take this opportunity to put our sidebar objection on
17 the record.

18 THE COURT: Certainly.

19 MR. BUCHANAN: The argument I had, under the
20 objection based on a prior objection to hearsay, was
21 brought in by Ms. Johnson's comments regarding the log.
22 But for that objection being ruled in the State's favor,
23 the relevance for the log would not -- there would be no
24 relevance and no foundation for the entry of the log
25 into evidence.

1 THE COURT: Certainly your objection is on the
2 record. I would affirm my prior ruling concerning the
3 testimony under 803 exceptions and McFadden. Further,
4 as far as relevancy on the log, the officer's testimony
5 was he noticed it because it appeared out of place.

6 He further noticed that it had hair on it. In
7 his opinion as an non-expert, it was consistent with the
8 gray braided hair of Ms. Johnson. So I think there is
9 an independent relevancy to that particular item of
10 evidence, but your objections are certainly noted. Was
11 there any others?

12 MR. BUCHANAN: I don't believe so.

13 THE COURT: Thank you very much. We will take
14 about 15 minutes.

15 (Whereupon there is a recess).

16 THE COURT: Anything before we bring in our
17 jury, Solicitor?

18 MS. PATTERSON: Nothing from the State, Your
19 Honor.

20 THE COURT: Mr. Buchanan?

21 MR. BUCHANAN: No, Your Honor.

22 (The jury returns to the courtroom).

23 THE COURT: Our jury is back present in the
24 courtroom. We are continuing the trial of the case with
25 the presentation of testimony by the State in its case

1 in chief.

2 Solicitor, you may call your next witness.

3 MS. PATTERSON: Thank you, Your Honor. The
4 State would like to recall Master Deputy Kevin Blake.

5 CLERK: Still under oath, Your Honor?

6 THE COURT: Come around, please. You are
7 still under oath.

8 KEVIN NEAL BLAKE, having been
9 previously duly sworn, resumes the witness stand and
10 testifies as follows:

11 DIRECT EXAMINATION

12 BY MS. PATTERSON:

13 Q Deputy Blake, do you remember what time you left
14 the incident location on March 22, 2008?

15 A Around 10:45, 11:00 o'clock a.m.

16 Q What did you do after you left the incident
17 location?

18 A Being a weekend I immediately went into bond court.
19 It was the first available judge to obtain an
20 arrest warrant based on evidence collected and what
21 we had on scene for Mr. Golston.

22 Q What did you do once you received the arrest
23 warrant?

24 A I started traveling back to the area to help other
25 units assist in trying to locate Mr. Golston.

1 Q So at that time other units were still at the scene
2 looking for him?

3 A Answering calls. And due to the severity of the
4 injuries and what had happened based on us
5 responding out there initially that morning, when
6 deputies got a free moment between calls or
7 reports, they were back in the area. I was
8 traveling in that direction with the warrant in my
9 possession.

10 Q Do you know around what time you got back to the
11 incident location with the warrant?

12 A We were specifically directed there later on
13 because we did get a phone call indicating that
14 Mr. Golston was spotted at a residence and later
15 going into a wooded area. We knew he was
16 definitely in the area. So at that point I
17 probably got there, I think, around 3:00 o'clock
18 maybe.

19 Q When you got to the area, were you involved in the
20 search for him?

21 A Only to the extent as a perimeter unit. We like to
22 set up a perimeter the best we can with as many
23 units as we can and stay near our cars so as not to
24 contaminate any possible scent for the dog to
25 track.

1 Q Was the dog able to track a scent to a certain
2 place?

3 A It was. The dog and the handlers went to a
4 residence located nearby Ms. Johnson's house at
5 . If you are looking at her house from the
6 roadway, it was back and to the left of
7 Ms. Johnson's residence.

8 Q I show you what has been admitted into evidence as
9 State's Exhibit 3 through 8 and ask you if you
10 recognize those photos.

11 A (Pause). I do.

12 Q And what is in that photo?

13 A This is the structure that the dog tracked to. The
14 dog actually tracked to the rear door, which was
15 open.

16 Q And did you go into this structure?

17 A I only went into one part of the structure. There
18 is a part above where two cars are parked in an
19 open area. There's no doors sealing it off. You
20 can see the tail end of the white car with the
21 brick column in between.

22 Directly between the two vehicles that are
23 there, there used to be a set of stairs, but there
24 is no longer any risers on the stairs. It's only
25 the stringers or runners.

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1 I had to balance on the center one and the two
2 on the outside and make my way to an open area
3 above the garage. There is no walls or anything
4 and nothing to indicate anybody could hide in
5 there. So I did a cursory look up there.

6 Q So that's as far as you got, like that bottom level
7 of that structure?

8 A Into the upstairs above the garage. I made it up
9 that far through an opening in the floor.

10 Q Did you find Bennie Golston?

11 A I did not.

12 Q Were other officers present at this location?

13 A Yes, Master Deputy Merckle and Deputy Radford were
14 at the other part of the structure just behind the
15 garage in the area above that.

16 Q Were they able to locate Bennie Golston in this
17 structure?

18 A No, they were not.

19 Q Was anything located in this structure?

20 A Yes. Deputy Merckle, while I was making my way
21 around the residence, after I cleared my section
22 and was walking back to the rear door to see if I
23 could assist, he advised me that he had located a
24 hatchet beneath a mattress. I collected the
25 evidence on scene, and he immediately, while we

1 were there with the structure, handed the hatchet
2 over to me.

3 Q I will show you what has been marked as State's 1
4 for identification purposes only and ask if you
5 recognize this.

6 A I do.

7 Q What is this?

8 A That is the hatchet recovered by Deputy Merckle.

9 Q How are you sure?

10 A It's got my tag attached, as well as I placed this
11 piece of tape on the back of the hatchet head at
12 the time. Again, we are talking about a year ago.
13 There was a fine piece of what appeared to be gray
14 fiber or hair consistent with what I had located at
15 the house, and I put the tape on here in an attempt
16 to preserve that.

17 Q What did you do when you took the hatchet from the
18 scene?

19 A I immediately -- I had already turned in the other
20 evidence. I took that and logged it in the same
21 procedure with the other evidence from earlier that
22 day to the evidence section at headquarters.

23 Q Has this hatchet remained in the evidence section
24 until you signed it out?

25 A It has.

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1 Q Did you sign it out?

2 A I did.

3 Q And you brought it over to the courthouse?

4 A This morning, yes, ma'am.

5 MS. PATTERSON: Your Honor, at this time I
6 would move that the hatchet be admitted into evidence.

7 MR. BUCHANAN: We object based on previous
8 objections.

9 THE COURT: Thank you, Mr. Buchanan. State's
10 1 is in evidence subject to previous objections. I
11 reaffirm my previous rulings.

12 (State's Exhibit Number 1 is received into
13 evidence).

14 BY MS. PATTERSON:

15 Q When Ms. Johnson described the hatchet to you --
16 did she describe the hatchet to you?

17 A She did. She said it was a hatchet with a dark
18 colored handle. That is the information I got from
19 her.

20 Q When she also talked to you, did she tell you about
21 what time the assault took place?

22 A She said it was dark. It was late at night, very,
23 very early in the morning, somewhere around
24 midnight or after, somewhere in the time frame.

25 Q So it was dark?

1 A Yes.

2 MS. PATTERSON: Beg the Court's indulgence.

3 (Pause).

4 MS. PATTERSON: Thank you, Your Honor. No
5 further questions.

6 THE COURT: Thank you, Solicitor,
7 Mr. Buchanan, anything?

8 MR. BUCHANAN: No questions, Your Honor.

9 THE COURT: Thank you, Mr. Buchanan. Thank
10 you, Deputy Blake. You may step down.

11 THE WITNESS: Sure.

12 (Witness leaves the witness stand).

13 THE COURT: Solicitor, you may call your next
14 witness.

15 MS. WHETSTONE: Thank you, Your Honor. The
16 State calls Deputy Shannon Radford.

17 THE COURT: Deputy Radford, if you would come
18 around for us and be sworn.

19 SHANNON RADFORD, being
20 first duly sworn, testifies as follows:

21 CLERK: State your full name, spelling your
22 last.

23 THE WITNESS: Deputy Shannon Radford,
24 R-A-D-F-O-R-D.

25 THE COURT: Solicitor.

1 DIRECT EXAMINATION

2 BY MS. WHETSTONE:

3 Q Thank you, Deputy Radford. Can you tell us where
4 you currently work.5 A I am employed with the Lexington County Sheriff's
6 Department.

7 Q How long have you worked at Lexington County?

8 A Approximately three and a half years.

9 Q What positions have you held during that time?

10 A I've been a road deputy and I have been a canine
11 handler.

12 Q How long have you been a canine handler?

13 A Approximately two and a half years.

14 Q Do you have specific training in that area?

15 A Of course.

16 Q Can you explain that for us a little bit.

17 A We go through, as far as my canine duties, we go
18 through a four-week long academy, so to speak, with
19 our dog and trainers for a non-stop, four-week
20 period. Then we also train every week with our
21 personal dogs.

22 Q Do you continue to train every week now?

23 A Correct.

24 Q And you say our dog. Do you have a specific dog
25 that you work with?

1 A Correct. Each handler has his own dog he works and
2 rides with each night.

3 Q What is the name of your dog?

4 A My dog's name is Barut.

5 COURT REPORTER: Can you spell that for me,
6 please.

7 THE WITNESS: B-A-R-U-T.

8 BY MS. WHETSTONE:

9 Q And how long have you worked with Barut?

10 A Two and a half years.

11 Q Since you have been a canine handler?

12 A Correct.

13 Q He went to the academy training with you?

14 A Correct.

15 Q What breed of dog is Barut?

16 A A Belgium Malinois.

17 COURT REPORTER: Can you spell that for me?

18 THE WITNESS: M-A-L-I-N-O-I-S.

19 BY MS. WHETSTONE:

20 Q Does Barut have specific training in law
21 enforcement or tracking skills?

22 A That is correct, through a four-week period and a
23 non-stop period that we do now. He is trained in
24 what is called a dual purpose canine. He's trained
25 in tracking and he is trained in narcotic detection

1 and also apprehension biting.

2 Q Have you been out on a number of calls with Barut?

3 A Many calls, at least, if not more, than one a night
4 since I have been working with him.

5 Q So that's two and a half years once a night; is
6 that correct?

7 A Correct.

8 Q Do you remember an incident on March 22, 2008,
9 involving the Defendant?

10 A I do.

11 Q How did you learn of that incident?

12 A I was called out during the day. The road deputies
13 at that time, we were on call. I believe it was a
14 Sunday. We don't work during that period. We are
15 only on call.

16 They explained to us they had a subject they
17 had an arrest warrant for, and they called me and
18 said they had a last sighting on him. We respond
19 to that location and we place our dogs on the
20 ground and track.

21 Q Do you recall what time that was?

22 A It was around 3:30 or so.

23 Q When you reached the scene, what did you do?

24 A I spoke with the deputies and I believe the
25 victim's brother or son, excuse me. They said they

1 had a last sighting of who we now know is Bennie
2 Golston, which I am familiar with.

3 They give us a location at which he was seen
4 leaving. I placed my dog on the ground at that
5 time. At that time my dog indicated a direction in
6 which the suspect or the Defendant traveled, and we
7 continued to track from that point.

8 Q Do you know how long it was since the last sighting
9 of Mr. Golston and between when your dog started
10 tracking?

11 A I believe about 40 minutes, 30 or 40 minutes. I
12 live fairly close and I was within about 10 or 15
13 minutes getting there. To set up and get the dog
14 on its own, that takes about 10 or 15 and then
15 speaking to officers about which way we need to go.

16 Q While we are on that subject, can you explain for
17 us how a dog tracks a scent.

18 A Dogs track human scent or odor, which you can use
19 them one in the same. As a person -- every person
20 in here's odor or scent is different. As you
21 travel or throughout the day, your skin it admits
22 rafts, and that's basically dead skin removing from
23 the body.

24 It becomes bacteria. It falls to the ground,
25 and the dog tracks on that that comes off the body.

1 As a human you only have about 5 million
2 epithelial cells or skin cells that produce from your
3 body.

4 The dog's sense of smell is 44 times greater
5 than a human's. So you can imagine what the
6 difference is and how many skin cells that we drop
7 from our body at one time.

8 Q So when you started tracking, it was about 44
9 minutes afterwards. What happened when the dog
10 started tracking?

11 A From the training and it's an everyday process,
12 they have a change in behavior when they are
13 tracking. My dog, as we begin to track, he pulls
14 strong. He put his ears back and he puts his nose
15 to the ground. That indicates to me that is on a
16 scent.

17 Given the fact that is the last place that
18 Mr. Golston was seen, that indicated to me that's
19 the direction we were traveling. The dog pulled
20 strongly the whole time continuously throughout the
21 track.

22 We moved to different areas and a dog usually
23 stays in a five to ten foot area of that suspect
24 track or scent cone, which a person admits from his
25 body.

1 We continued to track around the house and
2 through a field of low grass and around the back
3 side of an abandoned building where the dog showed
4 us that somebody may have gone up into the
5 building, and we stopped at that point.

6 Q Deputy Radford, I will show you what has been
7 marked for State's Exhibit 3 through 8. Can you
8 tell me if you recognize these photographs?

9 A (Pause). Yes, this is the residence that myself
10 and Deputy Merckle, Deputy Blake, and my canine
11 partner Barut tracked to.

12 Q When you are looking at this picture, which
13 direction did you track to the house from? Can you
14 describe that for us.

15 A If memory serves me correctly, we came through
16 before the wood line here and the big tree and
17 around to the back side of the building, around the
18 cars.

19 Q And what did you do upon arriving at the residence?

20 A At that time, as we do when we come to a building
21 or when our canine indicates that someone may have
22 entered a building, we stop there. We advise the
23 surrounding perimeter of what we have and that we
24 need to enter the building.

25 We announce at that time, myself personally

1 and all our canine handlers, will announce three
2 times to let them know that we will be coming in,
3 and we have a dog. He will bite. When we opened
4 the door, there was holes in the floor, nails
5 showing the heads. I decided not to place my dog
6 inside at that time.

7 Q What did you do with your dog?

8 A My dog was secured. After Deputy Blake came, he
9 checked the area in the shed or the carport.
10 Basically he came back out. He secured my dog as
11 Deputy Merckle and myself entered the building.

12 Q Were you looking for anything when you entered the
13 building?

14 A We were looking for a person.

15 Q Who were you looking for?

16 A At that time we believed it was Bennie Golston.

17 Q Did you find Mr. Golston within that building?

18 A We did not.

19 Q What did you do upon the conclusion of your search
20 of that building?

21 A At that time Deputy Merckle came out with some
22 evidence, which he passed onto Deputy Blake. We
23 continued. I circled my dog around the building,
24 as we always do if we do not find someone inside,
25 to see if this person or persons may have left from

1 another location.

2 My dog indicated to me that -- there is an
3 open field on the other side, a cutover, so to
4 speak, that a person may have run. My dog began to
5 track into that wooded area.

6 We tracked in there for probably another hour.
7 There's numerous trees laid over, there's pools of
8 water that had been standing, and we circled in
9 there for probably an hour and did not locate
10 anyone.

11 Q Going back to this building, can you describe what
12 you saw when you entered the building and the
13 condition of the building?

14 A As we approached the building, there was what
15 appeared to be an old, I guess, deck. There was
16 nothing but boards and rafters. We had to jump up
17 on there. There was no steps to get up on it. I
18 did not place my dog inside.

19 When we got inside the building after my dog
20 was secure, the door was ajar and broken. So
21 Deputy Merckle and I went in. As we always do, we
22 will both take part of the house to secure and to
23 cover each other.

24 Deputy Merckle went off to the right. I went
25 off to the left. As we cleared the building, we

1 noticed there was no power. The light switches
2 that were there were in shambles. We tried them
3 but no lights came on.

4 There looked to be a bathroom that had been
5 set up for a while. There was some dried up debris
6 inside of it. There was no water standing in it.
7 There was cobwebs that we had to push away to
8 enter.

9 Deputy Merckle advised that he had a bed in
10 there where he was, and he was going to be checking
11 it. After I cleared my section, I came back to him
12 and stood at the door while he checked the bed as
13 we always do when someone is hiding. Of course,
14 there are places people hide in small areas. So we
15 check every place we can.

16 Q Did this residence in your opinion appear to be
17 somewhere -- a liveable residence?

18 A No, ma'am. In my opinion some of our best vagrants
19 would not live there.

20 Q Upon the conclusion of your search of this area,
21 did you leave the scene?

22 A I did not. We stayed in the area for a little
23 while. I believe some of our other tracking
24 handlers were out. There was many deputies looking
25 for him due to the fact that he fled, and we did

1 not catch him.

2 There was neighbors, parties going on
3 everywhere. We spoke to many people who advised
4 that they would let us know if they saw him.
5 About, I guess, an hour, maybe two hours, I'm not
6 sure, we got another sighting of Mr. Golston on
7 , I believe, which is close proximity to the
8 area.

9 I was in the area at that time, so I went to
10 that location. I spoke with a homeowner who was
11 sitting on his porch. I asked him if he had seen
12 Mr. Golston. He said no.

13 And when he said no, he pointed to the right,
14 which is a wooded area beside him. I acknowledged
15 the fact. I walked to the edge of the wood line,
16 which was approximately maybe 20 yards. Into the
17 wood line about 20 feet, I observed Mr. Golston
18 standing behind a tree.

19 Q How were you able to observe him?

20 A He was standing -- I believe he had on a red shirt
21 or a red ball cap, I can't be specific. But he was
22 standing behind the tree looking away from me. I
23 challenged him, as I always do, anybody that we are
24 looking for.

25 I withdrew my service weapon, advised him that

SHANNON RADFORD -- DIRECT -- MS. WHETSTONE

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1 I had a dog. I advised him to get on the ground.
2 He turned around. I recognized him. He recognized
3 me. He at that time put his hands up and got on
4 the ground.

5 Q Upon approaching the Defendant, how did he appear
6 to you?

7 A He wasn't saying anything until I got up on him,
8 and I told him to place his hands behind his back.
9 He said, What did I do? What did I do? I didn't
10 say anything to him. I placed him in handcuffs and
11 detained him, took him back to my vehicle. I sat
12 him in the vehicle waiting for other units to
13 arrive.

14 As we walked back, he continued to ask what I
15 did. I told him I believe we had a warrant for
16 him. I wasn't sure what it was for. We came back
17 to the vehicle. I had to help him. He was very
18 unstable on his feet. With prior experiences he
19 was -- he smelled of an alcoholic beverage.

20 I took him back to my vehicle, sat him in the
21 vehicle. He didn't say anything to me. He
22 continued to ask what was going on. I told him we
23 had a warrant for his arrest. When I told him we
24 had a warrant for his arrest, the only thing he
25 said to me was, I didn't hit that girl.

1 MR. BUCHANAN: Objection, Your Honor.

2 THE COURT: What is the basis of your
3 objection?

4 MR. BUCHANAN: Jackson v. Denno, objection
5 under Jackson v. Denno.

6 THE COURT: Madame Forelady, ladies and
7 gentlemen of the jury, if you would please step to the
8 jury room. Do not discuss the case during this brief
9 recess.

10 (The jury retires to the jury room).

11 THE COURT: Solicitor.

12 MS. WHETSTONE: Your Honor, I believe that
13 Deputy Radford said he had detained the Defendant at
14 this point and placed him in his car. I don't believe
15 he said he was under arrest.

16 THE COURT: Even if he is under arrest, where
17 is the custodial interrogation? I took it that the
18 Defendant is asking the officer what did he do, what did
19 he do.

20 The officer said, I don't know. We've got a
21 warrant for your arrest. Then the Defendant
22 spontaneously makes a statement, I didn't hit that girl.
23 If we want a hearing on that, he's obviously in custody,
24 but I'm not sure there is custodial interrogation.
25 Mr. Buchanan.

1 MR. BUCHANAN: Well, Your Honor, initially I
2 would need to start by saying that I believe there is a
3 Rule 5 violation. We were not provided with any sort of
4 information that there would be any statements by
5 Mr. Golston that they were planning on entering into
6 evidence.

7 I have the report by Deputy Radford which does
8 not indicate any statements. It describes his arrest of
9 Mr. Golston. It does not specify any prior statements
10 by the Defendant. So we were not able to even address
11 the issue of whether there should be a Denno hearing or
12 not.

13 THE COURT: Let me take them up in the manner
14 in which you brought up the objection. The first
15 objection was Jackson versus Denno. I will get to the
16 discovery violation if there is one. Based on what
17 Deputy Radford has testified to, do you think there is
18 custodial interrogation?

19 MR. BUCHANAN: Well, Your Honor, Deputy
20 Radford did explain to Mr. Golston by his testimony that
21 he had a warrant for his arrest. I do not believe that
22 there was any point in time that Mr. Golston would have
23 felt free to leave as he was escorting him back to the
24 car.

25 THE COURT: I have no question that he is in

1 custody. I mean, he is handcuffed with an armed officer
2 with a trained dog. It's clear to me he is in custody.
3 Where does the issue of interrogation come in? I don't
4 question that Deputy Radford had Mr. Golston in custody,
5 as he was required to do under a valid court order,
6 which was the arrest warrant.

7 MR. BUCHANAN: Right.

8 THE COURT: I am trying to determine where the
9 interrogation aspect would come in.

10 MR. BUCHANAN: It would be our position that
11 Deputy Radford's responses to Mr. Golston's questions
12 and his statements were designed to elicit an
13 incriminating response from Mr. Golston.

14 THE COURT: I don't agree with that. I don't
15 see how that can be the functional equivalent of
16 interrogation when a defendant is asking the officer a
17 question, and this officer gives him an answer.

18 His answer is, I don't know. We've got an
19 arrest warrant for you. Perhaps it would be a little
20 bit different if the officer would have said, Well, I
21 think we've got an arrest warrant for you for hitting
22 that girl, criminal domestic violence, and beating her
23 up, and he said, I didn't hit that girl. I do not see
24 that as the functional equivalent of interrogation, so I
25 don't think it requires Miranda.

1 Now, as far as the Rule 5 issue, what about
2 that, Solicitor? Mr. Buchanan said he never received
3 notice of any statement of the Defendant as I recall.

4 MS. WHETSTONE: Your Honor, that would be
5 correct. We did not give the defense notice of it. I
6 believe we learned of it -- I can't tell you exactly.
7 It was relatively recent. I'm not sure.

8 We can withdraw the question if that is a
9 violation. That is correct, we did not provide that
10 statement. I can't tell you exactly when we received
11 it. It was recently, but I can't tell you the exact
12 date.

13 MR. BUCHANAN: Your Honor, in light of that
14 and the fact that the officer has said that out loud, we
15 are not going to be able to get it out of the jury's
16 ears. We have to move for a mistrial.

17 THE COURT: I will deny your motion for a
18 mistrial. Is there any -- you have already made one
19 motion to strike testimony, and I have granted it. I
20 would be glad to give the jury whatever instruction you
21 would like me to give concerning disregarding and
22 striking the testimony.

23 MR. BUCHANAN: Your Honor, obviously we
24 believe that a mistrial is the appropriate remedy here.
25 We would not agree that striking and an instruction

1 would be appropriate.

2 THE COURT: I understand. I have ruled on the
3 mistrial motion. My question is, is there an
4 instruction you want me to give this jury concerning
5 striking the testimony?

6 MR. BUCHANAN: Beg the Court's indulgence,
7 Your Honor.

8 (Pause).

9 MR. BUCHANAN: Your Honor, probably the most
10 appropriate would be to strike it from the record and
11 instruct the jury that they cannot in any way consider
12 the statement while Mr. Golston was placed under arrest
13 in their deliberations.

14 THE COURT: All right.

15 MS. WHETSTONE: Your Honor, I know you have
16 already ruled on this, too. I just want to make clear
17 the State's position would be that he only said, his
18 exact statement was, I didn't hit that girl. He didn't
19 name specifically. It's not so prejudicial that it
20 requires a mistrial, and we do believe it can be cured
21 with an instruction.

22 MR. BUCHANAN: We would also ask Your Honor,
23 too, when describing the statement describe it as an
24 alleged statement.

25 THE COURT: All right. Thank you.

1 Mr. Buchanan. Thank you, Solicitor. In reading some of
2 the cases very cursory at this point concerning
3 mistrial, the power of the Court to declare a mistrial
4 ought to be used with the greatest caution and under
5 urgent circumstances in very plain and obvious causes
6 stated into the record by the trial judge.

7 A mistrial should not be granted unless
8 absolutely necessary. To receive a mistrial, the
9 Defendant must show error and resulting prejudice. The
10 less than lucid test is therefore declared to be whether
11 the mistrial is dictated by manifest necessity or the
12 ends of public justice.

13 Again, going back to the original objection,
14 I find it was not a Jackson versus Denno violation. The
15 State indicates they learned of this recently and did
16 not convey the information to the defense, as I take it.
17 Is that correct, Solicitor?

18 MS. WHETSTONE: Yes, sir.

19 THE COURT: Therefore, they withdraw the
20 question and the answer. I don't see how in the world
21 it could be prejudicial to the Defendant when it's a
22 denial of the crime.

23 When the Defendant says, I didn't hit that
24 girl, it's obvious that the crime had occurred
25 somewhere, give or take midnight the night of the 22nd,

1 early morning hours of the 23rd.

2 Officers didn't respond to the residence until
3 approximately 10:00 a.m. on the 23rd. They responded
4 back to the area at 3:30 in the afternoon on the 23rd.
5 I have lost my tracking, but I know this is several
6 hours later when Deputy Radford goes back to the area,
7 and he takes Mr. Golston into custody.

8 It's indicated to me that everybody knows
9 everybody in that area, which further indicates to me in
10 my common sense, whatever I may have, is that everybody
11 knows everybody else's business.

12 Further, the people would be aware of what had
13 occurred in the area with the police in the area at
14 least three times throughout the day. Mr. Golston may,
15 in fact, have heard, because he had been seen earlier
16 sitting on a porch and then seen this other time, had
17 learned of alleged allegations placed against him.

18 Again, I don't see how a denial can be
19 prejudicial to a criminal defendant. In fact, many
20 times a defendant is trying to get that denial in
21 through testimony otherwise than having to take the
22 stand.

23 Be that as it may, I will give them an
24 instruction concerning that last question and last
25 response. Anything further, Mr. Buchanan?

1 MR. BUCHANAN: No. No, Your Honor.

2 THE COURT: You want me to use the term
3 alleged statement; is that correct?

4 MR. BUCHANAN: Yes, Your Honor.

5 THE COURT: Anything further, Solicitor?

6 MS. WHETSTONE: Nothing further, Your Honor.

7 THE COURT: Thank you. If you would bring us
8 our jury, Mr. Bailiff.

9 (The jury returns to the courtroom).

10 THE COURT: Madame Forelady, ladies and
11 gentlemen of the jury, prior to being excused from the
12 courtroom upon the last objection, there was a question
13 asked of Deputy Radford which elicited a response
14 concerning an alleged oral statement made by
15 Mr. Golston.

16 I have ruled that that evidence is not
17 competent, that it is not admissible, and that it would
18 be stricken from the record. What that means is it is
19 not competent evidence, and you may only consider
20 competent evidence that is presented before you.

21 So it cannot be part of your deliberations in
22 any manner. Obviously questions are not testimony. The
23 responses of the witnesses are testimony. So that
24 response is not testimony. It cannot be considered by
25 you. It cannot even be discussed by you in the jury

1 room concerning any alleged oral statement made by
2 Mr. Golston on the 23rd of March of '08.

3 Obviously you have all taken an oath to well
4 and truly try and a true deliverance make between the
5 State and the Defendant at the bar according to the law
6 and the evidence.

7 I am telling you, as I told you earlier, I am
8 the judge of the law. You are the judge of the facts.
9 You are sworn that you will follow the law exactly as I
10 state it to you. So I advise you to please follow my
11 instructions in that regard. Thank you. Thank you very
12 much.

13 With that being said, Solicitor, you may
14 continue.

15 MS. WHETSTONE: Thank you, Your Honor. The
16 State has no further question at this time.

17 THE COURT: Thank you. Mr. Buchanan.

18 CROSS EXAMINATION

19 BY MR. BUCHANAN:

20 Q Deputy Radford, you prepared an incident report
21 when you made an arrest on Mr. Golston; did you
22 not?

23 A Yes, sir.

24 Q When you put in the information on Mr. Golston, you
25 listed his address; did you not?

1 A I believe so.

2 Q And the incident report you actually listed his
3 address as , correct?

4 A If that's what is on the report, yes, sir, which
5 would have been what he had given to me, yes,
6 sir.

7 Q Thank you.

8 MR. BUCHANAN: No further questions, Your
9 Honor.

10 THE COURT: Thank you. Anything in redirect,
11 Solicitor?

12 MS. WHETSTONE: Nothing further, Your Honor.

13 THE COURT: Thank you. Thank you very much,
14 Deputy Radford. You may step down.

15 (Witness leaves the witness stand).

16 THE COURT: Solicitor, you may call your next
17 witness.

18 MS. PATTERSON: Thank you, Your Honor. The
19 State calls Jennifer Watson.

20 JENNIFER WATSON, being
21 first duly sworn, testifies as follows:

22 CLERK: State your full name. Speak up loud
23 and clear, spelling your last.

24 THE WITNESS: My name is Jennifer Watson,
25 W-A-T-S-O-N.

1

DIRECT EXAMINATION

2

BY MS. PATTERSON:

3

Q Ms. Watson, where are you employed?

4

A Palmetto Health Richland Emergency Department.

5

Q And how long have you been employed at Palmetto

6

Health Richland Emergency Department?

7

A About four years.

8

Q And how long have you been a nurse?

9

A I've been a nurse for ten years.

10

Q And were you on duty at Palmetto Health Richland on

11

the morning of March 22, 2008?

12

A Yes, ma'am.

13

Q And did you receive a patient named Myrtle Johnson?

14

A Yes, ma'am.

15

Q Have you had opportunity to review her record?

16

A I have.

17

Q Can you tell us about what time she came in that

18

morning?

19

A She arrived to us at 11:14 in the morning.

20

Q Can you tell us how she was transported?

21

A By E.M.S.

22

Q Can you tell us under what circumstances she was

23

brought into the E.R.?

24

A She came in with lots of facial pain and swelling,

25

and that's the reason that she was transported to

1 us.

2 Q Do you have anything -- do you know how she looked
3 when she came in?

4 A Yes, ma'am. I have documented in several places in
5 my notes that she had lots of edema to her face,
6 which is swelling, and that her eyes were so
7 edematous that they were swollen shut.

8 Q Were you able to communicate with her?

9 A Yes, ma'am. I documented that she was alert and
10 oriented times three and that she was able to
11 follow commands.

12 Q Did her appearance cause any kind of medical
13 concerns?

14 A Yes, ma'am, to the point where the physician
15 ordered some of the trauma scans that we routinely
16 do on patients who come in with lots of trauma.
17 They had ordered C.A.T. scans of the face and then
18 routine trauma blood work.

19 Q Do you know what the results of these tests were?

20 A The trauma blood work that we do, just for example,
21 the hemoglobin and hematocrit in her blood levels,
22 they came back within normal limits. Then the
23 C.A.T. scans that they did, the C.T. of the head,
24 showed tissue swelling, no visible facial
25 fractures.

1 We also did the cervical spine or the neck,
2 which showed no cervical spine fracture but left
3 posterior soft tissue hematoma noted, which would
4 have been bruised, and a large amount of swelling
5 to the back of the neck.

6 Q So she had no fractures?

7 A No, ma'am.

8 Q No broken bones?

9 A No, ma'am.

10 Q But she had a great amount of swelling?

11 A Yes, ma'am.

12 Q And she also had a great amount of bruising?

13 A Yes, ma'am.

14 Q Did Ms. Johnson complain of any pain?

15 A Yes, ma'am. I documented -- we do a scale, a zero
16 to ten scale. Tell me and rate your pain on a
17 scale of zero to ten. Zero is no pain and ten is
18 the worst. I got documented that she told me her
19 pain scale was eight.

20 Q Was she treated with any kind of pain medicine?

21 A She was. She was given morphine for pain.

22 Q When is morphine normally prescribed for patients?

23 A That is at the doctor's discretion. It's usually
24 for severe pain.

25 Q Severe pain. Do you know how long Ms. Johnson was

1 at the emergency room?

2 A Yes, ma'am. She came in at 11:14 in the morning
3 and was discharged around 5:30 in the afternoon.

4 Q Do you know who she left the hospital with?

5 A It was documented that she left with her son.

6 Q And was she given any kind of follow-up
7 instructions?

8 A She was. She was giving discharge instructions for
9 facial contusion and also eye contusion, which is
10 bruising around the face and the eye, and also
11 instructed to follow up with Richland Ophthalmology
12 Clinic to get her eyes examined again.

13 Because at this point the doctor documented
14 that she was so swollen, he couldn't do the type of
15 exam that he wanted to do to make sure that she
16 could have vision.

17 Q What type of instructions was she given for the
18 contusion and the swelling?

19 A She was given -- it says Vicodin, which is a pain
20 tablet, and he has prescribed that for every four
21 hour as needed for pain. Also, the eye ointment
22 and then instructed to return to the emergency
23 department for any other concerns.

24 MS. PATTERSON: Beg the Court's indulgence.

25 (Pause).

1 BY MS. PATTERSON:

2 Q Thank you, Ms. Watson. Please answer any questions
3 the defense may have?

4 THE COURT: Thank you, Solicitor.
5 Mr. Buchanan.

6 MR. BUCHANAN: Your Honor, may we please
7 review the notes the witness is referring to?

8 THE COURT: Do you have notes, Ms. Watson?

9 THE WITNESS: I do.

10 THE COURT: Certainly.

11 (Pause).

12 CROSS EXAMINATION

13 BY MR. BUCHANAN:

14 Q Ms. Watson, when you said there was routine or
15 trauma blood work, do they do a screen for drugs in
16 her system?

17 A It's not necessarily our protocol anymore to screen
18 for drugs in the system. It's at the doctor's
19 discretion.

20 Q Was there any drug screen in this instance?

21 A There were no drug screens as far as like the urine
22 drug screen that we usually do. However the doctor
23 did test for alcohol in the system, and it was
24 non-detectable.

25 Q What do the notes reflect regarding her percentage

1 of blood alcohol in her system?

2 A I think it's going to say less than ten is how
3 our -- let's see. Here it says alcohol level less
4 than ten. Then the normal -- or it says the
5 alcohol milligrams per deciliter is less than ten.
6 So that is less than 0.01 percent.

7 Q Isn't there -- did she also not tell either you or
8 one of the doctor's that was placed in the note
9 that she had a beer last night?

10 A I saw that in the doctor's dictation. Under social
11 history it says, the doctor dictated occasionally
12 uses alcohol and tobacco, had one beer last night,
13 denies drug use.

14 Q Thank you.

15 MR. BUCHANAN: Beg the Court's indulgence,
16 Your Honor.

17 THE COURT: Yes, sir.

18 (Pause).

19 MR. BUCHANAN: No further questions.

20 THE COURT: Redirect, Solicitor?

21 REDIRECT EXAMINATION

22 BY MS. PATTERSON:

23 Q Ms. Watson, what does less than ten mean in
24 detecting alcohol?

25 A To us?

1 Q Yes, ma'am.

2 A It means that she is not -- she doesn't have
3 alcohol in her system. We would consider that
4 negative.

5 Q Thank you.

6 THE COURT: Recross?

7 MR. BUCHANAN: Just a minute, Your Honor.

8 (Pause).

9 MR. BUCHANAN: Nothing, Your Honor.

10 THE COURT: Thank you. Thank you very much
11 for being with us. You may step down.

12 (Witness leaves the witness stand).

13 MS. PATTERSON: Your Honor, we would ask that
14 the witness be excused if she would like.

15 MR. BUCHANAN: No objection, Your Honor.

16 THE COURT: I am trying to balance the
17 emergency room and the courtroom.

18 MS. PATTERSON: Yes, sir, Your Honor.

19 THE COURT: Thank you very much, Ms. Watson.
20 You are now excused.

21 Solicitor, you may call your next witness.

22 MS. WHETSTONE: Thank you, Your Honor. The
23 State calls Tarik Johnson.

24 THE COURT: Mr. Johnson, if you would come
25 around for us, please, and be sworn.

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1 TARIK JOHNSON, being
2 first duly sworn, testifies as follows:

3 CLERK: State your full name, spelling your
4 last.

5 THE WITNESS: My name is Tarik, T-A-R-I-K,
6 Johnson.

7 DIRECT EXAMINATION

8 BY MS. WHETSTONE:

9 Q Thank you, Tarik. Can you tell me where you
10 currently live?

11 A Right now I spend most of my time in Northeast
12 Columbia, which is at or I am in
13 Rock Hill because I'm in school at Winthrop
14 University, so I will spend time up there with my
15 kids at . I where
16 my friend lives, it takes me maybe 40, 45 minutes
17 to get to school. That's where I spend most of my
18 time now.

19 Q What are you studying in school?

20 A I'm a double major in history and political
21 science. I will actually be graduating in August
22 with both degrees.

23 Q Congratulations.

24 A Thank you.

25 Q Have you ever lived with your mother in the past?

1 A Oh, yes, ma'am.

2 Q Who is your mother?

3 A Ms. Myrtle Johnson.

4 Q Is that the victim in this case?

5 A Yes, ma'am, it is.

6 Q Can you tell me when you lived with her?

7 A Yes, ma'am. I stayed with momma after grandpapa
8 passed, and we moved into the house in '99, 2000,
9 somewhere in there. My sister was there, I was
10 there, my wife and kids were there. My wife and I
11 split up. I was there from that point to probably
12 about '05, '06, at which point I just couldn't take
13 the Defendant anymore.

14 Q So during this time while you were living at home,
15 did your mother meet Mr. Golston?

16 A Yes, ma'am. Yes, ma'am. They met one day -- at
17 the time I had and I still have an '84 Camaro. I
18 was under the hood doing some work, and the
19 Defendant came over to allegedly help me.

20 Q At that point did your mother and the Defendant
21 begin a relationship?

22 A Oh, no, ma'am. This is probably 2000, maybe 2001
23 at this point. As a matter of fact, it had to be
24 late 2000, early 2001. At that point, no. Ben
25 was -- that's when Ben started sniffing around a

1 lot, but they weren't in a relationship for a year
2 or two at that point. I would say it would be less
3 than a year before they would enter into a real
4 relationship.

5 Q Can you tell us about when that started?

6 A Roughly '03, '04, somewhere in the time. When I
7 had shoulder surgery, I say they really got
8 serious. Prior to that mom knew that Ben and I
9 didn't get along. She kind of tried to hide it,
10 but I was aware of what was going on. So I would
11 say maybe '02, '03, but definitely '04, '05, it was
12 pretty well known.

13 Q And just for clarification, I don't believe I asked
14 you, where were you living at this point?

15 A I was with momma at

16 Q Thank you. Did you eventually move out?

17 A Yes, ma'am, I had to leave. My wife and I had
18 separated. The kids were gone, so it was just me
19 and momma. My sister had moved out at that point.
20 It was pretty good but Ben was there.

21 It was at first during the day and I wasn't
22 there, so it didn't bother me. He would leave
23 early evenings usually, and then it gradually came
24 to the point where Ben was there all the time or
25 90 percent of the time.

1 If I came home, Ben was there. When I woke
2 up, Ben was there. When I went to sleep, Ben was
3 there, and half the time Ben would come in drunk,
4 loud. He had this guitar that he loved to play --

5 MR. BUCHANAN: Objection.

6 THE COURT: I would sustain that objection,
7 Solicitor, as far as the 403(3) type of testimony.
8 Anything further?

9 MR. BUCHANAN: That's what we objected to.

10 THE COURT: Anything further you want to say
11 in that regard, Mr. Buchanan?

12 MR. BUCHANAN: Move to strike all of that.

13 THE COURT: Thank you. Mr. Foreman and ladies
14 and gentlemen of the jury, I would ask you to strike
15 responses concerning any prior conduct relating to
16 drinking. It's not relevant.

17 I am not fussing at you at all, Mr. Johnson.
18 Don't take it like that. I couldn't compete with you
19 historically or in political science. It's not a matter
20 of fussing at you, but it's not relevant to what may or
21 may not have happened on the 22nd of March of '08.

22 THE WITNESS: Yes, sir.

23 THE COURT: That would not be part of your
24 deliberations. Thank you. Thank you, Solicitor. You
25 may continue.

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1 MS. WHETSTONE: Thank you, Your Honor.

2 BY MS. WHETSTONE:

3 Q At the point when you began to move out or during
4 that time, would you say that the Defendant was
5 living with your mother?

6 A Oh, yes, ma'am. Actually at that point, Ben was
7 there 90 percent of the time. He was probably
8 there more than I was. I would spend most of my
9 days out and come in in the evening. Even after I
10 had my shoulder surgery, Ben was there most of the
11 time. I couldn't go anywhere, so I was there.

12 Q Did he have clothing at the house?

13 A Yes, ma'am. Momma washed his clothing and mine,
14 shoes, ate with momma, cooked for momma, chopped
15 the wood, stacked the wood, built a fire. He was
16 there.

17 Q When he was living there, where did he stay in the
18 house? Did he sleep in a particular bedroom?

19 A Momma's, yes, ma'am.

20 Q Did the Defendant have a key during this time at
21 all?

22 A Yes, ma'am. About the time momma started having to
23 go up to Jersey, she would go to take care of my
24 grandparents. She would stay maybe four weeks,
25 come back home for four weeks and stay.

1 At that point we had just found out that my
2 grandmother had Alzheimer's and my grandfather had
3 Parkinson's and some type of cancer. So she and my
4 cousin Jowanna (phonetic), who stays in
5 Philadelphia, which is where I was born, would
6 trade off.

7 Nobody could kind of take care of both of them
8 at the same time. Jowanna would come over and stay
9 with grandma and grandpop for awhile. They would
10 switch off.

11 One of the early trips momma took, Ben had a
12 key, and I raised a big stink about it. When momma
13 came back, she took the key. After I was gone, she
14 gave him the key back.

15 He broke the key off in the lock, which is why
16 Alfred was changing the locks. So there were only
17 two keys at that point. It was my key and momma's
18 key, but we couldn't use the front door.

19 We had to use the door through the garage or
20 the back door to get in. He had a key at that
21 point, and then there was some debate between
22 myself and momma about giving him a key after she
23 got the locks changed.

24 Q When you say when Alfred was changing the locks,
25 can you tell us when that happened?

1 A That was after both my grandparents had passed and
2 momma had moved in full-time down at . He
3 changed the locks the night/day of the incident.
4 That's when he finally changed the locks.

5 We had been talking about getting it done for
6 months now because grandma's probate was about up,
7 and they were bringing the furniture from grandma's
8 house to the house. We wanted to get things real
9 pretty. My grandmomma had some beautiful
10 furniture, and we wanted to get the house right for
11 it.

12 Q Moving forward, when did you learn that something
13 had happened with your mother?

14 A That morning I was -- it was roughly 9, 9:30. I
15 usually get up and go for breakfast --

16 Q When you are talking about that morning -- sorry to
17 interrupt you -- what date was that? Do you recall
18 that date?

19 A That would have been the 22nd, March 22, 08. But I
20 was going for breakfast as I normally do. I got to
21 the Waffle House, ordered my food and everything,
22 and my phone rang.

23 It was a number I didn't recognize; which
24 usually I don't answer. Since it was a Saturday, I
25 picked it up. That's when Miss Gail had told me

1 that momma was in trouble, to make it, come over or
2 whatever.

3 So I asked Gail what happened. She couldn't
4 really tell me at that point. She just said,
5 Something has happened to your momma. I said,
6 Okay, have we called the police? Gail said -- I
7 think she said, No I'm about to or maybe I asked
8 her to. I'm not sure which way, but we involved
9 the police.

10 So I canceled my order, headed onto the house,
11 and somewhere in between there, I realized I hadn't
12 talked to momma. I didn't really know what was
13 happening. So I called Gail back, and Gail said
14 she had called the police.

15 I asked to talk to momma, and I heard momma's
16 voice, but she was -- her breathing was kind of
17 labored, and I was getting a little worried about
18 her. So I was like, I'm on the way. I am already
19 on 77. I will be there soon.

20 Q How long between when you received the call from
21 Ms. Jones until you arrived at ?

22 A No more than 20 minutes, no more than 20 minutes.
23 I probably did it that day in about 15. I wasn't
24 speeding but I wasn't exactly going slow either.

25 Q Tarik, do you recall how the yard and the residence

1 looked upon your arrival?

2 A Yes, ma'am.

3 Q Can you describe for me what you did upon your
4 arrival at your mother's house?

5 A I parked my car -- actually I wasn't driving my
6 car. I was driving a friend's car. I parked her
7 car, went into the house, went to the back, and I
8 saw my momma laying there. That was my momma but
9 that wasn't my momma. I wasn't prepared for that.

10 I worked rescue at Rocket Rescue for about two
11 years, and I've seen wrecks with fatalities. I've
12 never seen anybody's face swollen like that. If
13 she hadn't talked, I wouldn't have known that was
14 my momma.

15 Q Was she able to say anything when you arrived?

16 A Yes, ma'am. She asked me -- I asked her what
17 happened and she said, she told me, that the
18 Defendant had done this to her.

19 MR. BUCHANAN: Objection, hearsay, Your Honor.

20 THE COURT: Solicitor, will you lay the
21 foundation for that testimony, please.

22 MS. WHETSTONE: Thank you, Your Honor.

23 BY MS. WHETSTONE:

24 Q Who was there when you arrived at the scene?

25 A When I got there, Miss Gail was the only one there.

1 Deputy Blake arrived shortly thereafter. I
2 couldn't have beat him by more than five minutes at
3 the most.

4 But when I spoke to momma, he hadn't arrived
5 yet. So it was the movers and they wouldn't come
6 in. It was just Miss Gail and myself in momma's
7 room.

8 Actually it was my bedroom. We had put
9 everything in my bedroom while they painted her
10 room. So my mattress was on the floor. Her
11 mattress was up against the wall.

12 Q At this point where was she?

13 A She was laying in the bed. She was kind of curled
14 up. She kept complaining that she was cold, and
15 she was -- she could answer you. She kind of
16 seemed incoherent, but I think that was more
17 because you couldn't understand what she was
18 saying.

19 She would try to speak to you. She would
20 answer you, but it came in short, little, ragged
21 breaths. She wasn't -- she was responsive but she
22 wasn't able to communicate greatly.

23 Q Could she tell you what had happened?

24 A All she could say was that Ben had beat her up.
25 She didn't go into any detail.

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1 MR. BUCHANAN: Objection Your Honor.

2 THE COURT: I would overrule your objection.

3 (State's Exhibits Number 22-25 are marked for
4 identification).

5 BY MS. WHETSTONE:

6 Q Tarik, I am going to show you some pictures. Can
7 you tell me if you recognize the subject of these
8 pictures?

9 A Yes, ma'am, that is momma.

10 Q I have shown you 22. Can you go through the
11 pictures and see if you recognize all of them.

12 A This is momma. Judging by where she was at, that
13 is shortly after we got to Huriya's house, maybe
14 the next day, but I don't think so. It looks like
15 she has on like a little hospital thing. That's
16 momma in the house.

17 Q Can you tell me what number you are referring to.

18 A Sorry, I'm on Number 23. I can't tell exactly
19 which one this is, but I do believe this is also at
20 my sister's house. This must be three or four days
21 later because one of her eyes is starting to open
22 at this point, and she is looking a little better.

23 This is another one at my sister's house. I
24 can't tell you exactly what time it is. I can't
25 see if her eyes are open or not. I don't know how

1 far it was after this was taken. This one looks
2 like pretty much the shot earlier when momma's one
3 eye had started to open.

4 Q Thank you. I am going to show some additional
5 pictures that have already been entered into
6 evidence. Can you tell me what is in State's 13?

7 A Yes, ma'am, that was how we found momma in the bed.
8 Actually at this point they had -- must have got
9 her to roll over to take the picture because she
10 was on her side when I got there.

11 She was just holding my hand and trying to
12 cover herself up, so we had to get her more covers.
13 That's her. You can see the dirt and some wet
14 substance down her shirt that -- where she had been
15 there.

16 Q And State's 16?

17 A Yes, ma'am. That is pretty much the picture of
18 where momma was when we found her. You could see
19 her braids and everything. She was like -- that's
20 exactly how she was.

21 Q The picture you are referring to is now State's 16.
22 In this picture this is how your mother appeared?

23 A Yes, ma'am, that is almost verbatim how she was
24 when I found her. She might have had her hand in a
25 different position when I got there. You can see

1 she is kind of hunched over and swollen up. That
2 is just how she looked. That's her at that point.

3 Q You described she was on her side when you
4 appeared?

5 A Yes.

6 Q What does this picture depict?

7 A That's a picture of her. That's further out but
8 that's the same time. That is how it would have
9 looked when you came into the room had you been
10 standing at the foot of the bed. She was laying on
11 her side curled up, just kind of moaning and
12 groaning that she hurt, and that was it.

13 Q That was State's 15 for the record. Finally
14 State's 17. I believe that is similar to the one
15 we just looked at.

16 A Yes. I think that was the first attempt that they
17 tried to get her to roll over on her back. She
18 just moaned so much she couldn't make it. They
19 kind of stopped there and took the picture.

20 Then she was able to kind of twist herself
21 over and get over onto her back to take the other
22 one, but that was as good as we thought we were
23 going to get at that point. Moving hurt. She said
24 every time she moved it hurt.

25 Q What happened after these pictures were taken that

1 day?

2 A After those pictures, shortly after that, the
3 ambulance arrived. They came in and talked to
4 momma. The officers were outside, and I think
5 Deputy Blake stayed inside with us. They got momma
6 onto one of those C.T. back board things and got
7 her onto the stretcher and rolled her outside.

8 I was holding her hand, and momma asked, She
9 said, I am moving? I said, Yes, ma'am, you are
10 moving. She said, Am I outside yet? I said, Yeah,
11 momma, you are almost at the edge of the driveway.

12 The E.M.S. asked her where she wanted to go.
13 She said Lexington. One of the E.M.T.s or
14 paramedics asked me, she told me they would rather
15 take her to Palmetto Health Richland because they
16 have a better trauma center.

17 I said take her there. I said, Momma, they
18 are going to take you to Palmetto Health Richland.
19 She say okay. They took her over there. I
20 followed them over there.

21 In between leaving and while they were talking
22 to momma, I called my sister and told her where we
23 were going. She said she would meet me there. We
24 got there.

25 We sat around and waited while they had momma

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1 back there. But during the initial checkup or
2 something like that, we couldn't be back there. We
3 stayed and waited for awhile.

4 I tried to tell Huriya how -- prepare her for
5 how momma was going to look. We were finally
6 allowed back. She went back and my sister started
7 crying when she saw momma. I held onto her for a
8 little while, and I told her -- oh, I skipped.

9 In between that on the road I had called
10 Alfred, who was doing the work in the house, and
11 told him to go back to the house to help the movers
12 get things in because they couldn't move things in
13 without somebody being there. Obviously I couldn't
14 stay at that point.

15 Q When did you call Alfred?

16 A Before I left from the scene, before they carted
17 momma off in E.M.S.

18 Q Then you followed the ambulance to the hospital?

19 A Yes, then I followed the ambulance to the hospital.
20 My sister had arrived there. She was already
21 waiting when we got there. I think she had to work
22 that day anyway because she was in her little
23 scrubs.

24 Q Did you stay there all day?

25 A No, ma'am. I told Alfred I would be back, and I

1 actually had to get my car. My car was being
2 repaired in West Columbia. So I switched cars out.
3 I told Huriya, Stay with momma. I will be back or
4 call me if anything happens. I will go to the
5 house.

6 Because, again, we still had to get the
7 things -- they still had to get the things off the
8 truck --

9 MR. BUCHANAN: Objection, Your Honor,
10 relevance.

11 THE COURT: I sustain the objection. I don't
12 know how it hurts, but I will sustain the objection.
13 You can ask your next question, Solicitor.

14 BY MS. WHETSTONE:

15 Q Did you ever see the Defendant that day?

16 A Yes, ma'am. When I came back to the house, Alfred
17 told me that he had seen him and somebody else had
18 seen him. So I said, Okay, I am going to go ahead.
19 They had told me to call. I believe Officer Blake
20 had given me a card.

21 So I called the non-emergency number and
22 called for Deputy Blake to come out. They got
23 there pretty quick. So they had asked what
24 happened, and I told them, you know, that I had
25 heard that he had been right in the area. So

1 Deputy Blake had the arrest warrant in his hand.
2 He said, I am going to go down here and talk to
3 some of his people.

4 Q Down here meaning?

5 A The dirt road that sits by -- my mother's house and
6 Miss Gail's house is separated by a little dirt
7 road. I mean, it's not more than 50 feet. It
8 would take you two minutes at the most to walk to
9 Miss Gail's house, and that is a slow crawl.

10 Q Is that where you saw the Defendant?

11 A Actually he was back behind the dirt road. When
12 the officers went down, he was behind the dirt
13 road. There is kind of like a shack, shanty, tool
14 shed out there, and I saw him poke his head around,
15 at which point I started running, and I yelled to
16 the deputies, I see him. I see him. I see him.

17 They were further down on street -- I
18 think that's the name of that road. They started
19 running up. He headed into the high grass woods
20 area. The officers stopped, I stopped, and they
21 called for the canine units.

22 Q Did you see the Defendant again after that?

23 A The next time I saw him was at the -- where they
24 set bond after they had caught him. Again, after
25 that I didn't see him until then.

1 Q Did you see your mother later that day?

2 A Yes, ma'am. After that I went back to the hospital
3 and momma was actually speaking pretty good. She
4 was -- she had called down, I guess, so she was
5 speaking much better. She still couldn't see and
6 she still hurt a lot.

7 I think she was happy because Huriya and I
8 were there. They asked her if she wanted to go
9 home. They said, We will keep you overnight, but
10 you don't have any broken bones, and you can go
11 home if you have somebody to take care of you.

12 Q Did she go home with you?

13 A Yes, she went home with me. My sister said she
14 would take care of her. She had more flexibility
15 in her schedule. But at that point she couldn't
16 take her back to her house.

17 I took momma home. It was kind of easier to
18 get her in my car. I took momma home. We started
19 with the -- they told us to get a bag of frozen
20 peas and put it over her face every so often to try
21 to get the swelling to go down.

22 I took her home, and later that evening I
23 tried to feed her some soup, but it just dribbled
24 out. So later that evening my sister came and took
25 her home. From that point until she could actually

1 kind of function on her own and actually still
2 today, we switch off.

3 Momma will go down to her house every now and
4 again, but a lot of times if my sister has
5 something to do, I will take care of momma. If I
6 have something to do, momma will stay with Huriya.
7 She doesn't like being by herself too much anymore.
8 She will go with me often to Rock Hill since my
9 children, her grandchildren, are there. She will
10 spend the day with them.

11 Q So you saw your mother in the week following this
12 incident?

13 A Yes, ma'am.

14 Q You described for me moments earlier what was in
15 this. Does this -- do these pictures, State's for
16 identification 25, 24, 23, and 22, do they fairly
17 and accurately represent the stages your mother was
18 in a week after this incident?

19 A Yes, ma'am. You could see that one of her eyes had
20 opened to a point. I actually had to go -- I think
21 Huriya had to work one day. I said, I will take
22 care of momma.

23 I got there and momma was laying in the bed.
24 This is the first joke she told me after. You have
25 to understand, my momma is a jovial person. She

1 loves jokes. We always laughed. She said, I see
2 you today --

3 MR. BUCHANAN: Objection, Your Honor.

4 THE COURT: Objection to what?

5 MR. BUCHANAN: Relevance.

6 THE COURT: What part of it, that she is a
7 joking person?

8 MR. BUCHANAN: Basically.

9 THE COURT: I sustain the objection.

10 A She opened that eye, and she said, I see you today.

11 Q So what does this picture represent?

12 A This is probably, I would say, at most a week.

13 Q That's State's 22?

14 A Twenty-five.

15 Q Thank you. That's State's 25 you are referring to?

16 A Yes, ma'am. This is at most a week because I can
17 see one eye is open, but the other one is not. It
18 was probably four or five days before one eye
19 opened, and it was more like another week before
20 the second eye opened because I had take her to the
21 eye doctor.

22 They were concerned that since her eyes swole
23 up, they had got dirt or something in them, and
24 they were concerned she might have lost some kind
25 of sight, so we had to wait until they opened up.

1 I couldn't take her that week because the
2 second eye hadn't opened enough. When the second
3 eye opened up, which would have been a week after
4 that one, I took her to the doctor, but they
5 couldn't get the eye open enough to examine it.

6 Q Would State's Exhibit 23 represent about the same
7 time period?

8 A Yes, definitely. You can see that that eye has not
9 opened yet. At that point you could actually see
10 her eyes again, the eyelids, but she couldn't -- I
11 think maybe she could have got it opened, but that
12 one eye -- she could see out of the other one --
13 was always scrunched up. So that's got to be about
14 the same time.

15 Q Then we are looking at State's 24. What time
16 period was that? Was that a little prior or after?

17 A That was before that actually happened. At this
18 point she doesn't have either eyes opened. You can
19 barely see one eyelid. You can see the other one
20 fairly well.

21 So that is before that eye opened but not
22 before she actually got the swelling to the point
23 where she could actually open it. So I would say
24 that is probably three days at the most.

25 Q And when would you say State's 22 would fall in

1 that time range?

2 A That has to be the day -- that's either the night
3 we got her to Huriya's house or the next morning.
4 That's very recent. As a matter of fact, it looks
5 like one of us has put medicine in her eye. I
6 would say that is either that morning after or that
7 evening.

8 MS. WHETSTONE: Your Honor, at this point we
9 would move to enter State's 22 through 25 into evidence.

10 THE COURT: Mr. Buchanan.

11 MR. BUCHANAN: Your Honor, we object. I don't
12 believe they have laid the proper foundation. We don't
13 know who took those photographs.

14 THE COURT: Let me see them a minute,
15 Solicitor.

16 (Hands to Court).

17 THE COURT: I would overrule the objection. I
18 believe this witness has testified as to the various
19 stages and times, general times, in which those
20 photographs were taken. Twenty-two through 25 are in
21 evidence.

22 MS. WHETSTONE: Thank you, Your Honor.

23 THE COURT: Subject to the foundation
24 objection.

25 MR. BUCHANAN: Thank you, Your Honor.

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1 (State's Exhibits Number 22-25 are received
2 into evidence).

3 MS. WHETSTONE: Thank you, Your Honor.
4 Permission to publish these to the jury.

5 THE COURT: Yes, ma'am.

6 BY MS. WHETSTONE:

7 Q Briefly will you identify these pictures I am going
8 to show you again. This is State's 22.

9 A Yes, ma'am, that's the first one. That had to be
10 taken either that evening or the very next morning.

11 Q And State's 24?

12 A That one could be a day or two afterwards. Her
13 eyes haven't opened yet. You can start to see the
14 eyelids, but she hasn't got one eye opened. That's
15 at least four to five days. It was four to five
16 days before she opened her eyes. So I would say
17 that was two to three days before then.

18 Q And then State's 23?

19 A That's when momma got that first eye opened. She
20 was actually -- at that point she could get up and
21 kind of stumble to the bathroom on her own because
22 she could see where she was going.

23 That would be, I would say, five days after
24 the incident, which would make it the 27th, I
25 believe. That's five days after the incident. She

1 is sitting up and she has got her eye open.

2 MS. WHETSTONE: Beg the Court's indulgence,
3 Your Honor.

4 THE COURT: Yes, ma'am.

5 (Pause).

6 BY MS. WHETSTONE:

7 Q Tarik, since this incident has happened, have you
8 observed a change in your mother in her quality of
9 life?

10 A Yes, ma'am. Momma was very independent and she was
11 really proud and made us independent. So she
12 didn't like to get us to do things or take her
13 around too much. She liked to drive places on her
14 own. She will still drive places on her, but she
15 can't drive to Rock Hill anymore.

16 She will not -- she is almost always with my
17 sister or myself. She calls me, and granted I
18 probably talk to my momma every day of my life, but
19 she calls me two and three times a day now.
20 Sometime it's just to talk. She is a bit nervous
21 or she is down and depressed, and she just wants to
22 talk.

23 I will pick her up and take her up to Rock
24 Hill with me before I go to school so that she can
25 stay with the grandkids, which she is spending a

1 lot of time with them, and they fuss over her, so
2 everybody is happy.

3 Immediately following the incident, momma
4 wasn't herself. She just -- we all were a group of
5 laughing and funny people. We can't help it. I
6 guess we are smart alecky. It was some weeks
7 before momma really got back to it.

8 She shuffles her little feet now. She doesn't
9 walk -- again, she is just not as independent as
10 she was. She is not as confident as she was, and
11 she is scared a lot. She is just really scared.
12 She doesn't particularly like staying with myself
13 or my sister, but she finds that better than the
14 alternative of staying by herself, which we don't
15 mind.

16 Q Thank you, Tarik. I believe there's no further
17 questions.

18 THE COURT: Thank you, Solicitor.

19 Mr. Buchanan.

20 CROSS EXAMINATION

21 BY MR. BUCHANAN:

22 Q Mr. Johnson, how are you doing today?

23 A I'm well and yourself?

24 Q Mr. Johnson, when you went back to the area after
25 taking your mother to the hospital?

1 A Uh-huh. (Indicating affirmative response).

2 Q Did you try to confront Mr. Golston?

3 A Immediately after?

4 Q At some point.

5 A At some point, yeah, I'm pretty sure I did.

6 Q Did you bust out any windows of his house?

7 A Oh, no, sir. Vandalism is not my thing.

8 THE COURT: What was that last response, no,
9 sir, what?

10 THE WITNESS: Vandalism is not my thing.

11 THE COURT: I didn't quite hear you. You may
12 ask your next question.

13 MR. BUCHANAN: Thank you, Your Honor.

14 BY MR. BUCHANAN:

15 Q That night Mr. Golston did not have the key to your
16 mother's house?

17 A I wasn't there. I have no way of knowing whether
18 she had given him a key or not.

19 MR. BUCHANAN: Beg the Court's indulgence.

20 THE COURT: Yes, sir.

21 (Pause).

22 MR. BUCHANAN: No further questions, Your
23 Honor?

24 THE COURT: Thank you, Mr. Buchanan. Anything
25 further on redirect, Solicitor?

1 MS. WHETSTONE: Nothing further, Your Honor.

2 THE COURT: Thank you, Mr. Johnson. You may
3 step down.

4 THE WITNESS: Thank you, sir.

5 (Witness leaves the witness stand).

6 THE COURT: Solicitor, you may call your next
7 witness.

8 MS. PATTERSON: Your Honor, at this time the
9 State rests.

10 THE COURT: Thank you very much, Solicitor.

11 Madame Forelady, ladies and gentlemen of the
12 jury, as you have heard the State has now rested its
13 case in chief. I am required to take up some motions
14 outside of your presence.

15 I see it's getting close to the lunch hour
16 also. So I think what I will do is allow you to go on
17 to your luncheon recess. Since it will take probably a
18 few minutes for me to hear these motions, I am going to
19 give you a little bit longer for your luncheon recess
20 than normal.

21 I will ask you to please be back in your jury
22 room at 2:30. We will start back at 2:30. Usually I
23 give you an hour and a half so you can experience
24 Lexington lunch time traffic. I will give you more time
25 to sit in traffic.

1 Like I heard somebody say the other day,
2 Patience is a virtue, but sometimes it's real tough to
3 have to use it, but that will give you time to sit a few
4 extra minutes in Lexington lunchtime traffic.

5 I remind you, you are not to discuss this case
6 with anyone during the recess, including your fellow
7 jurors, your lunch mates, your family, friends or anyone
8 else.

9 If anyone tries to talk with you about the
10 case, please let me know. Remember to keep an open mind
11 and not begin your deliberations until you are
12 instructed to do so by the Court. I would ask you again
13 to please be back promptly at 2:30. I hope you have a
14 pleasant lunch. I will see you then. Thank you very
15 much.

16 (The jury is excused for lunch at 12:42 p.m.)

17 THE COURT: Anything from the Defendant,
18 Mr. Buchanan?

19 MR. BUCHANAN: Yes, sir, Your Honor. We would
20 wish to make a motion for directed verdict at this time,
21 Your Honor. The State has not proven each and every
22 element.

23 Furthermore, one of the main issues, of
24 course, as Your Honor might predict, is the cohabitation
25 requirement of criminal domestic violence, 16-25-10.

1 That is the section that defines household member.

2 At no point has there been any evidence or
3 testimony of Subsection (1), (2) or (3), spouse, former
4 spouse or persons with a child in common. So certainly
5 we would move that there is no evidence. Therefore,
6 those three would not be considered. So all that is
7 left is the number (4), a male and female cohabiting or
8 formerly having cohabited.

9 I have done some research on cohabit, and it
10 seems as though -- we would make the assertion that
11 cohabit is actually a term of art rather than a question
12 of fact for the jury.

13 THE COURT: In other words, I can decide it as
14 a matter of law then? It doesn't go to the jury on
15 cohabitation if I make the decision, and that's not an
16 element?

17 MR. BUCHANAN: Well, taking the plain meaning
18 of cohabitation and cohabit -- I'm sorry -- cohabiting
19 or formerly cohabiting, we would make the motion that
20 the State has not provided evidence that would give rise
21 to its plain meaning, and I would withdraw my motion
22 about the term of art.

23 THE COURT: All right, sir. Anything further?
24 I didn't mean to cut you off.

25 MR. BUCHANAN: That's fine, Your Honor. I am

1 talking faster than I'm thinking. Your Honor, cohabit
2 in its plain language meaning has some guidance in
3 family court, Jakar v. Jakar, which is 13 S.C. 295, 101
4 S.E. 337. That's a 1920 case.

5 In Justice Frazier's dissent he writes that
6 cohabit means living together as man and wife.
7 Certainly a much more recent case is E.D.M. versus
8 T.A.M., 307 S.C.471, 415 S.E.2d 812. That's a 1992
9 case.

10 The Court reference in Jacar and Frazier's
11 description, the Court said cohabitation was living
12 together in the same house. What we would also point
13 out Your Honor is Black's Law Dictionary, the seventh
14 edition, defines cohabitation as the fact or state of
15 living together, especially as partners in life, usually
16 with a suggestion of sexual relations.

17 So there is no evidence towards partners in
18 life or living together as man and wife. So we would
19 therefore make the motion as a directed verdict that the
20 State has not proven its burden and met its burden by
21 failing to address or present any evidence of -- for
22 that issue.

23 THE COURT: Thank you. Thank you very much,
24 Mr. Buchanan. Solicitor.

25 MS. PATTERSON: Thank you, Your Honor. As we

1 all know, at this point when deciding on whether there
2 is to be a directed verdict or not, the Court is only to
3 consider the existence or non-existence of evidence and
4 not the weight. That is a jury question.

5 It is the State's position that we have
6 proved -- we have provided evidence that the Defendant
7 lived with the victim, Ms. Myrtle Johnson, Your Honor.
8 She testified to it. Her son testified to it.

9 Mr. Golston was there 90 percent of time. He
10 had personal belongings there. He bathed there, slept
11 there, cooked there, ate there, brushed his teeth there,
12 he was there all the time.

13 When he was left wandering the streets, he
14 would always return there, Your Honor. Just because he
15 received mail at his mailbox as this structure, that
16 don't mean he lived there, Your Honor. The officers
17 testified this place was not a liveable place. It is
18 our position that he did not live there.

19 There is some evidence that he live there.
20 The victim and her son, they have no reason to lie about
21 him living there. She testified they were in a romantic
22 relationship. She loved him. She cared for him. They
23 had a good time together. Why would she lie about him
24 living or not living there, Your Honor?

25 We have provided enough evidence, I think, for

1 this case to be handed over to the jury and let the jury
2 decide. That is a question of weight and not the
3 existence thereof, Your Honor.

4 THE COURT: Thank you. Do you care to
5 respond, Mr. Buchanan?

6 MR. BUCHANAN: Basically, Your Honor, our same
7 basis is that the evidence presented does not rise to
8 the level of what cohabitation as defined in the various
9 sources that I quoted to the Court, Your Honor. A
10 directed verdict would be appropriate.

11 THE COURT: Thank you. As the solicitor
12 points out, the stage at which I'm at, a directed
13 verdict, it is to determine the existence or
14 non-existence of the evidence, not the weight of the
15 evidence.

16 When I look at E.D.M. versus T.A.M., the case
17 you cite, there is language in there where cohabitation
18 has been defined as living together in the same house.
19 The husband argues, however, this Court should define
20 cohabit as to require actual sexual intercourse.

21 This Court has never viewed the act of sexual
22 intercourse as distinguishable from other sexual
23 activity for determining marital matters. For instance,
24 we rejected an act that a homosexual act could not
25 constitute adultery because there was no actual sexual

1 intercourse.

2 Here in the case that you cited, the parties
3 admitted they lived together, shared the same bed, and
4 engaged in at least minimal sexual activities. We
5 conclude this evidence of living together in the instant
6 relationship supports a finding of cohabitation.

7 There is obviously evidence in the record that
8 there was clothes there, shoes, toothbrush. He ate
9 there and cooked there. The son, Mr. Johnson, testified
10 he lived there and that Mr. Golston was there more than
11 he, the son, and the son lived there.

12 So they were either cohabiting -- there is
13 evidence they were ever cohabiting or had formerly
14 cohabitated. I think it's a jury issue at this stage.
15 I would deny your directed verdict. Anything further,
16 Mr. Buchanan?

17 MR. BUCHANAN: Your Honor, I don't know if you
18 would like to take up the issue whether or not during
19 this break if you wanted to discuss with Mr. Golston
20 about his decision to testify now or if you prefer after
21 the lunch break. It might be an appropriate time.

22 THE COURT: All right. Mr. Golston, would you
23 please stand.

24 Madame Clerk, would you place Mr. Golston
25 under oath for me.

1 BENNIE GOLSTON is first duly
2 sworn.

3 THE COURT: Mr. Golston, I need to go over --
4 please stand for me -- I need to go over some things
5 with you. I do this with everyone who is on trial, and
6 I need your responses to be under oath. That's why I
7 had the clerk place you under oath.

8 We have reached the stage of the trial where
9 the State has rested, and your side, the defense, now
10 has the opportunity to present evidence for the jury to
11 consider. Do you understand where we are in the trial?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: In that regard you may call
14 witnesses to testify, and if you choose to testify
15 yourself, you may do so. Do you understand?

16 THE DEFENDANT: Yes, sir.

17 THE COURT: No one can force you to testify.
18 You have an absolute right to remain silent. And if you
19 choose not to testify, I will tell this jury that they
20 cannot hold your silence against you in any way. I will
21 tell them that they are not to discuss that in the jury
22 room. Do you understand?

23 THE DEFENDANT: Yes, sir.

24 THE COURT: If your side offers no evidence at
25 all, in other words, if neither you nor anyone on your

1 behalf testifies or offers any exhibits, then your
2 attorneys or your attorney will get to make the last
3 argument to the jury. Otherwise, the prosecutor gets to
4 make the last argument. Do you understand?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Is there any prior criminal record
7 that would subject Mr. Golston to impeachment under our
8 rule of evidence, Solicitor?

9 MS. PATTERSON: No, sir Your Honor.

10 THE COURT: Mr. Golston, the decision about
11 whether you testify or not is your decision to make and
12 yours alone. I expect that you have conferred with your
13 attorneys or perhaps with others whose opinions you
14 value on important decisions, but again the decision
15 about whether you testify or not is your call, your
16 decision. Do you understand?

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Has anyone exercised any undue
19 influence over you to get you to choose to testify or
20 not to testify?

21 THE DEFENDANT: No.

22 THE COURT: Today are you under the influence
23 of any drugs, alcohol, medication or anything that
24 negatively affects your thinking ability?

25 THE DEFENDANT: No.

1 THE COURT: Do you suffer from any physical or
2 mental problems that affect your thinking today?

3 THE DEFENDANT: No.

4 THE COURT: Are there any questions you would
5 like to ask me concerning your right to testify or not
6 to testify?

7 THE DEFENDANT: No.

8 THE COURT: I will give you an opportunity
9 over the luncheon recess to discuss that matter with
10 your attorney to make your decision. You may be seated,
11 Mr. Golston.

12 Mr. Buchanan, I would ask this. Obviously the
13 trial goes in one direction as far as timing if
14 Mr. Golston testifies and another direction as far as
15 timing if he chooses not to or if you choose not to call
16 any witnesses.

17 Can you tell us or is it premature for you to
18 tell us at this time whether or not you intend to call
19 any witnesses, not Mr. Golston, but any others?

20 MR. BUCHANAN: I think at this point we have
21 been planning on calling some witnesses. That might
22 change in my conversations with Mr. Golston, but I do
23 believe we will present a defense.

24 THE COURT: Should that change, in other
25 words, let say by 14:15 hours, by 2:15, if it appears

1 that the defense is going to rest and you are not going
2 to offer any testimony, Mr. Golston or others, would you
3 object to advising the solicitor and myself because I
4 still have perhaps a charge to prepare?

5 MR. BUCHANAN: I don't have a problem with
6 that.

7 THE COURT: So the solicitor would at least
8 have that 15-minute notice. It's not so much I care
9 whether the solicitor has notice or not, it's just I
10 want to be prepared to get the jury back in at 14:30
11 hours, at 2:30. Do you have any specific requests to
12 charge?

13 MR. BUCHANAN: Yes, I do, Your Honor. It
14 actually kind of dovetails the definition of
15 cohabitation.

16 THE COURT: All right. If you would just give
17 those to my law clerk and give a copy to the solicitor.
18 I will look at them over the luncheon recess.

19 MR. BUCHANAN: The Black Law's Dictionary, I
20 photocopied that. I cited it. I will provide a copy of
21 this.

22 (Hands to Court).

23 THE COURT: What edition of Black's Law is it?

24 MR. BUCHANAN: The seventh edition.

25 THE COURT: Any other specific requests to

1 charge?

2 MR. BUCHANAN: Not at this time, Your Honor.

3 THE COURT: Just let me know if you have any
4 others. Solicitor, do you have any?

5 MS. PATTERSON: No, sir Your Honor.

6 THE COURT: Thank you very much. Court will
7 be in recess until 2:30.

8 (Whereupon there is a luncheon recess).

9 THE COURT: Anything before we bring in our
10 jury, Solicitor?

11 MS. PATTERSON: Nothing from the State, Your
12 Honor.

13 THE COURT: Mr. Buchanan?

14 MR. BUCHANAN: Nothing, Your Honor.

15 THE COURT: Has the Defendant made a decision
16 about whether or not he wishes to testify?

17 MR. BUCHANAN: Yes, he has, Your Honor.

18 THE COURT: What is that decision?

19 MR. BUCHANAN: He has elected to testify, Your
20 Honor.

21 THE COURT: Would you please stand for me,
22 Mr. Golston. You have had the opportunity over the
23 luncheon recess to consider the matter of whether you
24 wish to testify or not testify?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Have you made that decision?

2 THE DEFENDANT: Yes, sir.

3 THE COURT: Whatever decision you have made,
4 was that your decision, of your own free and accord?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Do you have any questions you
7 would like to ask me about the decision you made?

8 THE DEFENDANT: No, sir.

9 THE COURT: Nobody has forced you into making
10 whatever decision you made?

11 THE DEFENDANT: No, sir.

12 THE COURT: What is your decision?

13 THE DEFENDANT: To testify.

14 THE COURT: Thank you very much. You may be
15 seated.

16 Sheriff, may I see you one moment.

17 (Pause).

18 THE COURT: If you need to refer to any items
19 of evidence that are in the box, Mr. Buchanan or
20 Mr. Mauldin, you may certainly do so. I just wanted to
21 secure it. I didn't want it to be an issue in front of
22 the jury. Anything further, Mr. Buchanan?

23 MR. BUCHANAN: Nothing, Your Honor.

24 THE COURT: All right. You can bring our
25 jury, please.

1 (The jury returns to the courtroom at
2 2:36 p.m.)

3 THE COURT: Did everyone get to experience
4 Lexington lunchtime traffic? I hope you did. Very
5 well. Welcome back. I hope you all had a pleasant
6 lunch. We are now continuing with the trial of the
7 case.

8 As you recall, the State has rested its case
9 in chief. The Defendant may present testimony or
10 evidence if he chooses to do so. A defendant in South
11 Carolina never has to present evidence.

12 As you know, the Defendant is presumed to be
13 innocent, and the State has the burden of proving the
14 case, each and every essential element of the charge,
15 beyond a reasonable doubt.

16 Again, however, the Defendant may produce
17 evidence if he chooses to do so. With that being said,
18 Mr. Buchanan, does the defense intend to offer any
19 witnesses or testimony?

20 MR. BUCHANAN: Yes, the defense does, Your
21 Honor.

22 THE COURT: You may call your witness.

23 MR. BUCHANAN: Thank you, Your Honor. The
24 defense wishes to call Myrtle Johnson back to the stand,
25 Your Honor.

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1 THE COURT: Ms. Johnson, would you come around
2 for us, please.

3 CLERK: Is she still under oath from
4 yesterday?

5 THE COURT: Yes, she is still under oath.
6 That would be appropriate.

7 MYRTLE JOHNSON, having been
8 previously duly sworn, resumes the witness stand and
9 testifies as follows:

10 THE COURT: Ms. Johnson, if you would please
11 consider yourself to still be under oath.

12 THE WITNESS: Yes, sir.

13 THE COURT: Thank you very much.
14 Mr. Buchanan.

15 MR. BUCHANAN: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. BUCHANAN:

18 Q Good afternoon, Ms. Johnson.

19 A Good afternoon.

20 Q I called you back up here because I wanted to ask
21 you a couple more questions just real briefly,
22 Ms. Johnson. The morning of March 22, 2008, you
23 were questioned by police; were you not?

24 A Yes, sir.

25 Q Before you got on the ambulance, the police asked

1 you some questions?

2 THE COURT: What date is that? Let me get
3 that straight.

4 MR. BUCHANAN: March 22, 2008.

5 THE COURT: Thank you.

6 BY MR. BUCHANAN:

7 Q The police asked you some questions, one of them
8 being that they asked you if any weapons were used
9 in the assault?

10 A I'm sure they did, sir.

11 Q Do you remember telling them no?

12 A No, I don't remember exactly what I said. At that
13 time that was just hours after the attack, correct?

14 Q Well, you are the one who is testifying so I can't
15 answer.

16 A That's when the police came into my home. I was
17 awakened by Gail. That means that was hours after
18 the attack, and I was very woozy. I couldn't
19 hardly speak. So I'm not real clear on the events,
20 how they happened.

21 Q That's fine, just what you remember. So you don't
22 remember telling them, no? When the police asked
23 you were there any weapons used in the attack, you
24 don't recall telling them no?

25 A I don't remember telling them no. What I do

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1 remember is telling them there was a hatchet, but
2 he didn't hit me, like on the head with the
3 hatchet. He rubbed the hatchet over my neck and
4 skin. That's what I remember.

5 Q Did the topic of the hatchet come up when they
6 asked you if Mr. Golston was known to carry any
7 weapons?

8 A Did he ordinarily carry weapons?

9 Q Did the officers ask you that?

10 A I don't remember that.

11 Q That's fine. Do you remember them asking you
12 several times, at least three times, about weapons,
13 and you answered no all three times?

14 A I don't remember that.

15 Q Thank you very much.

16 A You are welcome, sir.

17 THE COURT: Solicitor? Let's see if
18 Ms. Patterson or Ms. Whetstone have any questions for
19 Ms. Johnson.

20 MS. PATTERSON: No, sir, Your Honor. No
21 questions.

22 THE COURT: I didn't mean to slow you down.

23 THE WITNESS: I will start again.

24 THE COURT: You may step down, Ms. Johnson.

25 (Witness leaves the witness stand).

1 THE COURT: Mr. Buchanan, you may call your
2 next witness.

3 MR. MAULDIN: The defense would call Gail
4 Jones to the stand.

5 THE COURT: I apologize, Mr. Mauldin. You may
6 call your next witness.

7 MR. MAULDIN: That's fine.

8 CLERK: Still under oath, Your Honor?

9 THE COURT: Yes, Ms. Jones is still under
10 oath. Thank you.

11 GAIL JONES, having been
12 previously duly sworn, resumes the witness stand and
13 testifies as follows:

14 DIRECT EXAMINATION

15 BY MR. MAULDIN:

16 Q Ms. Jones, where were you when the police arrived
17 at Myrtle Johnson's house on March 22, 2008?

18 A In Myrtle Johnson's bedroom.

19 Q And where were you when they were asking her
20 questions about what had happened?

21 A Right beside Myrtle.

22 Q And what, if anything, did she say about a weapon
23 being used in the attack?

24 A The question was asked, Did he use any weapons on
25 you? She stated no.

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1 Q And how many times did she say that?

2 A Approximately three times.

3 Q When was the first time you heard her mention a
4 hatchet?

5 A One of the officers asked, Do you know if Ben
6 carried or have any weapons in his possession? She
7 said that he had been known to carry an axe.

8 MR. MAULDIN: No further questions, Your
9 Honor.

10 THE COURT: Thank you, Mr. Mauldin.
11 Solicitor?

12 MS. PATTERSON: No questions for this witness.

13 THE COURT: Thank you very much, Ms. Jones.
14 You may step down.

15 (Witness leaves the witness stand).

16 THE COURT: Mr. Buchanan, you may call your
17 next witness.

18 MR. BUCHANAN: The defense wishes to call
19 Ms. Bambi Gray.

20 THE COURT: Ms. Gray, if you would come
21 around, please.

22 BAMBI LADAWN GRAY, being
23 first duly sworn, testifies as follows:

24 CLERK: State your full name, spelling your
25 last, please.

1 THE WITNESS: Bambi Ladawn Gray, G-R-A-Y.

2 COURT REPORTER: Spell your middle name,
3 please.

4 THE WITNESS: L-A-D-A-W-N.

5 DIRECT EXAMINATION

6 BY MR. BUCHANAN:

7 Q Ms. Gray, can you tell us how you -- do you know
8 Mr. Golston?

9 A Yes, he is my uncle.

10 Q How long have you known Mr. Golston?

11 A All my life.

12 Q Have you ever been out to the area on
13 ?

14 A Yes, I go to that area like on the weekends, which
15 is like Friday, Saturday, and Sunday, but I live
16 here in Lexington.

17 Q So Mr. Golston being your uncle, do you know him
18 pretty well?

19 A Yes.

20 Q Do you know where he lives?

21 A Yes.

22 Q Where is that?

23 A I don't know the exact address, but he lives like
24 walking distance from where my mom -- my mom has a
25 place in that same area, which she is only there on

1 the weekends. She works in Greenville. It's like
2 walking distance.

3 Q How would you describe Mr. Golston's house?

4 A It's a structure but on the inside of the structure
5 is like a mobile home in the inside of it. The
6 outside is like an extra addition he just added on.

7 Q I am showing you what is marked State's Exhibit 3.
8 Do you recognize what is in that picture?

9 A Yes.

10 Q What is that?

11 A It's Bennie's house.

12 Q Do you remember anything that happened on March 22,
13 2008?

14 A Well, on that particular day I was down there in
15 that area at the place where my mom was. Yes, I
16 can remember some cops coming to my mother's house.
17 When they came in, they knocked on the door. My
18 mom went to the door. They asked her did she know
19 Bennie Golston.

20 My mom say, Yeah, that's my brother. They
21 said, Is he in here? My mom said, No. What is
22 going on? Then one of them stated, Do you know
23 Ms. Johnson, Myrtle Johnson? My mom said yes.
24 They was like, He literally almost killed her. My
25 mom was like, What's going on?

1 Can we just come in your house and search?

2 MS. PATTERSON: Objection to hearsay.

3 THE COURT: Ma'am?

4 MS. PATTERSON: Hearsay, what her mom is
5 saying.

6 THE COURT: Is the next point, Mr. Buchanan,
7 that they searched her mother's home? I don't know
8 where we are going. It's obviously hearsay, whatever
9 her statements her mother gave and told the police, and
10 at this point it's the unidentified police officer.

11 MR. BUCHANAN: I understand, yes, Your Honor.
12 Allow me to ask my next question, and I think we will
13 clarify what I need to get.

14 THE COURT: All right.

15 BY MR. BUCHANAN:

16 Q After the officers left your mother's house place,
17 did you remain in that area?

18 A Yes, I did.

19 Q Did you observe anything else happen after the
20 officers left?

21 A They just went around like to the back part of my
22 mother's house. If I can remember hearing them
23 holler, We saw him. I guess they saw him running
24 through the woods if that's what they saw. But I
25 was right there on the porch, and I saw everything,

1 and I heard them say -- ask my mother the questions
2 also.

3 Q Do you know Tarik Johnson?

4 A Yes, I do.

5 Q Did you happen to see Tarik that day?

6 A Yes, I did.

7 Q Did you see him doing anything?

8 A Well, he was standing out like behind -- on this
9 picture, it would be like on the side. He was, I
10 guess, looking for Bennie. I saw him threw
11 something up at the window. I don't if it was a
12 rock or what it was.

13 Then the window was like broke on that side,
14 this particular side right here (indicating).
15 Because my mother's house is like on this side
16 (indicating). If you look up, I can see everything
17 up the road, what is going on.

18 MR. BUCHANAN: Beg the Court's indulgence,
19 Your Honor.

20 (Pause).

21 MR. BUCHANAN: No further questions. Please
22 answer any questions the solicitor wishes to ask.

23 THE COURT: Thank you, Mr. Buchanan.
24 Solicitor.

25 MS. PATTERSON: Thank you, Your Honor.

1 CROSS EXAMINATION

2 BY MS. PATTERSON:

3 Q Ms. Gray, how long have you been going out to
4 | on the weekends?5 A Well, I grew up --- that's where I was born and
6 raised at. But, you know, as I grew up, I moved
7 away, got my own place. I been going out there on
8 the weekends for probably like pretty much --
9 pretty much a lot because my grandmother live in
10 that area also.11 Q So when you say you go there on the weekend, are
12 you there like from Friday to Sunday or just there
13 certain days on the weekends?14 A Sometimes I go from Friday to Sunday, and sometimes
15 it's like I will go Saturday morning and stay until
16 Sunday night.

17 Q So you spend the night?

18 A I spend the night.

19 Q I am going to show you what has been marked as
20 State's Exhibit 4 and ask you if you recognize it.
21 Do you recognize that?

22 A Yes.

23 Q What is that a picture of?

24 A It's a picture of the -- I would call it more like
25 an addition, like a built on type sort of thing of.

1 Bennie's house. This part right here (indicating)
2 is not where he lives. It's just an extra part
3 where he built on.

4 Q And when Mr. Buchanan was questioning you, you
5 referred to it as a structure?

6 A Well, that's all it is, is a structure. I mean, in
7 my eyesight.

8 Q Looking at that picture --

9 MS. PATTERSON: Beg the Court's indulgence.

10 THE COURT: Yes, ma'am.

11 (Pause).

12 BY MS. PATTERSON:

13 Q You mentioned you saw the victim's son Tarik throw
14 something at this structure?

15 A (Witness nods). (Indicating affirmative response).
16 Yes, I did.

17 Q Did you see what it was?

18 A I wasn't that close. I was standing on the porch.
19 Like I say, I can't tell you whether it was a rock.
20 I seen him throwing something up at the house.

21 Q Do you know if it caused any damage to the house?

22 A Yeah, he broke some windows.

23 Q You said some windows?

24 A On that particular side. I believe he was angry at
25 what had happened to his mother.

1 Q Was it on this side (indicating) of the house, of
2 the structure?

3 A It was more like -- okay, not on this side
4 (indicating), but more like on the side where it's
5 like a -- I guess you call it a porch, more like on
6 that side.

7 Q Do you know how this other damage -- what caused
8 this other damage?

9 A We had a real bad storm one time. I can't recall.
10 You know, it's been since Bennie has been in jail,
11 it has been storms. So I mean, no, I don't.

12 Q Do you know if those storms caused any damage to
13 those windows?

14 A The windows or the structure?

15 Q The structure.

16 A The structure, yeah, I'm sure the storm caused
17 damage to the structure. The windows, I couldn't
18 tell you because I did see him throw something up
19 at those windows.

20 MS. PATTERSON: No further questions.

21 THE COURT: Mr. Buchanan?

22 MR. BUCHANAN: Nothing, Your Honor.

23 THE COURT: Thank you, Ms. Gray. You may step
24 down.

25 (Witness leaves the witness stand).

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1 MR. BUCHANAN: Your Honor, we move to allow
2 Ms. Gray to be excused.

3 THE COURT: She can remain. I'm not excusing
4 her.

5 MR. BUCHANAN: Understood, Your Honor.

6 THE COURT: Thank you. You may call your next
7 witness.

8 MR. BUCHANAN: Your Honor, the defense calls
9 Bennie Golston.

10 THE COURT: Mr. Golston, if you would come
11 around, please, and be sworn.

12 BENNIE GOLSTON, being
13 first duly sworn, testifies as follows:

14 CLERK: State your full name once you are
15 seated, spelling your last.

16 THE WITNESS: Bennie Golston, G-O-L-S-T-O-N.

17 DIRECT EXAMINATION

18 BY MR. BUCHANAN:

19 Q Mr. Golston, how long have you lived on
20 ?

21 A About 45 years.

22 Q How old are you?

23 A Fifty-five.

24 Q What is the address of where you live on
25 ?

- 1 A
- 2 Q Is that the number of the lot?
- 3 A That's my mailing address.
- 4 Q Now, could you describe your house.
- 5 A It was a 48-foot mobile home. All right. I came
6 up 48-foot on the back, and I added 14-foot out,
7 and I went down 48 inches. I left at 48 inches. I
8 went out 26 inches -- 26 feet. Then I put the two
9 story on the top. Then I bricked the thing and put
10 a patio in the back with a fireplace.
- 11 Q What's your trade?
- 12 A Brick mason.
- 13 Q So it's kind of the worse for wear. How did that
14 happen?
- 15 A How what?
- 16 Q How would you describe your house right now?
- 17 A The storm tore it up.
- 18 Q Which storm?
- 19 A About two or three of them. It seems like it was
20 right when the storm passed.
- 21 Q Did you ever try fixing it up?
- 22 A I didn't have any money.
- 23 Q How did you use your house?
- 24 A Well, I go there when I don't want to be bothered.
25 I sleep, get up, and go.

1 Q Do you know Myrtle Johnson?

2 A Yes, I know Myrtle.

3 Q Did you ever live with Ms. Johnson?

4 A I spent a night sometimes.

5 Q Are you aware of Ms. Johnson having other
6 relationships?

7 A She had a boyfriend and she was married once.

8 Q Not to you?

9 A No.

10 Q Let's go back roughly a year, a little bit more
11 than a year, March of 2008. Did Ms. Johnson have a
12 boyfriend at that time?

13 A I don't know.

14 Q Let's talk about March 21, 2008. Do you remember
15 that day?

16 A Yes.

17 Q What did you do in the early parts of the day?

18 A There wasn't no early part of that day for me. I
19 worked at March 21. I knocked off 5:00 o'clock
20 that evening.

21 Q What did you do after you finished work?

22 A I rode with Myrtle to take the worker home.

23 Q The worker home, who is that?

24 A The worker she had working there.

25 Q Do you know who that person was?

1 A Alfred.

2 Q Alfred. So you took him home?

3 A Right.

4 Q Then what did you and Myrtle do?

5 A I sat on the front porch and started drinking a
6 beer.

7 Q Then what happened?

8 A I was waiting on the guys I work for to bring my
9 money I had worked for. So I sit and sit and
10 nobody never came. So after a while Alfred came
11 back, him and some girl, and they all went in the
12 house.

13 They stayed there, stayed, so finally after a
14 while I ran out of beer. I walked down to the
15 store and got another one and came back and sat and
16 drank that. It done got dark. So then I went
17 home.

18 Q Did you observe anything inside the house? Was
19 Alfred and Myrtle still inside?

20 A No, I didn't even look in it.

21 Q So then you went home? When you said it went dark,
22 you said then you went home?

23 A Yeah, I went home and went to bed.

24 Q That was at which house?

25 A About probably 8:30 or 9:00 o'clock.

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- 1 Q Which house was that you went home?
- 2 A My house.
- 3 Q So what happened? You said you went home and went
- 4 to bed? Did you sleep any?
- 5 A I slept till about 12:00 o'clock.
- 6 Q That same night --
- 7 A The same night. I got up 12:00 o'clock, and I went
- 8 up to Myrtle's house.
- 9 Q Was she still awake?
- 10 A I knocked on the door. It was like she was
- 11 standing to the door waiting on me.
- 12 Q What did you do then?
- 13 A She was all right. I told her I was going to go up
- 14 the street to the barbecue.
- 15 Q What is the barbecue?
- 16 A About a half mile up the street.
- 17 Q Is that a barbecue store?
- 18 A No, they was getting it ready for a party the next
- 19 day.
- 20 Q One of those longterm, long-cooking barbecues?
- 21 A Yeah, they was cooking all night. I didn't stay
- 22 down there but about an hour.
- 23 Q So you stayed there for about an hour. Then what
- 24 did you do?
- 25 A I came back to Myrtle's house.

1 Q Did you meet Myrtle there?

2 A I knocked on the door. She came out the house.

3 Q Then what happened?

4 A I don't know. She was furious. She said, I'm
5 going. I said, You ain't going nowhere. She
6 started walking off. I went behind her and said,
7 Where you going? You ain't going nowhere. She
8 turned around and jumped on me, clawed me in the
9 face.

10 Q How would you describe that clawing?

11 A She clawed me on both sides of my nose and must be
12 a thumb cut my lip all the way through, stuck her
13 fingernails all the way down in my face.

14 Q How did you respond?

15 A I slapped her, both sides of the face.

16 Q Then what?

17 A She fell. Then I walked off. I went in the house.

18 Q Whose house?

19 A Her house. I went in the house looking to see how
20 she done blooded my face up. I wipe that off. So
21 I reach up in her bedroom, and I picked the hatchet
22 up. When I came back out the door, she called me.
23 She say, Ben, come help me get up.

24 So after she called me, I knew then she was
25 sorry. Everything was all right. I laid the

1 hatchet on the car. I said okay. I went and
2 picked her up. She was real nice and all. She
3 kind of hobble off. I took her back to the front
4 porch. When I reached to the door, the door was
5 locked.

6 Q Had you locked the door when you left her house?

7 A No.

8 Q Were there any keys in the lock?

9 A No.

10 Q Where was her pocketbook?

11 A She didn't have a pocketbook.

12 Q So what did you do then?

13 A Well, I said, Well, Somebody here. After all the
14 commotion, I said I am going on home. I went on
15 home.

16 Q So where was Ms. Johnson?

17 A She was laying right on the front step on that pile
18 of wood.

19 Q Which home did you go to?

20 A I went to my house.

21 Q Let me go back a few days earlier. You said Alfred
22 was working on Ms. Johnson's house, right?

23 A Right.

24 Q He had changed the lock?

25 A Right.

1 Q Who had the keys to her house with the new lock?

2 A When he changed the lock, I got one key and she got
3 one, the big key thing that go around her neck.

4 Q Did you have the keys that night?

5 A No, he demanded the key back the next day. He
6 demanded it back, so I give to him. She didn't say
7 nothing, so I gave it to him.

8 Q The next day, you mean the day he installed the
9 lock?

10 A The day he installed the lock. I mean, no, the
11 next day after the lock was installed.

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

14 THE COURT: Yes, sir.

15 (Pause).

16 BY MR. BUCHANAN:

17 Q Now, sorry we are jumping around, but going back to
18 the night of the incident, when Ms. Johnson clawed
19 you, did you provoke her?

20 A No, she just was going, and it was 12:00 o'clock in
21 the night.

22 Q Did you feel you could get away?

23 A What do you mean?

24 Q How did you --

25 A When she clawed me?

1 Q Yes.

2 A Her fingernails were stuck down in my skin, and she
3 had done peeled the skin on my face both sides of
4 my nose probably about two inches and cut my lip
5 all the way through. She was locked in my face.

6 Q Did you feel then that you could get away?

7 A I had to tap her lose to get her away. She was
8 furious.

9 Q Mr. Golston, no further questions. Please answer
10 anything the solicitor asks you.

11 THE COURT: Thank you, Mr. Buchanan.

12 Solicitor.

13 MS. PATTERSON: Beg the Court's indulgence.

14 (Pause).

15 CROSS EXAMINATION

16 BY MS. PATTERSON:

17 Q Mr. Golston, were you ever in a romantic
18 relationship with Ms. Johnson?

19 A We was good friends and lovers at times.

20 Q And did you ever live with her?

21 A I spent the night there and a bunch of places.

22 Q About how many nights a week did you spend at her
23 house?

24 A Sometimes I didn't spend a night in months.

25 Q Did you have clothes at her house?

1 A No, she had clothes there for me. She's a
2 seamstress. She make clothes.

3 Q Did you wear those clothes?

4 A What clothes?

5 Q That she would make for you?

6 A They would be used clothes she done got somewhere
7 or something.

8 Q Did you have shoes at her house?

9 A No, she had shoes there if I wanted them.

10 Q Did you ever wear those shoes she had at the house
11 for you?

12 A I got a pair at a few different times, yeah, from
13 cleaning up, taking them to the trash pile or
14 whatever.

15 Q Did you ever cook at the house for her?

16 A Oh, yeah.

17 Q And when you did spend the night, where did you
18 sleep?

19 A We slept together.

20 Q You said on this date you took Mr. Alfred home?

21 A Right.

22 Q Do you have a driver's license?

23 A She drove.

24 Q Then you came back to her house?

25 A Right.

1 Q And you left?

2 A No, I didn't leave. I stayed on the porch.

3 Q You stayed on the porch. You had a beer?

4 A Right.

5 Q Ran out of beer?

6 A Before I ran out he came back with some woman with
7 him, and they went in the house. I stayed on the
8 porch.

9 Q How many beers did you have?

10 A I hadn't had but that one then. After I finished
11 that one while they was in the house, I walked to
12 the store and got another one. I was waiting on
13 the guys to bring my pay back.

14 Q Do you know why -- do you know why Ms. Johnson was
15 so furious?

16 A I don't know.

17 Q You said she clawed your face?

18 A Definitely.

19 Q Was it messed up pretty bad?

20 A Yeah, it was messed up.

21 Q Did you see a doctor about it?

22 A No.

23 Q When did you learn that the police were looking for
24 you?

25 A When he pulled the gun on me and told me he had a

1 warrant.

2 Q You didn't know before this that the police were
3 looking for you?

4 A No, I hadn't talked to no polices. I just seen
5 them.

6 Q Why were you hiding behind a tree?

7 A Because I was staying out his way.

8 Q You said after Ms. Johnson slapped you, you went in
9 the house and went and got a hatchet. Why did you
10 get a hatchet?

11 A Because I was going home.

12 Q What were you going to do with this hatchet?

13 A I was just taking it with me.

14 Q Do you carry around a hatchet often?

15 A I'm a construction worker. I might have anything.

16 Q Including a hatchet --

17 THE COURT: That wasn't her question. Her
18 question was, do you carry around a hatchet often?

19 THE WITNESS: No.

20 THE COURT: Listen to her questions and answer
21 them. You may continue, Solicitor.

22 MS. PATTERSON: Thank you, Your Honor.

23 BY MS. PATTERSON:

24 Q Did you have a key to Ms. Johnson's house?

25 A No.

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1 Q You never had a key to her house?

2 A I've had one before.

3 Q What happened to it?

4 A It broke.

5 Q How did it break?

6 A It just wore out and broke.

7 Q Did you get another key after that?

8 A They changed the lock.

9 MS. PATTERSON: Beg the Court's indulgence.

10 THE COURT: Yes, ma'am.

11 (Pause).

12 BY MS. PATTERSON:

13 Q Mr. Golston, where were you arrested?

14 A

15 Q What day were you arrested on?

16 A March the 22nd.

17 Q Were you booked into the Lexington County Detention
18 Center on this day?

19 A Right.

20 Q I am going to show you your booking form.

21 A Uh-huh. (Indicating affirmative response).

22 Q Can you please take a look at that.

23 MR. BUCHANAN: Objection, Your Honor. The
24 picture has not yet been authenticated.

25 THE WITNESS: I am looking at it.

1 BY MS. PATTERSON:

2 Q Is that your picture on that photo?

3 A Right.

4 MR. BUCHANAN: Objection, Your Honor. I don't
5 believe we have had a ruling yet.

6 THE COURT: She is asking him the question if
7 that is his picture. He can say yes or no or he can say
8 I don't know. I overrule your objection.

9 MR. BUCHANAN: Thank you, Your Honor.

10 BY MS. PATTERSON:

11 Q What date is on that booking photo?

12 A I don't have my glasses. I can't even see the date
13 on it.

14 MS. PATTERSON: May I approach the witness,
15 Your Honor.

16 THE COURT: Yes, ma'am, you may.

17 A Where is it? Show it to me.

18 Q (Indicating).

19 A Yes, that is 3/22/08.

20 THE COURT: What was the date on it,
21 Mr. Golston?

22 THE WITNESS: 3/22/08.

23 BY MS. PATTERSON:

24 Q So that was the incident date?

25 A Right.

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1 Q Was that booking photo related to this charge that
2 you are on trial for?

3 A Yes.

4 Q Is there anything on that booking report to
5 indicate that you had any injury to your face?

6 A No, but ask the police. He took me in.

7 MR. MAULDIN: Objection, Your Honor --

8 THE WITNESS: Ask the officer --

9 THE COURT: Wait just a minute. Let me hear
10 from your lawyer, Mr. Golston. Yes, sir.

11 MR. BUCHANAN: That information, that document
12 would be hearsay.

13 THE COURT: You can mark it as State's Exhibit
14 for identification, Solicitor. We can get the
15 appropriate person to authenticate it if you choose to
16 do so.

17 MS. PATTERSON: We don't choose to. Beg the
18 Court's indulgence.

19 (Pause).

20 MS. PATTERSON: Your Honor, may we approach?

21 THE COURT: Yes, ma'am.

22 (Whereupon there is a bench conference off the
23 record in the presence of the jury but out of the
24 hearing of the jury).

25 MS. PATTERSON: Your Honor, I would like to

1 get this booking photo marked for identification
2 purposes.

3 THE COURT: That would be State's 26, Madame
4 Court Reporter?

5 COURT REPORTER: Yes, sir.

6 (State's Exhibit Number 26 is marked for
7 identification).

8 BY MS. PATTERSON:

9 Q Mr. Golston, I am going to show you what has been
10 marked as State's Exhibit 3 and 4 and ask you if
11 you remember this.

12 A Yeah, that's my house and trucks.

13 Q And you are you saying that you live in that house?

14 A Not on the front part, on the other part, the
15 little part. There is a mobile home in there.
16 That's just a structure built around it. There's a
17 unit in there. It's a unit.

18 Q And did you have any power in this place?

19 A No, did I need power?

20 THE COURT: That's not a proper answer.

21 THE WITNESS: No, I didn't have any power.

22 THE COURT: Thank you, Mr. Golston.

23 BY MS. PATTERSON:

24 Q How long has it been since you have had power in
25 there?

1 THE COURT: Let me interrupt you one more
2 time. I didn't mean to cut you off a minute ago. You
3 can answer the question, and then you can explain your
4 answer.

5 If you say no, I didn't have power because
6 whatever. I don't mean to cut you off in that regard,
7 sir. You may explain your responses but try to respond
8 first, and then you can explain as fully and completely
9 as you think is necessary.

10 A I don't remember. It was the last storm broke the
11 power pole. Since I had this other structure added
12 on there, they was going to put the meter on the
13 other part of the house that tapped the central
14 heating and air conditioning unit in. It would
15 have put it back on the regular pole for the
16 trailer.

17 Q Did you have any running water in this structure?

18 A Ma'am, there is water there.

19 Q And did you have any furniture in this place?

20 A Yes, ma'am.

21 Q So you had floors in it, right?

22 A Yes.

23 Q Thank you.

24 MS. PATTERSON: No further questions.

25 THE COURT: Let me see if your lawyer has got

1 anymore questions, Mr. Golston.

2 Anything in redirect, Mr. Buchanan?

3 MR. BUCHANAN: No, Your Honor.

4 THE COURT: Thank you. Thank you very much,
5 Mr. Golston. You may step down.

6 (Witness leaves the witness stand).

7 THE COURT: Mr. Buchanan, you may call your
8 next witness.

9 MR. BUCHANAN: Your Honor, at this time the
10 defense rests.

11 THE COURT: Thank you very much.

12 Madame Forelady, ladies and gentlemen of the
13 jury, as you have heard the defense has now rested. I
14 think we are going to take a recess for a few minutes.
15 I remind you during this brief recess, do not discuss
16 the case amongst yourselves. Remember to keep an open
17 mind and not begin your deliberations until you are
18 instructed to by the Court. You may go with the
19 bailiff.

20 (The jury retires to the jury room).

21 THE COURT: Solicitor, do you intend to offer
22 any evidence or testimony in reply?

23 MS. PATTERSON: I do, Your Honor. We are
24 trying to get someone from booking, from the detention
25 center right now, to authenticate Mr. Golston's booking

1 photo.

2 THE COURT: Would you please keep Mr. Buchanan
3 and the Court advised as far as the timing of that.

4 MS. PATTERSON: Yes, sir, I certainly will.

5 THE COURT: How long do you think it will take
6 to get someone over here?

7 Of course, Mr. Buchanan, as you know, you can
8 offer testimony or evidence in sur-reply.

9 MR. BUCHANAN: Yes, Your Honor.

10 THE COURT: Keep that in mind. If you want to
11 be thinking about it and have somebody in mind, you can
12 do that now or if you need time after the State's reply,
13 if they do present a witness, I will certainly grant the
14 defense that.

15 I'm a little unsure, quite frankly, what I
16 will do about the diametrically opposed testimony that I
17 heard in this case from two of the witnesses. Once I
18 make my decision in that regard, I will certainly advise
19 the parties.

20 Anything further, Mr. Buchanan?

21 MR. BUCHANAN: Just, Your Honor, that once we
22 get a name from the State who they intend to call, I
23 would ask you to do a brief voir dire to make sure none
24 of the jury knows them.

25 THE COURT: Sure. You don't have any

1 objection to that?

2 MS. PATTERSON: No, sir, Your Honor.

3 THE COURT: Thank you very much. Court will
4 be in recess. Y'all let me know as soon as we are ready
5 to go.

6 Let me ask you one other thing, Mr. Buchanan.
7 Do y'all have any other requested charges?

8 MR. BUCHANAN: Given Mr. Golston's testimony,
9 we do request a charge of self-defense.

10 THE COURT: Solicitor, do you have an
11 objection to that?

12 MS. PATTERSON: Yes, sir, I object to that. I
13 don't think enough has been established to get the
14 charge of a self-defense charge. I will look over some
15 case law, but he is saying that Ms. Johnson clawed his
16 face and that he -- I just need a minute, Your Honor,
17 but I will object to that on the jury instruction.

18 THE COURT: I will look at it. I will look at
19 it during the break. Do you have a charge?

20 MR. BUCHANAN: A charge for?

21 THE COURT: Self-defense charge?

22 MR. BUCHANAN: I am going to -- I will try to
23 do one during the recess.

24 THE COURT: I will look at it during the
25 break. Thank you very much.

1 MR. BUCHANAN: Also, Your Honor, just one
2 additional thing.

3 THE COURT: Yes, sir.

4 MR. BUCHANAN: We would also like to request
5 an instruction on the lesser-included offense, both of
6 C.D.V., criminal domestic violence, as well as assault
7 and battery.

8 THE COURT: Do you have a position on that,
9 Solicitor?

10 MS. PATTERSON: There are not lesser-included
11 offenses of C.D.V.H.A.N., Your Honor. We would ask that
12 you don't instruct with respect to C.D.V. and assault
13 and battery of a high and aggravated nature.

14 THE COURT: Say that again.

15 MS. PATTERSON: Assault and battery of a high
16 and aggravated nature is not a lesser-included offense.
17 C.D.V. is.

18 THE COURT: I didn't think he asked for
19 assault and battery of a high and aggravated nature.

20 MR. BUCHANAN: I did not, Your Honor. I asked
21 for simple assault and battery, as well as criminal
22 domestic violence.

23 THE COURT: Simple assault and battery is not
24 because there are different elements. They are
25 different elements to simple assault and battery, as

1 opposed to criminal domestic violence. I think there is
2 a case directly on point as far as simple assault and
3 battery. What about criminal domestic violence?

4 MR. BUCHANAN: Your Honor, it would be our
5 position that the language of C.D.V.H.A.N. includes the
6 language of assault and battery. We agree with the
7 State that assault and battery of a high and aggravated
8 nature does not. I did find some case law to that
9 point.

10 The simple assault and battery is simply an
11 unlawful attempt, coupled with the present ability, to
12 commit a violent injury upon the person of another.
13 That is State v. Jones, a classic case from 1925, 33
14 S.C. 167. I believe that the elements for assault and
15 battery are contained within criminal domestic violence,
16 high and aggravated nature.

17 MS. PATTERSON: We would still object to that
18 charge as well.

19 THE COURT: Here is what the evidence shows,
20 depending on whose version you believe. If you believe
21 Ms. Johnson, it's criminal domestic violence of a high
22 and aggravated nature based on both the use of the
23 deadly weapon and serious bodily injury.

24 If you believe Mr. Golston, he is not guilty
25 because of self-defense. So factually I do not think

1 under these facts as presented and these witnesses, it
2 is not sufficient to charge either criminal domestic
3 violence or assault and battery, simple assault and
4 battery. Court will be in recess. Just let me know
5 when you get your witness here.

6 MS. PATTERSON: Thank you, Your Honor.

7 (Whereupon there is a recess).

8 THE COURT: Where is Ms. Gray? She hasn't
9 left?

10 UNIDENTIFIED MAN: No.

11 THE COURT: Anything before we bring in our
12 jury?

13 MR. BUCHANAN: Yes, Your Honor. I was hoping
14 we could revisit your ruling on the lesser-included
15 offense. There's a couple more points I would like to
16 make for the record in all due respect.

17 THE COURT: All right.

18 MR. BUCHANAN: Essentially, Your Honor, it's
19 our contention that the jury is given unfettered power
20 to believe all or even some parts of the testimony or no
21 parts of the testimony as the deciders of the fact.

22 Therefore, Your Honor, it could be conceivable
23 in their weighing of the facts, they could find the
24 elements of the lesser-included offenses met but the
25 principal offense not met. Therefore, again, Your

1 Honor, that's a point I would like to address and make
2 for the record regarding that.

3 THE COURT: Anything further?

4 MR. BUCHANAN: Just, Your Honor, I would like
5 to have a ruling on that for the record.

6 THE COURT: I thought I had already ruled. I
7 apologize if I didn't.

8 MR. BUCHANAN: I'm just wanted to be sure.

9 THE COURT: Let me look a little bit.

10 (Pause).

11 THE COURT: Under State versus Lacoste,
12 L-A-C-O-S-T-E, 553 S.E.2d 464, which is a case that
13 holds simple assault is a lesser-included offense of
14 criminal domestic violence. When I read that -- and I
15 certainly appreciate the fact that the jury has the
16 power and responsibility to rule on the credibility of
17 the witnesses that have testified under oath.

18 However, when I look at that case and many
19 other lines of cases, it advises the law to be charged
20 to the jury is determined by the evidence presented at
21 trial. The substance of the law must be charged to the
22 jury, not particular verbiage.

23 So the Court, as the gatekeeper of determining
24 what should or should not be charged, has to make
25 factual decisions to determine if a particular charge

1 would be appropriate to the jury under the testimony
2 that has been presented.

3 As I understand the testimony that has been
4 presented, again, as far as Ms. Johnson, it would
5 clearly be criminal domestic violence of a high and
6 aggravated nature.

7 As I understand Mr. Golston's testimony, it
8 goes to the issue if there is any evidence of
9 self-defense, the issue should be submitted to the jury
10 upon request. A trial court permits reversible error if
11 it fails to give a requested charge on the issues raised
12 by the evidence.

13 I am just going on the evidence and what law
14 may apply and what may have been raised by the evidence.
15 I do not think that simple assault and battery and
16 criminal domestic violence have been raised by the
17 evidence.

18 I think it's criminal domestic violence of a
19 high and aggravated nature, either guilty of that, or he
20 is not guilty and he is entitled to a charge on
21 self-defense.

22 If there are any particular cases you would
23 like me to look at in regards to revisiting the issue of
24 simple assault and battery or criminal domestic
25 violence, Mr. Buchanan, I would be glad to do so. If

1 there are any such cases, I would be more than happy to
2 look at them. Anything further?

3 MR. BUCHANAN: Your Honor, I do have a couple
4 of cases. I am certainly not interested in testing the
5 Court's patience.

6 THE COURT: All right.

7 MR. BUCHANAN: But I do have State versus, I
8 think, Cude, C-U-D-E, 265 S.C. 313, a 1975 case. The
9 actual language that I am referring to is found on page
10 316.

11 An instruction on the lesser-included offense
12 is proper only when the charged greater offense requires
13 that the jury find a disputed factual element which is
14 not a requisite for a conviction of a lesser offense.

15 THE COURT: Tell me what would be a disputed
16 factual element that would make this just simple assault
17 and battery or just criminal domestic violence.

18 MR. BUCHANAN: This is referring to just the
19 simple assault and battery, and that is the household
20 member requirement that is found in criminal domestic
21 violence and criminal domestic violence high and
22 aggravated.

23 THE COURT: If they don't meet the element,
24 tell me how it would be simple assault and battery
25 though? Because you still have serious bodily injury,

1 and you still have a deadly weapon. So I still do not
2 see how it would be simple assault and battery.

3 Because if you had a simple assault and
4 battery and a defendant was armed with a deadly weapon
5 or there was a threat of a deadly weapon, then it
6 wouldn't be simple assault and battery. It would be
7 assault and battery of a high and aggravated nature,
8 which we all know does not apply.

9 So I am little unsure how I get from these
10 facts to simple assault and battery. Obviously the
11 State has got to prove beyond a reasonable doubt that he
12 is a household member, that he fits that definition,
13 which I am going to charge under the statute about
14 cohabitation. But just because they don't cohabitate
15 doesn't make it simple assault and battery under these
16 facts.

17 MR. BUCHANAN: Well, Your Honor, my only
18 response is I can't think of anything else.

19 THE COURT: That's not a bad response.

20 MR. BUCHANAN: I can't think of anything else
21 that is a lesser-included offense under the law that
22 everyone would agree, Yes, it is a lesser-included
23 offense, that does not include the point of contention,
24 disputed factual elements. That's the only one I could
25 come to obviously, and that is the basis of my motion.

1 THE COURT: It may be a lesser-included
2 offense, but it's not one that is chargeable under
3 these -- this set of facts. That's my view of the
4 evidence and the law that should be charged.

5 It's kind of like I heard a lawyer one time
6 ask -- excuse me -- heard a judge one time ask the
7 lawyer, said, Have you got anymore motions? He said,
8 Judge, I can't think of any right now, but if there is
9 any you will grant, I would be glad to make them.

10 So if that's all you can think of, that's
11 fine. That's no problem at all. But I just don't see
12 this set of facts raises that issue as a lesser-included
13 offense.

14 Solicitor, anything further before we bring in
15 our jury?

16 MS. PATTERSON: Nothing from the State, Your
17 Honor. We chose not to put any other witnesses up in
18 reply.

19 THE COURT: So there is no evidence in reply?

20 MS. PATTERSON: No, sir.

21 THE COURT: How long then will your -- let's
22 start with our closings. How long is this going to
23 take? What time will I get this case to the jury?

24 MS. PATTERSON: My closing is probably about
25 30 minutes, Your Honor.

1 MR. BUCHANAN: I'm still not very good at
2 estimating those things, Your Honor. Roughly I will say
3 20 minutes, if that.

4 THE COURT: That's 50 minutes. It would be
5 5:00 o'clock before I would start charging.

6 MS. PATTERSON: Yes, sir.

7 THE COURT: And 5:30 before we got it to the
8 jury. Let's see what the jury wants to do.

9 MS. PATTERSON: Your Honor, did you rule on
10 the self-defense instruction?

11 THE COURT: Yes, I am going to charge
12 self-defense.

13 MR. BUCHANAN: Your Honor, we have a suggested
14 jury charge.

15 THE COURT: I have the basic standard charge.
16 I would be glad to look at it.

17 MR. BUCHANAN: I have also included one on the
18 burden of proof, which I will just allow you to look at
19 it.

20 THE COURT: All right.

21 (Hands to Court).

22 THE COURT: This self-defense charge that he
23 handed up appears to be the standard charge, Solicitor.

24 MS. PATTERSON: Yes, sir.

25 THE COURT: I think this second one that you

1 handed up, I generally -- I was looking at it at the
2 break as far as the charge on self-defense. The last
3 two sentences I have in this charge, three sentences:
4 Absence of self-defense must be proven by the
5 prosecution beyond a reasonable doubt.

6 If you have a reasonable doubt of the
7 Defendant's guilt after considering all the evidence,
8 including the evidence of self-defense, then you must
9 find him not guilty.

10 On the other hand, if you have no reasonable
11 doubt of the Defendant's guilt after considering all the
12 evidence, including the evidence of self-defense, then
13 you must find him guilty. I think that encapsulates
14 your number two request.

15 MR. BUCHANAN: Yes, Your Honor.

16 THE COURT: We will press on. I will ask the
17 jury and tell them it will probably be about an hour,
18 hour and a half before the case gets to them for their
19 consideration. If they are willing to do that, I
20 certainly am. Bring us our jury, please.

21 (The jury returns to the courtroom).

22 THE COURT: Madame Forelady, ladies and
23 gentlemen of the jury, thank you very much for your
24 patience this afternoon and your continued focus during
25 the trial of this case.

1 The defense has now rested. The State has
2 chosen not to call any witnesses in reply, which there
3 is no requirement for them to do so. So let me tell you
4 where we are at now as far as the stage of the trial.

5 We are now at the point of the closing
6 arguments. The procedure we follow in a case such as
7 this is the State has the right to open briefly on the
8 law.

9 Thereafter, Mr. Buchanan or Mr. Mauldin can
10 close on behalf of the Defendant in full. Thereafter,
11 Solicitor Patterson or Whetstone can present the closing
12 argument on behalf of the State.

13 Closing arguments, the timing of closing
14 arguments, is kind of like the timing of everything else
15 in court. It's a hard thing to estimate. When I was
16 still sitting out there where these young, fine trial
17 lawyers are now sitting, a trial judge told me one time,
18 A good trial lawyer can't estimate time. I hope that is
19 true of a good trial judge, too.

20 Be that as it may, I would say it would be 20
21 to 30 minutes per side for closings. That would give us
22 about 40 minutes to an hour of closing arguments. Then
23 I have to charge you the law, which I think will take
24 below 20 minutes. My court reporter thinks it takes two
25 hours every time I do that. I am thinking below 20

1 minutes.

2 All that being said, it would probably be
3 5:30, quarter to six, before we get the case to you for
4 your deliberations. I am willing to work. I am willing
5 to press on and submit the case to you for your
6 deliberations tonight. If y'all are willing to work, I
7 am willing to.

8 If anybody has any problem, commitments, raise
9 your hand. I won't hold it against you, and we will all
10 be right back here tomorrow, which is where I'm going to
11 be anyway. If y'all want to press on, we will certainly
12 do so.

13 (Pause).

14 FOREMAN: Yes, sir.

15 THE COURT: One further thing just very
16 briefly administratively. I have called nights such
17 this sometime cold pizza night. I can have the clerk
18 order food to have it here a certain time if you want me
19 to do that also. She can take care of that now to where
20 it will be here at 6:00 o'clock or something like that.

21 That's not to intimidate you to think you will
22 be here late. You could be here late or you could be
23 finished quickly. There's no set parameters on that.

24 Do you wish me to go on and have her do that
25 or wait and see after you go out to deliberate a while?

1 Just wait. That will be fine. With that being said,
2 are y'all going to open on the law, Solicitor?

3 MS. PATTERSON: No, sir, Your Honor.

4 THE COURT: The State is going to waive
5 opening.

6 MR. BUCHANAN: Your Honor, may we approach
7 briefly.

8 THE COURT: Yes, sir.

9 (Whereupon there is a bench conference off the
10 record in the presence of the jury but out of the
11 hearing of the jury).

12 THE COURT: Mr. Buchanan.

13 MR. BUCHANAN: Thank you, Your Honor. Before
14 I begin, I would like to renew all motions and all
15 arguments.

16 THE COURT: Thank you. Very well,
17 Mr. Buchanan. All your previous motions, protections
18 are noted for the record, and I would renew all my
19 rulings, both in camera and in court, evidentiary and
20 otherwise. Mr. Buchanan, you may address the jury.

21 Please, ladies and gentlemen, give the
22 attorneys your complete and undivided attention.

23 Further, I would ask that no one come and go
24 while the attorneys are addressing the jury. It can be
25 very distracting. This is the last opportunity they get

1 to address the jury on behalf of their clients.

2 With that being said, Mr. Buchanan.

3 **CLOSING ARGUMENT**

4 MR. BUCHANAN: Thank you, Your Honor, opposing
5 counsel, Madame Forelady, and members of the jury.

6 Well, thanks for bearing with us. This, of
7 course, has been one of the most significant points of
8 Mr. Golston's life. It's a small amount of time for
9 you, but this has been extraordinarily important for him
10 obviously. He is the accused here.

11 He came forward and spoke to you and told you
12 his side of the story, told you what happened. He told
13 you that there was no argument. He told you that he was
14 attacked and that he defended himself appropriately.

15 Now, what happened after that, how Ms. Johnson
16 ended up getting such a swollen face is something that
17 is -- well, ladies and gentlemen, that's kind of the
18 reasonable doubt part. We certainly have testimony by
19 medical, the nurse, who said there was no fractures, no
20 broken bones. It was just swollen tissue.

21 So what you will hear from the judge is the
22 law on self-defense. The judge, Judge McMahon, is going
23 to lay it down, and that's what you follow. But, of
24 course, I am here to give you my take on it.

25 That is essentially if it was appropriate

1 force and he didn't have any means of defending himself
2 any other way, and you heard him testify that he was
3 clawed. They had him or she had him by the flesh of his
4 lip and his nostrils. So he responded appropriately.
5 That's what we hope you will find when you go back and
6 deliberate.

7 The other thing that I hope you also will
8 consider is the fact whether Mr. Golston did, in fact,
9 live in this house. The Solicitor's Office, they made a
10 lot of issue about that. I think they knew that was
11 their weak link.

12 They have thrown all these pictures out here
13 of the exterior, which everyone admits who lived there,
14 said, Yeah, it was an exterior built around a liveable
15 mobile home, an old mobile home. I think there was
16 testimony that it was laid there decades ago.

17 It was something that Mr. Golston, as a
18 bricklayer, brick mason, built around it and created the
19 structure around it that you see. You also heard some
20 testimony that there was some storms that came through.
21 He didn't have the money to effect all the repairs.

22 Sometimes that's how people live. It's
23 something that I hope, ladies and gentlemen, that you
24 don't pass too much of a judgment on, how someone lives.
25 Keep in mind that he lived there.

1 We have testimony from folks, including
2 Mr. Golston himself, that's where he lived. That was
3 his home. You saw Ms. Gail Jones bring and show you
4 that she had a stack of mail that she brought for
5 Mr. Golston yesterday.

6 There was -- the definition that you will
7 hear, because the law is very specific, it talks about
8 three different ways a person can be a household member
9 that makes criminal domestic violence domestic violence.
10 That is married. We didn't hear any testimony about
11 that. Having children in common, we didn't hear any
12 testimony about that.

13 All that is left is to cohabit. Cohabitate,
14 you are allowed to use plain English language, meaning
15 actually living together. I found some -- a definition.
16 This is actual Black's Law Dictionary. Cohabitation,
17 the fact or state of living together, especially as
18 partners in life.

19 So, yeah, Mr. Golston would go over to a
20 neighbor's house and cook dinner on occasion, someone
21 who -- use your common sense. People can be boyfriend
22 and girlfriend and not actually live together even if
23 they spend some time together.

24 That's what you as a jury can do. Use your
25 common sense. What is -- does cohabitation

1 automatically mean they are living together? Or does
2 being boyfriend and girlfriend automatically mean they
3 are living together, A/K/A, cohabitation? The answer is
4 no. The answer is no.

5 So, yes, the State has made a lot of issues
6 about the house, the condition. Of course, you have
7 Mr. Johnson who didn't much care for Mr. Golston,
8 thinking he was around an awful lot.

9 Again, it's a matter of when you have got a
10 house right next door where you are getting your mail.
11 You have got a place to go. You have parents nearby,
12 other relatives nearby.

13 So what if a storm knocked out the power. You
14 have got access to get other necessities of life. The
15 point of the matter is you heard him testify that that
16 was where he lived.

17 He lived there a long time, well before
18 Ms. Johnson move in, well before their relationship.
19 Mr. Golston seemed to be living the way he had lived
20 prior and since he started that relationship with
21 Ms. Johnson.

22 So where does that bring us to what your --
23 how you are going to decide? Well, again the reasonable
24 doubt standard will apply, which means that the benefit
25 of the doubt goes to Mr. Golston, not to the State.

1 The State has to make you firmly convinced
2 there was cohabitation, that he was not acting in
3 self-defense, and that all the other elements are not
4 present.

5 The elements, like I explained to you before,
6 it's kind of like a recipe. Take, for example, a real
7 simple recipe for a cake. You have milk, flour, eggs,
8 butter, and sugar. If you omit one of the elements, you
9 don't get a cake. If you omit the sugar, you will not
10 get a cake.

11 It's just like this. If you have -- even if
12 you might find that they have other things, if they
13 don't have the cohabitation, you don't have the cake,
14 and the State doesn't have a cake.

15 So those are the -- again, ladies and
16 gentlemen, it's for the defense of the individual
17 against the power of the State that the burden lies with
18 them.

19 It's what the founding fathers established.
20 It's based on a distrust of government from olden times,
21 and to this day juries are sworn to put the State to the
22 test, not the defense.

23 The defense didn't have to -- we didn't even
24 have to put up anything, but we chose to present our
25 side of the story. Mr. Golston came up and testified.

1 Family members, folks from around there who knew him,
2 came up and testified and said, No, he didn't live with
3 her.

4 He never did. He had his own place and got
5 his mail there. Those were the facts you heard, ladies
6 and gentlemen. So when you go and deliberate, keep that
7 in mind.

8 In the next phase, you are going to be hearing
9 from the solicitor, and they are going to try and show
10 these pictures. Now, notice you are only going to see
11 the outside. You never get an inside picture of what it
12 was like inside. So Mr. Golston said it was livable.
13 He lived there. The officers are making their own
14 judgment call.

15 Ladies and gentlemen, your call is to put the
16 State to the test. And when you go back and deliberate,
17 you will find that the State doesn't have a case,
18 doesn't have a case. They omitted one of the most
19 important elements of the crime for which Mr. Golston is
20 charged, and therefore you must find him not guilty.
21 Thank you.

22 THE COURT: Thank you, Mr. Buchanan.
23 Solicitor.

24 MS. PATTERSON: Thank you, Your Honor. May it
25 please the Court.

1 THE COURT: Yes, ma'am.

2 CLOSING ARGUMENT

3 MS. PATTERSON: Opposing counsel. I thought I
4 was going to die. I thought I was going to die. I
5 thought I was going to die. On March 22, 2008, the
6 victim in this case, Ms. Myrtle Johnson, thought she was
7 going to die.

8 She thought she was going to die at the hands
9 of the Defendant, Bennie Golston, someone she had a
10 romantic relationship with, someone she loved, someone
11 she had good times with, someone she let live in her
12 house.

13 Members of the jury, Bennie Golston is charged
14 with criminal domestic violence of a high and aggravated
15 nature. His attorney is right. It is my burden of
16 proof, proving to you not beyond all doubt, but beyond a
17 reasonable doubt, that all the elements were met in this
18 charge.

19 The judge will instruct you later with respect
20 to what I have to prove. I am certain that I have met
21 that burden, far beyond what I had to do. In meeting
22 that burden, let's just review some of the testimony,
23 review some of the evidence that have been put before
24 you this last day and a half.

25 First of all, you heard from Ms. Myrtle

1 Johnson. She sat right there on the stand, a nice,
2 little old lady, 70 seven years old now, 69 years old at
3 the time.

4 She testified that she met Mr. Golston maybe
5 about five, six years ago. About a year after they met,
6 they began a relationship, had good times together. He
7 would cook. They would laugh. He eventually moved in
8 with her. Her kids wasn't too thrilled about it, but he
9 moved in with her. She gave him a key.

10 On March 22, 2008, what did he do? She was
11 getting her house prepared to move her mother's nice
12 furniture into her house and had a friend of many years
13 and his wife over. They were painting, doing some
14 things. She was doing what she could.

15 The Defendant knew they were over there, left
16 and came back that night. Ms. Johnson was by herself
17 getting ready for bed. The Defendant came in. She
18 thought nothing of it at first. This is what he did,
19 until he stated to her, I ought to kill you.

20 It startled her. She didn't know what was
21 going on. Then she smelled the odor of alcohol on him.
22 She could tell he had been drinking. So she got -- she
23 tried to talk to him sensibly, but this didn't work.

24 He hit her in the face. What did she do? She
25 tried to get away. She got to her car but what

1 happened? He caught her and dragged her back and struck
2 her again numerous times in the face.

3 Stop, Bennie. Don't hit me. She tried to get
4 him to stop, but he didn't. She said he straddled her
5 at one point. He hit her with a log. Then he picked up
6 this hatchet, rubbed it on her body, and held it over
7 his head.

8 She pleaded with him. Stop, please don't kill
9 me. This is what saved her life. She pleaded over and
10 over, and something clicked in him and he put it down
11 and left her on the ground about midnight, that
12 69-year-old woman.

13 She asked him to help her up. She said he
14 tried to help her up, but he got frustrated with her and
15 threw her back down and he left. She laid on that
16 ground, defenseless. She lay on that ground in pain.
17 She saw a neighbor's light on. She tried to get over
18 there but she didn't make it.

19 She felt she would hurt herself on the
20 concrete, but she was able to slither her way in her
21 house, slither in that house like a snake. Luckily
22 since they were remodeling, the mattress was on the
23 floor, and she could crawl into it and cover herself up.
24 She yelled for help but the neighbors didn't hear her.
25 Even though the houses were close in proximity, they

1 didn't hear her.

2 The next morning the movers came as they had
3 been planning for. You heard that testimony over and
4 over and over again. The movers came. They got
5 concerned. They saw the stuff laying in the yard. They
6 saw the key stuck in the door.

7 They called for her and she didn't answer
8 because she was lying in there helpless and in pain. So
9 what did they do? They went over to the neighbor's
10 house. The neighbor just happened to be the Defendant's
11 niece, Ms. Gail Jones, to see if she would come and help
12 them.

13 She did. She came over to see about her
14 neighbor. When she saw her, she got concerned. She
15 called for help. Why would she call 9-1-1? Because she
16 saw that her neighbor needed to be helped. She called
17 the neighbor's son, she called Ms. Johnson son, and help
18 arrived.

19 Help arrived. Her son came. He didn't even
20 recognize his momma. He didn't recognize her. They
21 were able to take pictures. Eventually Ms. Johnson was
22 able to tell the deputies what happened, who did this to
23 her.

24 What did they do? They began their
25 investigation. They began canvassing the area, looking

1 for the Defendant. They began gathering evidence. And
2 what did they found?

3 They found evidence consistent with
4 Ms. Johnson's story. They found a patch in the yard
5 that looked like it had been freshly disturbed. They
6 found hair that had been pulled out. They found this
7 log with Ms. Johnson's hair on it. They didn't find the
8 Defendant right off. He ran. He fled. He knew they
9 was looking for him.

10 Ms. Johnson's injuries were serious, ladies
11 and gentlemen. You will be able to take the pictures
12 back with you, and I want you to just look at them.
13 Yes, she went to the E.R.

14 The nurse testified that luckily she didn't
15 have any broken bones, any fractures or anything, but
16 they were concerned when they saw this 69-year-old woman
17 come in the E.R. with all of this swelling.

18 They ran the necessary tests to rule out
19 anything, and luckily she was fine. She was able to go
20 home with her children, and they cared for her like a
21 baby. They had to feed her. They had to apply cold
22 compresses on her, ointment, give her pain medicine.

23 She was in serious pain. Ms. Watson, the
24 nurse, testified they gave her morphine. She said they
25 gave that to patients who are in some serious pain, not

1 minor pain, severe pain.

2 Ms. Johnson couldn't open her eyes for weeks.
3 She couldn't see again. She was defenseless. She had
4 to be cared for by her children. Ms. Johnson and her
5 son also testified that now her quality of life has
6 changed. This has changed her life.

7 The defense talked about this is a significant
8 event in the Defendant's life. This is a greater, more
9 significant event in Ms. Johnson's life. She is not the
10 same. She will never be the same.

11 You heard from the officers. After they
12 received this information, they knew who they were
13 looking for. This was an area that -- Mr. Golston
14 testified he didn't have a license. He was probably
15 still in this area.

16 They would receive tips. They would act on
17 the tips. He would dart. He would leave. He would go
18 again. They called the dogs in. They tracked him to
19 what he referred to as his structure. This structure is
20

21 The defense will have you believe that
22 Mr. Golston lived in this structure. The roof is caving
23 in. The officers testified no floors, no electricity.
24 They called out. They said it wasn't livable. The
25 conditions were so bad they didn't even let the dog go

1 in. They made him stay out.

2 Now, they would have you believe that he chose
3 to live here instead of living with Ms. Johnson. Why
4 would Ms. Johnson lie about living with her? This was
5 her boyfriend. They had good times together.

6 He slept there. He ate there. He cooked
7 there. He had personal items there. Her son said he
8 was there. When he lived with his mom, the Defendant
9 was there more than he was.

10 Now, the Defendant will have you believe just
11 because he received mail at this location, this is where
12 he lived. He could have still had a mailbox there.
13 That doesn't mean anything because he gets mail there.
14 A lot of people get mail at different places, P.O.
15 boxes, different address.

16 After all this structure was just across the
17 path from Ms. Johnson's house. Why would he get his
18 address changed? He could just walk a couple more steps
19 and get his mail. It doesn't matter.

20 Don't let that blindside you. Use your common
21 sense. Just as the defense attorney said, use your
22 common sense. He lived here. The Defendant himself
23 said, yes, he had clothes there. He wants you to
24 believe that the victim just happened to have these
25 clothes and shoes there that were his size.

1 Yet he wore them. He had them there because
2 he was living with her. He had a key. Yeah, he broke
3 the key off in the door at some time, but he had a key.
4 He lived there.

5 Now, his nieces came up and they testified
6 that he didn't live there, but let's talk about their
7 credibility. They are related to him. Yeah, they are
8 going to say that for their uncle. He lived there. Use
9 your common sense. Would he live here when he could
10 live in the comforts of Ms. Johnson's home? Use your
11 common sense, ladies and gentlemen.

12 The officers tracked. The dogs tracked his
13 scent to this structure. They went inside. They looked
14 for him. They looked in places that their law
15 enforcement experience have shown them that people may
16 be hiding.

17 They looked in the corners. They flipped the
18 mattress. What did they find? The good, old hatchet.
19 What is a hatchet doing under a mattress if it wasn't
20 meant to be hidden because it was involved in something?

21 The Defendant would have you believe he just
22 carries around a hatchet, like many people probably
23 carry around a pocketknife. He just happens to carry
24 around a hatchet.

25 They want to say it's not the hatchet that

1 they described, that she described. It was dark. She
2 knew about this metal piece that was going up and down
3 her body. His hands were wrapped around it. Her eyes
4 were swollen shut. She knew about this hatchet.

5 Now, when the officers were looking for the
6 Defendant, this is a small area, a lot of family lived
7 around. He probably got word they were looking for him,
8 and he was hiding.

9 So when they get the final call of a Bennie
10 Golston sighting, they act on it. They bring the dogs.
11 They chase him to the outskirts of the woods. Where is
12 Mr. Golston? Standing behind the tree trying to hide.

13 I asked him why he was standing behind the
14 tree. He said he saw the policemen and wanted to get
15 out of the their way. So if he just wanted to get out
16 of their way, he just chose to go in the woods behind a
17 tree and hide and be real still.

18 Use your common sense. You know why he was
19 behind that tree. He was hiding from the police because
20 he knew they wanted him for this crime. Then when
21 Deputy Radford approached him, what did he observe?
22 Staggering, smelling odor of alcohol Mr. Golston, just
23 as the victim had described he had showed up at her
24 house earlier that morning when he beat her, how he was
25 looking, just his demeanor.

1 Ladies and gentlemen, we have met every
2 element of this crime. He assaulted, seriously
3 assaulted, the victim in this case. She had to be spoon
4 fed by her children. She had to be cared for by the
5 family.

6 She thought she was going to die when he
7 raised that hatchet up and when he was beating her with
8 that log. The medical staff was concerned when they saw
9 her. The kids were concerned, didn't recognize their
10 momma. This is serious bodily injury.

11 He wants to raise the defense of self-defense.
12 In order for there to be self-defense, there must be
13 imminent danger. There must be no other way to get out
14 of that situation.

15 If you were to believe what the Defendant told
16 you, that the victim was scratching him, he said she
17 scratched him, and then he went in her house. If he was
18 so afraid of her, why did he go in the house? If he was
19 so afraid of her, why did he help her off the ground
20 like he said. None of that is true.

21 We all know his motive for getting up here and
22 telling that. Don't believe him. Use your common
23 sense. Ms. Johnson did not provoke him. She couldn't
24 provoke him. She testified nobody fights Bennie.

25 He lived with her. At one point or another,

1 he lived with her. He assaulted her seriously. He did
2 not feel the threat of imminent danger, and she thought
3 she was going to die. It's a burden that I gladly
4 accept. It's a burden that I'm certain I have met.

5 But if you think that the Defendant didn't
6 live with her, if you think he didn't assault her, if
7 you think he didn't make her feel like she was going to
8 die that night, then you give him this hatchet, and you
9 return him to that structure. Thank you.

10 THE COURT: Thank you. Thank you very much,
11 Solicitor.

12 (Whereupon the Court charged the jury as
13 follows).

14 THE COURT: Madame Forelady, ladies and
15 gentlemen of the jury, I would ask you to please give me
16 your complete and undivided attention. It generally
17 takes me a little over 20 minutes or so to charge the
18 jury.

19 The manner in which I do that is I charge you
20 the general law that applies to all criminal cases in
21 South Carolina first. After that I will give you the
22 specific law or statute as it applies to criminal
23 domestic violence of a high and aggravated nature.

24 I will then charge you the law on
25 self-defense, and finally I will charge you the form of

1 the verdict. Generally when I change from one topic to
2 another, I will give you kind of the caption or the area
3 that I am fixing to cover.

4 Charge, arrest, indictment, not evidence. The
5 indictment charges the Defendant under 2009-GS-32-05027
6 with the offense of criminal domestic violence of a high
7 and aggravated nature.

8 I remind you that the fact that the Defendant
9 was arrested, charged, and indicted in this case is not
10 evidence in the case and cannot be considered by you as
11 evidence of guilt in the case, nor does it create any
12 presumption or inference of guilt.

13 This document, this indictment, is simply the
14 formal written instrument which contains the charge made
15 against the Defendant. It is the formal notice document
16 which places the Defendant on notice of the charge
17 placed against him and brings the case before this
18 court.

19 Presumption of innocence. The Defendant has
20 pled not guilty to the indictment, and that plea puts
21 the burden on the State to prove the Defendant guilty.
22 A person charged with a committing a criminal offense in
23 South Carolina is never required to prove himself
24 innocent.

25 I charge you that it is an important rule of

1 the law that the Defendant in a criminal trial, no
2 matter the seriousness of the charge, will always be
3 presumed to be innocent of the crime for which the
4 indictment was issued unless guilt has been proven by
5 evidence satisfying you the jury of that guilt beyond a
6 reasonable doubt.

7 This presumption of innocence does not end
8 when you begin your deliberations, but it accompanies
9 the Defendant throughout the trial until you reach a
10 verdict of guilt based on evidence satisfying you of
11 that guilt beyond a reasonable doubt.

12 The presumption of innocence is like a robe of
13 righteousness placed about the shoulders of the
14 Defendant which remains with the Defendant until it has
15 been stripped from the Defendant by evidence satisfying
16 you of the Defendant's guilt beyond a reasonable doubt.

17 The presumption of innocence is not a mere
18 legal theory. It is not just a legal phrase. It is a
19 substantial right to which every defendant is entitled
20 unless you the jury are satisfied from the evidence of
21 the Defendant's guilt beyond a reasonable doubt.

22 Reasonable doubt. The State has the burden of
23 proving the Defendant guilty beyond a reasonable doubt.
24 Some of you may have served as jurors in civil cases
25 where you were told that it is only necessary to prove

1 that a fact is more likely true than not true, such as
2 by the greater weight or the preponderance of the
3 evidence.

4 In criminal cases the State's proof must be
5 more powerful than that. It must be beyond a reasonable
6 doubt. Proof beyond a reasonable doubt is proof that
7 leaves you firmly convinced of the Defendant's guilt.

8 There are very few things in this world that
9 we know with absolute certainty, and in criminal cases
10 the law does not require proof that overcomes every
11 possibly doubt.

12 If based upon your consideration of the
13 evidence you are firmly convinced that the Defendant is
14 guilty of the crime charged, you must find the Defendant
15 guilty.

16 If, on the other hand, you think there is a
17 real possibility that the Defendant is not guilty, you
18 must give him the benefit of that doubt and find him not
19 guilty.

20 Duties of jury and trial judge. I remind you
21 that during this trial, you and I have certain duties to
22 perform. As the trial judge, it is my responsibility to
23 preside over the trial of this case, and I also have the
24 additional duty to rule on the admissibility of the
25 evidence offered during the trial.

1 You are to consider only the competent
2 evidence before you. If there was any testimony ordered
3 stricken from the record during this trial, you must
4 disregard that testimony. You are to consider only the
5 testimony which has been presented from this witness
6 stand and any exhibits which have been made a part of
7 the record.

8 I have the additional duty to charge you the
9 law that applies to this case. As the presiding judge,
10 I am the sole judge of the law of this case, and it is
11 your duty as jurors to accept and apply the law exactly
12 as I now state it to you.

13 If you already have any idea as to what the
14 law is or what the law ought to be and it does not agree
15 with what I now tell the law is, you must abandon your
16 idea because you are sworn to accept the law and apply
17 the law exactly as I state it to you.

18 In every case tried in this court before a
19 jury, the jury becomes the sole and exclusive judge of
20 the facts in a case. A trial judge cannot intimidate,
21 state, comment on or make any statement to a trial jury
22 about the facts in a case.

23 Since you the jury are the sole judge of the
24 facts in this case, you are not to infer from what I
25 have said during the progress of this trial in ruling

1 upon the admissibility of evidence or otherwise or
2 anything that I say now during the course of this
3 instruction to you that I have any opinion about the
4 facts in this case.

5 The law does not allow me to have an opinion
6 about the facts in the case. This is a matter solely
7 for you the jury to determine. As jurors, using your
8 good judgment and common sense, it is your duty to
9 determine the effect, the value, the weight, and the
10 truth of the evidence that has been presented during
11 this trial.

12 Direct and circumstantial evidence. There are
13 two types of evidence which are generally presented
14 during a trial, direct evidence and circumstantial
15 evidence.

16 Direct evidence is the testimony of a person
17 who claims to have actual knowledge of a fact, such as
18 an eye witness or an ear witness. It is evidence which
19 immediately establishes the main fact to be proved.

20 Circumstantial evidence is proof of a chain of
21 facts and circumstances indicating the existence of a
22 fact. It is evidence which immediately establishes
23 collateral facts from which the main fact may be
24 inferred. Circumstantial evidence is based on inference
25 and not on personal knowledge or observation.

1 Our law makes absolutely no distinction
2 between the weight or the value to be given to either
3 direct or circumstantial evidence, nor is there a
4 greater degree of certainty required of circumstantial
5 evidence than of direct evidence.

6 You should weigh all of the evidence in the
7 case. After weighing all of the evidence if you are not
8 convinced of the guilt of the Defendant beyond a
9 reasonable doubt, you must find the Defendant not
10 guilty.

11 Credibility of witnesses. Necessarily you
12 must determine the credibility of the witnesses who have
13 testified in this case. Credibility simply means
14 believability.

15 Again, using your good judgment and your
16 common sense, it becomes your duty to analyze and
17 evaluate the evidence and determine which evidence
18 convinces you of its truth.

19 In determining the believability of the
20 witnesses who have testified in this case, you may
21 believe one over several or several over one. You may
22 believe the part of the testimony of a witness and
23 reject the remaining part of the testimony of that same
24 witness.

25 You may believe the testimony of a witness in

1 its entirety or reject the testimony of a witness in its
2 entirety. You may consider whether any witness has
3 exhibited to you any interest, bias, prejudice or other
4 motive in this case. You may also consider the
5 appearance, the demeanor, the manner of the witness
6 while testifying on the witness stand.

7 Intent. In order to establish criminal
8 liability. Criminal intent is required. For example,
9 the mental state required to be proven by the State for
10 a particular crime might be purpose or intent, knowledge
11 or recklessness.

12 Criminal intent must be proven by the State
13 beyond a reasonable doubt. Criminal intent is always a
14 matter that must be determined by the jury from the
15 circumstances surrounding the situation.

16 There is no way to prove intent to a
17 mathematical certainty. There is no way that medical
18 science can dissect a person's brain and determine what
19 the person had in mind.

20 So the law says that criminal intent may be
21 infer from the circumstances shown to have existed.
22 This is how you make your determination of whether or
23 not the element requiring intent was present.

24 It is not necessary to establish intent by
25 direct and positive evidence, but intent may be

1 established by inference in the same way as any other
2 fact, by taking into consideration the acts of the
3 parties and all the facts and circumstances of the case.

4 Ladies and gentlemen, that is the law,
5 criminal law, of South Carolina that applies to all
6 criminal cases in South Carolina. Next I am going to
7 cover the specific charge of criminal domestic violence
8 of a high and aggravated nature, the charge for which
9 the Defendant has been indicted.

10 The Defendant is charged with criminal
11 domestic violence of a high and aggravated nature. The
12 State must prove several things. The State must prove
13 beyond a reasonable doubt that the Defendant caused
14 physical harm or injury to a member of the Defendant's
15 own household or that the Defendant offered or attempted
16 to cause physical harm or injury to a member of the
17 Defendant's own household with the apparent present
18 ability to cause harm or injury under circumstances
19 reasonably creating a fear of imminent danger.

20 The State must also prove beyond a reasonable
21 doubt one of the following occurred. The person who
22 committed the criminal domestic violence would have
23 either, number one, committed an assault and battery
24 which involved the use of a deadly weapon or resulted in
25 serious bodily injury to the victim.

1 Now, a deadly weapon is defined as any object
2 or substance which is used in such a way that it is
3 reasonably likely to cause death or serious bodily
4 injury.

5 Serious bodily injury. As to bodily injury,
6 it is up to you the jury to determine whether or not the
7 State has proven beyond a reasonable doubt that any
8 injury sustained by the victim in this case would
9 constitute serious bodily injury.

10 So, again, the State must prove beyond a
11 reasonable doubt that the Defendant caused physical harm
12 or injury to a member of the Defendant's own household
13 or that the Defendant offered or attempted to cause
14 physical harm or injury to a member of the Defendant's
15 own household with the apparent present ability to cause
16 harm or injury under circumstances creating a fear of
17 imminent danger.

18 The State must also prove either one or more
19 of following: That the assault and battery -- that the
20 person committed an assault and battery which involved
21 the use of a deadly weapon or resulted in serious bodily
22 injury to the victim or an assault with or without an
23 accompanying battery which would reasonably cause a
24 person to fear imminent serious bodily injury or death.

25 The statute also defines household member. A

1 household member means either, one, a spouse; two, a
2 former spouse; three, persons who have a child in
3 common; or, four, a male and female who are cohabitating
4 or formerly have cohabitated.

5 Cohabitation. Cohabitation is defined as the
6 act or state of living together, especially as partners
7 in life, usually with the suggestion of sexual
8 relations, at common law the act of a man and a women
9 openly living together without being married to each
10 other.

11 Cohabitation is defined as the act of living
12 together and having a sexual relationship, especially
13 without being married. That is the charge of criminal
14 domestic violence of a high and aggravated nature.

15 Next I am going to cover the charge of
16 self-defense. Self-defense is a complete defense. Thus
17 you must find the Defendant is not guilty unless the
18 State proves beyond a reasonable doubt that each of the
19 four elements of self-defense did not exist in this
20 case.

21 The four elements are: First, the Defendant
22 must be without fault in bringing on the difficulty.
23 Second, the Defendant must have actually believed he was
24 in imminent danger or he was actually in such imminent
25 danger.

1 Three, if the defense is based upon a belief
2 of imminent danger, if the Defendant bases his belief --
3 bases his defense on a belief of imminent danger, a
4 reasonably prudent person of ordinary firmness and
5 courage would have entertained the same belief.

6 If the Defendant actually was in imminent
7 danger, the circumstances were such that would warrant a
8 reasonable man of ordinary prudence, firmness, and
9 courage to strike the blow in order to save himself from
10 that danger.

11 And, fourth, the Defendant had no other
12 probable means of avoiding the danger than to act as he
13 did in this particular circumstance. These are the four
14 elements of self-defense that the State must prove did
15 not exist.

16 If you have a reasonable doubt of the
17 Defendant's guilt after considering all of the evidence,
18 including the evidence of self-defense, then you must
19 find him not guilty.

20 If, on the other hand, you have no reasonable
21 doubt of the Defendant's guilt after considering all of
22 the evidence, including the evidence of self-defense,
23 then you must find him guilty. That concludes the
24 charge on self-defense.

25 Finally, ladies and gentlemen, there are two

1 possibly verdicts which you may find in this case. You
2 will have a verdict form in there with you, Madame
3 Forelady, ladies and gentlemen of the jury, that lists
4 the possible verdicts.

5 There is absolutely no significance whatsoever
6 in the order in which I state these possible verdicts.
7 It's simply that one must be stated first. And, ladies
8 and gentlemen, your verdict must be unanimous. All 12
9 of you must agree.

10 The verdict form is very simple to follow. It
11 has got the caption of the case, the indictment number.
12 Please circle the appropriate verdict below and follow
13 the accompanying instructions carefully.

14 As to the charge of criminal domestic violence
15 of a high and aggravated nature, we the jury unanimously
16 find the Defendant, Bennie Golston, based on your
17 determination of the facts in the case, applying it to
18 the law as I have told you the law is, the State has
19 proved its case beyond a reasonable doubt considering
20 all of the evidence, including the evidence of
21 self-defense, you determine by unanimous verdict that
22 the Defendant is guilty, you would check to the left of
23 the word guilty and circle the check and that word.

24 If, on the other hand, after your
25 determination of the facts, applying it to the law as I

1 have told you the law is, you find the State has failed
2 to reach its burden of proving its case beyond a
3 reasonable doubt, you would check to the left of not
4 guilty and circle the check and the two words not
5 guilty.

6 Once the jury has reached that unanimous
7 verdict, Madame Forelady, if you would please sign as
8 the presiding juror and place the date -- I believe it's
9 14 May of '09 -- in the lower right.

10 Again, all 12 of you must agree on your
11 verdict. Your verdict cannot be based on sympathy,
12 passion, prejudice, emotion or any other consideration
13 not in evidence in this case.

14 When the jury has reached the unanimous
15 verdict and you have signed and dated it, Madame
16 Forelady, if you would please knock on the jury room
17 door. Inform the bailiff that you have reach a verdict.
18 At that time we will receive you back into the courtroom
19 for your verdict.

20 You will have the verdict form and all the
21 items that were presented in evidence to you. If you
22 have any questions, you have anything you need, anything
23 of that nature, if you would just write me out a note,
24 Madame Forelady. Knock on the door. One of the
25 bailiffs will be available for you, and they will get

1 that to my attention.

2 Do not begin your deliberations yet. The law
3 requires I meet with the attorneys one final time
4 outside of your presence. I may have to bring you back
5 in here.

6 If not, the bailiff will deliver the verdict
7 form, the items of evidence, and either the bailiff or
8 the clerk will inform you to then begin your
9 deliberations. With that being said, if you would
10 please go with your bailiff to your jury room. Thank
11 you very much.

12 (The jury retires to the jury room).

13 THE COURT: Any exceptions or additions,
14 Solicitor?

15 MS. PATTERSON: None from the State, Your
16 Honor.

17 THE COURT: Mr. Buchanan?

18 MR. BUCHANAN: None from the defense, Your
19 Honor.

20 THE COURT: All right. Thank you,
21 Mr. Buchanan. If y'all would please check the exhibits
22 and the verdict form.

23 (Pause).

24 (The jury commences its deliberations at
25 5:14 p.m.)

1 THE COURT: Sheriff, did you locate Ms. Gray?

2 SHERIFF: I did not Your Honor.

3 CLERK: She is coming in, Your Honor.

4 THE COURT: The case has now gone to the jury,
5 but I did want to put one matter on the record. I am
6 going to ask my court reporter to provide the Court with
7 a transcript of part of the testimony of the cross
8 examination of Mr. Tarik Johnson concerning whether or
9 not he broke the window at the residence of

10 , which as I recall his respond was: No, vandalism
11 is not my thing or words to that effect. I didn't hear
12 part of his response, and he repeated it for the Court.

13 As I understand that testimony and comparing
14 it to the testimony of Ms. Gray, her testimony was that
15 she observed Mr. Johnson throw something, don't know
16 what it was, but broke some windows on that side.

17 That's diametrically opposed to each other in
18 my opinion from my notes. However, I am going to
19 confirm that by the record. If that is diametrically
20 opposed, I am going to notify the South Carolina Law
21 Enforcement Division that this Court would like a full
22 and complete investigation of that matter with a view
23 towards charging an individual or individuals with
24 perjury or subornation of perjury under 16-9-10.

25 This Court is not going to sit idly by and

1 have individuals place their hand on the Bible and swear
2 to tell the truth and tell lies, tell falsehoods. If
3 that bears out in the transcript, I am going to have
4 that investigated.

5 If any of these individuals think they may
6 need attorneys, I would suggest that they get them.
7 Because perjury is a felony and upon conviction, a
8 person must be fined in the discretion of the Court,
9 which can be up to \$10,000 or imprisonment for not more
10 than five years or both.

11 The trial is supposed to a truth-seeking
12 process, and that's a failure in my opinion,
13 diametrically opposed testimony like that. With that
14 being said, court will be in recess awaiting our jury
15 verdict.

16 Now Ms. Gray may be excused if she chooses to
17 be excused. Thank you very much.

18 (The following occurred at 5:25 p.m.)

19 THE COURT: Anything before we bring in our
20 jury, Solicitor?

21 MS. PATTERSON: Nothing from the State.

22 THE COURT: Mr. Buchanan?

23 MR. BUCHANAN: Nothing, Your Honor.

24 THE COURT: Ladies and gentlemen, out in the
25 gallery, there should be no show of emotions either way,

1 regardless of what the verdict is. Please keep that in
2 mind because I advise the sheriff to take into custody
3 anyone that cannot contain their emotions. If you feel
4 like you cannot, I would ask you to please leave prior
5 to the jury returning.

6 (The jury returns to open court to report its
7 verdict).

8 THE COURT: Madame Clerk.

9 CLERK: Madame Forelady, have you reached a
10 verdict?

11 FOREMAN: Yes, we have.

12 CLERK: Please pass it up by the bailiff.

13 (Hands to Court).

14 THE COURT: Our verdict appears to be in the
15 proper form, Madame Clerk.

16 (Whereupon the verdict of the jury is
17 published as follows).

18 CLERK: Indictment 2009-GS-32-5027, the State
19 versus Bennie Golston, as to the charge of criminal
20 domestic violence of a high and aggravated nature, we
21 the jury unanimously find the Defendant, Bennie Golston,
22 guilty, and it is so signed Diane Davis, forelady.

23 Madame Forelady, and ladies and gentlemen of
24 the jury, if this is your verdict, please indicate each
25 of you by raising your right hand.

1 (All jurors so indicate).

2 CLERK: All hands are raised, Your Honor.

3 THE COURT: Thank you, Madame Clerk.

4 Solicitor, anything further for the jury?

5 MS. PATTERSON: Nothing from the State, Your
6 Honor.

7 THE COURT: Mr. Buchanan?

8 MR. BUCHANAN: Your Honor, we request the jury
9 be polled.

10 THE COURT: Madame Clerk, if you would please
11 explain that procedure to the jury and conduct the
12 procedure.

13 CLERK: Yes, sir. As I call your name if you
14 will hold your hand up where I can recognize you. I
15 will make the statement, As to the verdict, was this
16 your verdict, and is it still your verdict? At that
17 time respond, please.

18 THE COURT: The answer, of course, is either
19 yes or no.

20 CLERK: James Evans, as to the verdict, was
21 this your verdict and is it still your verdict?

22 JUROR: Yes.

23 CLERK: William Wilson, as to the verdict, was
24 this your verdict and is it still your verdict?

25 JUROR: Yes.

1 CLERK: Buddy Lindler, as to the verdict, was
2 this your verdict and is it still your verdict?

3 JUROR: Yes.

4 CLERK: Gary Stewart, as to the verdict, was
5 this your verdict and is it still your verdict?

6 JUROR: Yes.

7 CLERK: Lynn Moore, as to the verdict, was
8 this your verdict and is it still your verdict?

9 JUROR: Yes.

10 CLERK: John Hellams, as to the verdict, was
11 this your verdict and is it still your verdict?

12 JUROR: Yes.

13 CLERK: Diane Davis, as to the verdict, was
14 this your verdict and is it still your verdict?

15 JUROR: Yes.

16 CLERK: Henry Timms, as to the verdict, was
17 this your verdict and is it still your verdict?

18 JUROR: Yes.

19 CLERK: Adrien Voisine, as to the verdict, was
20 this your verdict and is it still your verdict?

21 JUROR: Yes.

22 CLERK: Sandra Branham, as to the verdict, was
23 this your verdict and is it still your verdict?

24 JUROR: Yes.

25 CLERK: Diane Cook, as to the verdict, was

1 this your verdict and is it still your verdict?

2 JUROR: Yes.

3 CLERK: Wilford Nienberg, as to the verdict,
4 was this your verdict and is it still your verdict?

5 JUROR: Yes.

6 CLERK: All jurors are polled, Your Honor.

7 THE COURT: Thank you, Madame Clerk. Anything
8 further for the jury, Mr. Buchanan?

9 MR. BUCHANAN: Nothing, Your Honor?

10 THE COURT: Thank you. Thank you very much,
11 Mr. Buchanan.

12 Madame Forelady, ladies and gentlemen of the
13 jury, I never criticize nor commend a jury for their
14 verdict. However, I will advise that if you ever find
15 yourself a part of the system in the future -- and I
16 hope you never do, by way of witness or otherwise -- I
17 hope the jury that is selected in the trial of that case
18 is as hard working, as focused, and as patient as you
19 have been and have shown to all the parties throughout
20 the trial of this case.

21 We would not be able to be about the very
22 important business of administering your criminal
23 justice system without your participation. Obviously
24 citizens that come before this Court have the
25 constitutional right to trial by jury, a trial and a

1 right that is near and dear to all of our hearts.

2 We couldn't provide jury trials, as I say,
3 without your participation and the participation of
4 jurors week to week, not only in Lexington County but
5 throughout South Carolina.

6 Momentarily I will release you from your jury
7 service for the remainder of the week. As a matter of
8 fact, this would you conclude your jury service for this
9 week. Again, thank you very much. It has been my
10 pleasure and my privilege to serve with you this week.

11 Hopefully our paths will cross in a positive
12 manner in the future. I hope they do. Good luck to all
13 of you, and I hope you all have a pleasant evening.
14 Again, it has been my pleasure and privilege. You are
15 now excused from your jury service.

16 Of course, I have motions to hear and then I
17 will sentence the Defendant this evening. Of course,
18 you are welcome to stay if you choose to so. However,
19 if you choose to leave, you are welcome to do so at this
20 time. Thank you very much.

21 (The jury is excused).

22 THE COURT: Any motions, Mr. Buchanan?

23 MR. BUCHANAN: Yes, Your Honor. Your Honor,
24 the defense would move for a new trial. The grounds
25 would be all the rulings, all our motions and arguments,

1 both collectively and taken individually.

2 THE COURT: All right. I would respectfully
3 deny your motion for a new trial. I will reaffirm all
4 my trial rulings.

5 MR. BUCHANAN: Then, Your Honor, we would make
6 a motion for a verdict in arrest of judgment. Again,
7 the argument is based on our arguments for the directed
8 verdict.

9 THE COURT: I would deny that motion also.

10 MR. BUCHANAN: Also, Your Honor, we did
11 have -- never mind, Your Honor. I did put that on the
12 record. I was thinking we were going to do that after
13 the jury arguments, but I'm fine.

14 THE COURT: All right. Any reason why
15 sentence cannot be imposed at this time?

16 MS. PATTERSON: No reason by the State, Your
17 Honor.

18 THE COURT: Mr. Buchanan?

19 MR. BUCHANAN: I don't see a reason, Your
20 Honor.

21 THE COURT: Sheriff, could you bring the
22 Defendant around, please. Mr. Buchanan, come around.

23 (Pause).

24 THE COURT: Madame Solicitor, anything further
25 from the State?

1 MS. PATTERSON: It is, Your Honor. On behalf
2 of the victim, her daughter, Huriya Johnson, would like
3 to be heard by the Court at the appropriate time, and I
4 would also like to address, Your Honor, before
5 sentencing..

6 THE COURT: I would be glad to hear from
7 Ms. Johnson, if she would come around, please.

8 (Pause).

9 THE COURT: Tell me your name, please.

10 MS. JOHNSON: Huriya Johnson H-U-R-I-Y-A.

11 THE COURT: Madame Clerk, would you place
12 Ms. Johnson under oath for me, please.

13 HURIYA JOHNSON is first duly
14 sworn.

15 THE COURT: Ms. Johnson, I would be glad to
16 hear from you.

17 MS. JOHNSON: If there is such a thing as an
18 innocent victim, if there is such a thing as a
19 defenseless victim, if there is such thing as an honest
20 victim, then it is Myrtle Johnson.

21 If there is such a thing as an unapologetic
22 criminal, if there is such thing as a blatant criminal,
23 if there is such thing as a malicious criminal, then it
24 is the Defendant in this case.

25 This jury has found him guilty. That's why I

1 called him a criminal. It has been tried. It has been
2 proven in this court of law. From what I understand by
3 sitting here is that law proceedings and these types of
4 things are about setting a standard and establishing
5 some type of border and precedent.

6 So if there is a case in which we should enact
7 the full realm of the law, then this would be it. If
8 there is a case that would be fitting of a maximum
9 sentence, then this is it.

10 If you want to teach the world, if you want to
11 set a precedent for South Carolina, if you want to say
12 what is right and what is wrong, you will give this
13 Defendant the maximum sentence because that is what he
14 deserves.

15 I don't know what else to say, and I don't
16 want to come about as though emotional because what I'm
17 saying is actually factual. There were no lies. There
18 was evidence. There was testimony. There was a
19 verdict.

20 I beseech you that you use all of the things
21 that have happened here today, all of the preparation
22 that you have had in your life to do what you are
23 capable of doing, and give this man the maximum sentence
24 that he so rightfully deserves. Thank you very, very
25 much.

1 THE COURT: Thank you very much, Ms. Johnson.
2 Solicitor.

3 MS. PATTERSON: Thank you, Your Honor. I
4 would like to mimic what Ms. Johnson stated, Your Honor.
5 This was a cruel, this was an uncalled for assault on
6 Ms. Johnson. She was 69 years old. She is 70 now. Her
7 life will never be the same.

8 She loved this man and she trusted this man,
9 and he hurt her. He hurt her brutally, Your Honor.
10 It's the State's position that he should receive the
11 maximum sentence allowed by law of the ten years, Your
12 Honor. He does have a prior record if Your Honor would
13 like to hear it at this time.

14 THE COURT: Yes, ma'am.

15 MS. PATTERSON: He has a 1982 disorderly
16 conduct, a 1984 carrying a pistol, 1994 threatening the
17 life of a public official, 1996 disorderly conduct,
18 driving under the influence.

19 In 1997 obstructing justice, 1999 disorderly
20 conduct and obstructing justice, 2002 disorderly
21 conduct, two counts, 2003 petty larceny, disorderly
22 conduct, two counts, 2004 possession of cocaine,
23 disorderly conduct, 2006 disorderly conduct.

24 THE COURT: Anything further, Solicitor?

25 MS. PATTERSON: Nothing from the State, Your

1 Honor.

2 THE COURT: Thank you. Mr. Buchanan.

3 MR. BUCHANAN: Thank you, Your Honor. Your
4 Honor, as to the Defendant's prior record, I do believe
5 the second obstructing justice was actually a probation
6 violation for the previous one.

7 THE COURT: All right. I will not consider
8 that. I will just consider one prior obstruction of
9 justice charge.

10 MR. BUCHANAN: One thing, Your Honor, that
11 this trial should have brought forth is that Mr. Golston
12 does have a big family. I met other members of his
13 family in my investigation of this case.

14 Mr. Golston has been at the Lexington County
15 Detention Center since his arrest on that day back in
16 2008. If I added it up correctly, that's 418 days.
17 Certainly this crime carries a mandatory minimum. I
18 would submit he has met that.

19 I think based on a lot of the -- even his
20 record actually shows he has got problems with alcohol
21 and getting rowdy when he drinks, though this one really
22 has been uncharacteristic of him.

23 He has maintained since the very start that it
24 was a freak accident of how she swelled up. Your Honor,
25 of course, heard his testimony. Obviously the jury has

1 spoken. So he stands before you convicted.

2 What he hopes Your Honor will consider is his
3 age, 55 years old. He has been around the block a few
4 times and certainly would not be a spring chicken over
5 there at the Department of Corrections.

6 If you are to consider the maximum, that would
7 be something that would be -- especially considering
8 this crime is considered violent, he would be housed
9 with other violent offenders. At his age it would be
10 more difficult.

11 His family, some of his members here, do wish
12 to address, Your Honor, and speak on his behalf.

13 THE COURT: I would be glad to hear from them,
14 Mr. Buchanan.

15 (Pause).

16 THE COURT: Ms. Jones, if you would consider
17 yourself still under oath.

18 MS. JONES: Yes, sir, I do.

19 THE COURT: Tell me your full name again for
20 the record.

21 MS. JONES: Gail M. Jones.

22 THE COURT: I would be glad to hear from you,
23 Ms. Jones.

24 MS. JONES: Your Honor, I have sat here and
25 heard all the testimony. I am Ben's niece's and I am

1 Myrtle Johnson's friend. I have been with Myrtle and
2 Ben for the last three years. Both of them know that my
3 mother suffered from Alzheimer's and my father had a
4 terminal cancer.

5 I don't know what happened that night, but I
6 do know that neither one were in their right mind. I
7 can truthfully say that from the bottom of my heart. My
8 condolence go out to Myrtle. I have been beside Myrtle
9 since day one, and I stand beside her.

10 I stand beside my uncle because both of them
11 needs help, and that is the truth from the bottom of my
12 heart. All the truth did not come out here today, and I
13 can say that because I'm right beside Myrtle and Bennie.
14 I know what happened. I know what goes on there.

15 But Ben have changed tremendously. Yes, he
16 had a problem. Yes, Ben have done some bad things, but
17 I truly think he is on the right path to change. So I
18 come asking for leniency on Ben. I do think he could
19 make a difference in society.

20 I'm just saying what I feel at this point. I
21 need him. His sister needs him. My father needs him.
22 His family needs him. Please, I beg you, show some
23 mercy.

24 THE COURT: What do you say happened?

25 MS. JONES: They were both doing drugs if the

1 truth has to be told. I seen it. I seen it. Her
2 daughter knows it. Her son knows it. Ben knows it. It
3 wasn't stated here. It's still going on, Your Honor.

4 I didn't get the opportunity to say it, but I
5 can say it now, and I'm saying it from the bottom of my
6 heart. This is what is going on. I have pleaded to
7 Myrtle to get help and Ben. I have just recently talked
8 to Myrtle last week.

9 But, you know, I was abiding by the Courts.
10 It exists whether we recognize it or not, and I'm using
11 this as a platform to bring it before y'all. That's
12 what happened.

13 Now, I can't tell you all the details of what
14 went on that night. But had that not been a
15 contributing factor, I don't think we would have been
16 here today.

17 Your Honor, that is the truth. I see it every
18 day, and it's still going on. Ben is not there, but
19 it's still going on. I'm sorry, but that is the truth.

20 THE COURT: Thank you. Thank you, Ms. Jones.
21 Anyone else, Mr. Buchanan?

22 MR. BUCHANAN: Beg the Court's indulgence,
23 Your Honor.

24 (Pause).

25 MR. BUCHANAN: Apparently, no, Your Honor.

1 But those were some factors that I had heard about in my
2 investigation of the case. Obviously I chose not to try
3 and really shine the spotlight on that for the Court's
4 decorum and for Ms. Johnson's sake.

5 I hope Your Honor will see that that is
6 something that was appropriate. Again, Your Honor, I've
7 worked with Bennie for more than a year. He wanted to
8 say his piece. He wanted to have his day in court, and
9 we gave it to him.

10 It's something that, Your Honor, we are asking
11 for mercy. The amount of time that he has done exceeds
12 the mandatory minimum. Your Honor has essentially in
13 its discretion the amount of jail time or probation,
14 whatever you might feel appropriate in this case. So I
15 would echo Ms. Jones' call for mercy.

16 THE COURT: Thank you. Anything you would
17 like to say, Mr. Golston?

18 THE DEFENDANT: No, sir.

19 THE COURT: Solicitor, do you have a
20 sentencing sheet?

21 MS. PATTERSON: Yes, sir.

22 THE COURT: Well, it's obvious to this Court
23 that this was not some type of freak accident. You can
24 look at the photographs and tell the multiple brunt
25 trauma that was inflicted upon a 69-year-old slightly

1 built female that the jury has found by what appears to
2 be a healthy built 55-year-old male, much larger and
3 much stronger.

4 Really what amazes me is that from listening
5 to the testimony of Ms. Johnson after the infliction of
6 the injuries and attempting to get back in her house and
7 her eyes being swollen and crawling until she hit the
8 pavement, if that happened at midnight, I guess if the
9 movers weren't coming that morning, I don't know how
10 long she would have been laying there.

11 I guess she would have laid there until she
12 ended up in her grave. I don't understand the
13 callousness of not helping any fellow human being, but
14 particularly one that from her testimony, she loved you.
15 I take it at some point in your testimony was that y'all
16 were lovers, so you loved her.

17 That's almost an incomprehensible callousness
18 in my mind. You could have made an anonymous call in
19 that regard. 09-GS-32-5027 -- is that the indictment
20 number?

21 CLERK: 5027, yes, your Honor.

22 THE COURT: The State versus Bennie Golston,
23 the jury having returned a verdict of criminal domestic
24 violence of a high and aggravated nature, the Defendant
25 is committed to the State Department of Corrections for

1 a determinate term of ten years, credit for time served.

2 Good luck you to, Mr. Golston.

3 MS. PATTERSON: Thank you.

4 THE COURT: Anything further, solicitor?

5 MS. PATTERSON: Nothing further, Your Honor.

6 THE COURT: Thank you very much. Court will
7 be in recess.

8 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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C E R T I F I C A T E

I, the undersigned L. Coconut Pantsari, Official Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of all the proceedings had and the evidence introduced in the trial of the captioned cause, relative to appeal, in the Criminal Court for Lexington County, South Carolina on the 13th and 14th days of May, 2009.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 23, 2009

A handwritten signature in cursive script, reading "L Coconut Pantsari", written over a horizontal line.

Court Reporter

370

Lexington Co. Sheriff's Dept.
Booking Form
Run Date: 04/06/2008 - 10:29
ORI: SC0320000

Inmate Bio Information

Inmate: GOLSTON, BENNIE NMN
AGE: 55
SSN:
Resident Status: THIS JURISDICTION
Address:

License No: // SC/ S
No of Children: 1
Military:
Occupation: UNEMPLOYED - BRICK MASON
Birth Place: LEXINGTON SOUTH CAROLINA
Employer:
Country/State: U.S.A. / SC
Potentially Dangerous: N

Jail ID: 30139
DOB:
Booking No: 26187609
Citizen: Y
FBI#:

Marital Status: X

Phone: (
Church/Religion: NONE
Education: GRADE NINE
Housed at Unit: 2C08
Escape Risk: NO
Suicidal Risk: NO
ClassCode: MX



Inmate Physical Information

Sex: MALE
Skin: MEDIUM
Height: 5'09
Eyes: BROWN
Eyes: BROWN
Glasses: NONE
Build: MEDIUM

Race: BLACK
Ethnicity: NON HISPANIC
Facial Hair: MUSTACHE
Hair Style: SHORT-ABOVE EAR
Hair: BLACK
Weight: 200

Current Charges

Charge Code	Offense	Fel/Mis	ITN	Docket No Case No	Bond Amt
2988	DOMESTIC/CRIM DOM VIOL-HIGH & AGGR NATUR	M	08026476	J846375	\$100,000.00
Note: NO COURT DATE LISTED BOND COURT UPDATE DG		Dispo: SURETY/PROPERTY BOND			

Current Arrest Information

Arrest Date: 03/22/2008
Arrest Type: FULL BOOKING
Arresting Agency: LEXINGTON COUNTY SHERIFF'S DEPT
Armed I: 0
Armed II:
Drug Activity:
NO MULTIPLE CLEARANCE

Arrest Time: 19:30
Arresting Officer: GOULD
Arrest Situation: ON-VIEW ARREST
Weapon Type I:
Weapon Type II:
Drug Type:
Juvenile disposition:

Current Booking Information

Booking Date: 03/22/2008
Booking Officer: [E72476] Paula HARE
Search Officer: [E72476] Paula HARE
Warrant No.:
Civil Process: N
Resist: N
Physical Education: N
Release Date: ?
Outdate: 03/22/2008

Booking Time: 20:18

Warrant No.:
Local Check: Y
Alcohol: N
NCIC Check: Y
Total Bond: 100,000.00
Release Time: 00:00

Scars/Marks/Tattoos

Type	Description
NONE	NONE

Alias Info

Type	Alias Information
Alias Name	GOLSTON, BEN

Next of Kin

Relation	Name	Age	Can Visit	Notif?	Address
BROTHER	GOLSTON, RAYMOND		N	Y	WEST COLUMBIA, SC



STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
Appellate Defender

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

ATTORNEY FOR APPELLANT

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Statutes

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S.C. Code Section 16-25-65	passim

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying appellant's motion to proceed solely on a charge of criminal domestic violence (CDV) instead of criminal domestic violence of a high and aggravated nature (CDVHAN) because the language of the indictment was insufficient for CDVHAN but described the charge of CDV as contained in S.C. Code Section 16-25-20?
2. Did the trial court err in admitting a hatchet which was seized from the residence of appellant in violation of his Fourth Amendment rights because the officers did not have a search warrant?
3. Did the trial court err in refusing to charge the jury on the lesser included charge of CDV when there was evidence of CDV?

STATEMENT OF THE CASE

In May 2009, the Lexington County Grand Jury indicted Bennie Golston on the charge of criminal domestic violence of a high and aggravated nature (CDVHAN). On May 13 – 14, 2009, Golston proceeded to trial before the Honorable R. Knox McMahon and a jury. He was represented by Matthew C. Buchanan, Esquire, and David M. Mauldin, Esquire. The jury found Golston guilty as indicted. Judge McMahon sentenced Golston to the maximum sentence of ten years imprisonment. Golston's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in denying appellant's motion to proceed solely on a charge of criminal domestic violence (CDV) instead of criminal domestic violence of a high and aggravated nature (CDVHAN) because the language of the indictment was insufficient for CDVHAN but described the charge of CDV as contained in S.C. Code Section 16-25-20.

On March 22, 2008, movers approached the home of Myrtle Johnson in Lexington to deliver furniture from her deceased mothers' home in New Jersey. However, when the movers did not get an answer to their knock on the door, they went to the home of a nearby neighbor, Gail Jones. When Ms. Jones entered the home of Ms. Johnson, she found Ms. Johnson lying on a mattress in the bedroom with injuries to her face, and her eyes were swollen shut. R. 17, ll. 8 – 25; R. 18, ll. 1 – 25; R. 19, ll. 1 – 15.

Ms. Jones called 911. When the police arrived, they asked Ms. Johnson what happened. She told them that “Bennie” beat her when they had an argument the night before. R. 17, ll. 1 – 22.

Ms. Johnson testified that she and Golston had been in a relationship about five years, and that he stayed with her “off and on.” Sometimes he stayed the entire week and other times he would stay maybe two nights at her house. He had some personal belongings there. R. 77, ll. 10 – 25; R. 78, ll. 1 – 25; R. 79, ll. 1 – 25.

On March 22, 2008, Ms. Johnson had a man and his wife who were friends of hers do some work on the house, since she was moving her mother's furniture into her house. R. 80, ll. 1 – 25. She said that Golston became jealous of the man. R. 81, ll. 1 – 25; R. 82, ll. 1 – 25. That night, she said that Golston was drinking and did not know what he was doing

when he started hitting her with his fists. R. 83, ll. 1 – 25; R. 84, ll. 1 – 25; R. 85, ll. 1 – 25. She said he did not hit her with a hatchet but rubbed the steel over her skin. R. 85, ll. 6 – 15. She managed to get back into the house when he left. She went to sleep. She awoke when her neighbor, Gail Jones, came in. R. 86, ll. 1 – 25; R. 87, ll. 1 – 25; R. 88, ll. 1 – 25.

During part of her testimony, Ms. Johnson admitted that that she talked to the police the morning of March 22, 2008, but that she did not remember telling them that no weapons were used in the assault on her. R. 175, ll. 16 – 25; R. 176, ll. 1 – 25; R. 177, ll. 1 – 16.

Gail Jones testified that she was in Ms. Johnson's bedroom with her when the police questioned Ms. Johnson. Ms. Jones told the court that Ms. Johnson told the police approximately three times that no weapons were used against her in the attack. R. 178, ll. 11 – 25; R. 179, ll. 1 – 9.

Deputy Kevin Blake testified that he responded to the call along with Deputy Michael Merckle. He said that Ms. Johnson was hit with a piece of firewood and he found a piece of firewood with hair on it at the residence. However, he did not have an analysis done on the hair. R. 35, ll. 4 – 25; R. 36, ll. 1 – 25; R. 37, ll. 1 – 25; R. 38, ll. 1 – 25; R. 39, l. 1 – 11; R. 126, ll. 15 – 25; R. 127, ll. 1 – 2.

After the police were called, Ms. Johnson was taken to the trauma center at Palmetto Richland Hospital. R. 89, l. 1 – 25; R. 90, ll. 1 – 25. Jennifer Watson, the emergency room nurse testified that Ms. Johnson was alert and could communicate when she arrived. The blood work was normal; the C.A.T. scans showed no fractures. She testified that Ms. Johnson had no broken bones, although there was a large amount of swelling and that her

eyes were swollen shut. R. 148, ll. 1 – 25; R. 149, ll. 1 – 29; R. 150, ll. 1 – 24. She spent a few hours at the ER during the day and was discharged. R. 150, ll. 25; R. 151, ll. 1 – 12.

Bennie Golston testified that he did not live permanently with Ms. Johnson, but they had a relationship and he slept there sometimes. R. 55, ll. 15 – 25. He said that the night of the incident, Ms. Johnson became furious with him, and then she was leaving. When he told her to stay, she turned, jumped on him, and began clawing him in the face. She clawed him on both sides of his nose and cut his lip all the way through. He admitted that he slapped her, and she fell. He went into the house and got a hatchet. When he got outside, she was talking to him so he knew she was okay. He put the hatchet on the car and left. R. 180, ll. 16 – 25; R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 25; R. 185, ll. 1 – 25; R. 186, ll. 1 – 25; R. 187, ll. 1 – 25; R. 188, ll. 1 – 11.

Defense counsel made a pretrial motion, before the jury was sworn, that the language of the indictment was insufficient for the charge of CDVHAN, but was sufficient for CDV, and that appellant was prepared to go forward on the CDV. He explained that the language in the indictment was the language of Section 16-25-20(a)(1) which was the language for CDV. He argued that the statute for CDVHAN in Section 16-25-65 included more elements for high and aggravated than the CDV language. R. 2, ll. 24 – 25; R. 3, ll. 1 – 25; R. 4, ll. 1 – 25.

The assistant solicitor argued that S.C. Code Section 16-25-65 was referenced in the body of the indictment, and that appellant knew what he was being charged with. The assistant solicitor argued that Section 17-19-20 required the plain language of the statute and that appellant could read the indictment and easily understand the charge. She cited the case of Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995). R. 5, ll. 1 – 25.

Defense counsel argued that the CDVHAN statute used the terms such as “the use of a deadly weapon”, and “serious bodily injury,” and “fear of death or serious bodily injury.” This language was not in the indictment. R. 35, ll. 1 – 19.

The judge cited the cases of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) and State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), which basically held that “an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.” He said the court must look at the indictment in view of all the surrounding circumstances. R. 6, ll. 24 – 25; R. 7, ll. 1 – 25.

The judge continued by stating that the indictment included some language of the CDV statute 16-25-20, but it also included the statute number for CDVHAN of 16-25-65. And, he continued, that 16-25-65 referred back to 16-25-20 which made it part of 16-25-65. He denied the motion. R. 8, ll. 1 – 25; R. 9, ll. 1 – 25.

Section 16-25-20 provides:

(A) It is unlawful to: (1) cause physical harm or injury to a person’s own household member; or (2) offer or attempt to cause physical harm or injury to a person’s own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

Indictment 2009-GS-32-05027, which charged Golston with CDVHAN, read:

At a court of General Sessions, convened on May 2009, the Grand Jurors of Lexington County present upon their oath: That Bennie Golston did in Lexington County, South Carolina on or about March 22, 2008, (1) cause physical harm or injury to a family or household member, and/or (2) offer or attempt to cause physical harm or injury to a family or household member with apparent present ability under circumstances reasonably creating fear of imminent peril, namely Myrtle Johnson, by striking the victim an undetermined amount of times with closed fists and a wooden log approximately 18" in length and 3" in diameter and used a hatchet to rub on the victim's arms and threaten her, in violation of Section 16-25-65 of South Carolina Code of Laws (1976) as amended.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Supreme Court held that in determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. If an objection to an indictment is timely made, the circuit court should judge the sufficiency of the indictment by determining whether: (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Id.; Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005).

An indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime, or so plainly that the nature of the offense charged may be easily understood. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006).

The trial judge cited the case of State v. McCloud, 354 S.C. 40, 579 S.E.2d 534 (Ct. App. 2003), where the defendant had argued that the indictment failed to specify circumstances for CDVHAN. It cited the statute just as it did in Golston's case. The body of the indictment in McCloud read as follows: "That Douglas Edward McCloud did in Fairfield County on or about June 16, 2000 commit an act of violence against Kernisha L. Golden, by striking her in the face with his closed fist, also hit her in the head and pulled her hair and scratched her neck." The Supreme Court held that the averments in the indictment were sufficient to notify McCloud that he was charged with causing serious bodily injury to the victim.

McCloud, *supra*, is distinguished from Golston's case because Golston's indictment contained the exact language for simple CDV from Section 16-25-20. Then it included other descriptions which could fit into the CDV statute. However, Golston's indictment did not contain all of the elements for CDVHAN as listed in 16-25-65. The indictment did not include the words "the use of a deadly weapon" and did not specify "serious bodily injury." The indictment in McCloud did state that he committed an "act of violence." Although Golston's indictment described a "log," this did not necessarily mean a deadly weapon in the typical sense especially without "serious bodily injury" being mentioned.

Although the caption on Golston's indictment stated "Criminal Domestic Violence of a High and Aggravated Nature", the Supreme Court held in State v. Means, *supra*, that the court should focus primarily on the charging language in the body of the indictment, but that a caption or title which is consistent with the language in the body of the indictment may be considered in conjunction with the body in determining the sufficiency of the

indictment as a whole. The caption on Golston's indictment was not consistent with the language in the body of the indictment which was the language for CDV.

The court should have gone forward with the trial on CDV only.

ARGUMENT

II.

The trial court erred in admitting a hatchet which was seized from the residence of appellant in violation of his Fourth Amendment rights because the officers did not have a search warrant.

After Ms. Johnson told the officers that “Bennie” did this to her, Gail Jones told them that Golston lived behind her mother where he had lived all of her life (49 years) as she was Golston’s niece. She said it was not a nice house. R. 39, ll. 9 – 25; R. 40, ll. 1 – 2; R. 47, ll. 17 – 25; R. 48, ll. 1 – 25; R. 49, ll. 1 – 10.

Officer Michael Merckle and Officer Kevin Blake testified they went together to look for Golston. Officer Merckle said they received word that Golston was on the porch of a neighbor. He was not there when they arrived so they called the K-9 tracking dogs. The dog led them to Golston’s house. R. 19, ll. 5 – 25; R. 20, ll. 1 – 25.

Officer Merckle described it as an “abandoned house.” He said the house was completely dilapidated with no power, no water, and all the windows were broken out. He said the interior was so “hazardous” that they would not take the dog in for fear he would be hurt. He did not believe anyone lived there. R. 21, ll. 1 – 25.

Officer Merckle at first said they thought Golston might be hiding in the house. However, he admitted that he did not know if Golston would actually be in the house. R. 31, ll. 1 – 22.

Officer Kevin Blake testified that he obtained an arrest warrant for Golston after they talked to Ms. Johnson. On his way back to the incident location with the warrant, he

heard the call that Golston was seen in the area. They went to Golston's house to serve the arrest warrant. R. 58, ll. 1 – 25; R. 59, ll. 1 – 25; R. 60, ll. 1 – 25; R. 61, ll. 1 – 8.

The two officers went through the house looking for Golston but did not find him there. They looked where they thought a person might hide. Officer Merckle looked in between two mattresses stacked on top of each other because he said he had found people hiding between mattresses. R. 22, ll. 1 – 25; R. 23, ll. 1 – 25; R. 24, ll. 1 – 5. However, he testified on cross examination that the mattresses were flat on the floor, and the mattress was not “humped” up at all. There was no lump in the mattress. R. 32, ll. 1 – 15.

When he lifted the mattress, Officer Merckle found a hatchet which he took into evidence as he thought this might be the hatchet the victim described as used in the assault. However, he admitted that the hatchet found had a rubber handle and Ms. Johnson described the hatchet as having a wooden handle. R. 24, ll. 1 – 20; R. 34, ll. 1 – 10.

Defense counsel argued that the house was Golston's residence, and therefore he had an expectation of privacy in the house. R. 67, ll. 18 – 25. Two of Golston's nieces, Gail Jones and Bambi Gray, testified that he had lived at the house many years. R. 48, ll. 1 – 25; R. 49, ll. 1 – 25; R. 50, ll. 1 – 25; R. 51, ll. 1 – 5. Golston testified that he lived in the house and had built a brick wall around a mobile home unit. R. 53, ll. 1 – 25. He explained that the house was damaged by several storms, and he did not have the money to repair it. R. 54, ll. 1 – 25; R. 55, ll. 1 – 14; R. 180, ll. 16 – 25; R. 181, ll. 1 – 25. He denied that he lived permanently with Ms. Johnson. R. 55, ll. 15 – 25.

The state argued that Golston had no expectation of privacy in the house. The officers believed it was unlivable. The state argued there was no Fourth Amendment violation as the officers “just happened” to find the hatchet which was clearly being hidden.

The state argued that the house was abandoned. R. 65, ll. 13 – 25; R. 66, ll. 1 – 25; R. 67, ll. 1 – 17. The judge ruled that Golston had an expectation of privacy in the house but that it was reasonable for the officers to search given the condition of the house, and that the officers could execute the arrest warrant. He ruled that the hatchet was admissible. R. 71, ll. 15 – 25; R. 72, ll. 1 – 25; R. 73, ll. 1 – 25; R. 74, ll. 1 – 25; R. 75, ll. 1 – 25; R. 76, ll. 1 – 6.

The Fourth Amendment to the United States Constitution provides that the people have a right to be secure in their persons and homes against unreasonable searches and seizures, and no warrants shall issue, but with probable cause, supported by oath and affirmation, describing the place to be searched and the things to be seized.

In Payton v. New York, 445 U.S. 573 (1980), the United States Supreme Court ruled that a valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence "when there is reason to believe the suspect is within." This ruled was followed by the South Carolina Supreme Court in State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981).

The officers testified that they believed the house was abandoned. Officer Merckle said he did not know if Golston would be inside. They did not have a search warrant but Officer Merckle searched between the mattresses when there was no hump or lump which might indicate a person was there.

The search was a violation of Golston's Fourth Amendment rights and the hatchet should have been suppressed. The hatchet and "log" were used to show the element of "aggravation" to enhance the offense from CDV to CDVHAN.

ARGUMENT

III.

The trial court erred in refusing to charge the jury on the lesser included charge of CDV when there was evidence of CDV.

Defense counsel requested the judge to charge the jury on the lesser included charge of CDV. R. 199, ll. 1 – 25. The judge ruled that the evidence did not support a charge of CDV because Ms. Johnson’s version of the evidence required a CDVHAN based on the use of a deadly weapon and serious bodily injury. And Golston claimed self-defense. Therefore, the judge refused to charge the lesser included CDV. R. 200, ll. 1 – 25; R. 201, ll. 1 – 5.

The judge explained that the law to be charged was determined by the evidence presented at trial. He recognized that the jury has the power and responsibility to rule on the credibility of the witnesses that testified. He stated that the case was CDVHAN and Golston was either guilty or not. R. 201, ll. 13 – 25; R. 202, ll. 1 – 25; R. 203, ll. 1 – 25.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 433 S.E.2d 848, 849 (1993). A request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, 305 S.C. at 447, 409 S.E.2d at 392 (1991). The test for determining if a crime is a lesser included offense of another crime is whether the greater of the two offenses includes all the elements of the lesser offense. State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. (2001).

CDV was clearly a lesser included offense of CDVHAN because the statute for CDVHAN, Section 16-25-65 references the statute for CDV, Section 16-25-20. Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

There was a reasonable probability that the jury may have determined that her injuries were not serious bodily injuries because she had no broken bones; no evidence of any cuts or stitches required; and no permanent damage to her eyes as she said she could see. R. 90, ll. 1 – 25; R. 91, ll. 1 – 18; R. 92, ll. 1 – 25; R. 93, ll. 1 – 25; R. 94, ll. 1 – 12.

She told the officers, according to the witness Gail Jones because Ms. Johnson did not remember, that no weapons were used in the assault. She testified that she was not hit with the hatchet. R. 85, ll. 1 – 10; R. 179, ll. 1 – 25; R. 177, ll. 1 – 25; R. 178, ll. 1 – 25; R. 179, ll. 1 – 8. Ms. Johnson never testified that Golston hit her with the piece of firewood. R. 77 – 103. Officer Blake testified that she was hit with a piece of firewood. R. 114, ll. 1 – 25.

Ms. Johnson did testify that she was afraid that Golston was going to kill her. R. 95, ll. 1 – 21. However, the jury would determine her credibility. The judge should have

charged the lesser included offense of CDV because there was evidence from which the jury could reasonably find CDV.

If Golston slapped her as he said, but the jury disbelieved self-defense, then that would be evidence of the lesser offense of simple CDV. The victim never testified that Golston used a weapon. The police officer was the only one who said that she was hit with the firewood or "log". Therefore, the log or the use of a weapon would be an issue for the jury.

CONCLUSION

Based on the above, the conviction and sentence should be reversed and the case remanded to the circuit court.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and 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."



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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

CERTIFICATE OF SERVICE

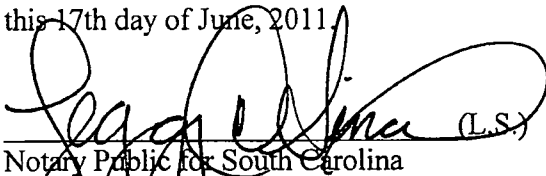
The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah Shupe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 17th day of June, 2011.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of June, 2011.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: December 4, 2017 .

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

BENNIE GOLSTON,

Appellant.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL**I.**

The indictment sufficiently alleged criminal domestic violence of a high and aggravated nature, and Appellant had ample notice of the charge against him.

II.

The circuit court did not abuse its discretion in admitting the hatchet found by officers when they entered a structure to search for Appellant and place him under arrest pursuant to a valid arrest warrant.

III.

The circuit court properly refused to give a jury charge on criminal domestic violence because the evidence presented at trial did not support such a charge.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On May 12, 2009, the Lexington County Grand Jury indicted Appellant Bennie Golston ("Golston") on one count of criminal domestic violence of a high and aggravated nature ("CDVHAN"), in violation of S.C. §16-25-65 (Supp. 2007). (Indictment No. 2009-GS-32-05027; Record on Appeal [R.], pp. 233-234). The case was called for a jury trial on May 13, 2009, before the Honorable R. Knox McMahon, Circuit Court Judge.

Prior to trial, Golston moved to proceed on a charge of criminal domestic violence ("CDV") rather than CDVHAN, arguing the language in the indictment only alleged CDV under S.C. §16-25-20 (Supp. 2007). The circuit court denied the motion, finding the indictment cited §16-25-65 in three different places, and the caption specifically referenced CDVHAN; therefore, Golston had notice he was charged with CDVHAN. (Trial Transcript [TT], pp. 32-38, 40-44; R., pp. 3-9, 11-15).

Golston also moved to suppress evidence officers found while searching for him. (TT, pp. 44-45; R., pp. 15-16). Master Deputy Michael Merckle ("Deputy Merckle") of the Lexington County Sheriff's Department, testified *in camera* that he responded to a call on March 22, 2008, and when he arrived at the scene, the victim was laying on a bed in a fetal position, her face extremely swollen and her breathing shallow. The victim indicated Golston lived with her, and he assaulted her the night before with his fists and a hatchet. (TT, pp. 46-48, 56-57; R., pp. 17-19, 27-28).

Golston was not at the victim's residence when Deputy Merckle arrived, so he and other officers at the scene spoke to neighbors in an effort to locate Golston. Later that day, someone reported seeing Golston sitting on the porch of a residence near the scene, and then

walking toward the woods. Officers tracked him with a canine unit from the yard where he was seen, through the woods to the open back door of a dilapidated structure. (TT, pp. 48-50, 57-60; R., pp. 19-21, 28-31).

Deputy Merckle described the structure as "unlivable," with no power or water, broken windows and open doors. The back porch had fallen in, and there were only small two by six boards going across it. After looking inside through the open door, the officers determined the structure was so hazardous the canine could not go through it without being injured. Deputy Merckle stated the structure was in such bad shape they believed it was abandoned. (TT, pp. 50-51; R., pp. 21-22).

After entering the structure, the officers searched places Golston could be hiding. Deputy Merckle testified "[w]e have found people hiding in closets, underneath beds, in between mattresses, underneath piles of clothes, trash, this, that, and the other." There were two mattresses stacked up on the floor, so he looked between them and found a hatchet matching the description the victim gave of the weapon Golston used while beating and threatening her. (TT, pp. 51-54, 60-62; R., pp. 22-25, 31-33).

Master Deputy Kevin Neal ("Deputy Neal") testified he also responded to a call on March 22, 2008, regarding a possible assault at the victim's house. Information officers initially gathered at the scene was sufficient to obtain an arrest warrant for Golston's arrest, and he left the scene to secure a warrant from the magistrate. After the warrant was issued, he returned to the scene, and had it in his patrol car when they received information Golston was seen in the area. (TT, pp. 64-68, 87-93; R., pp. 35-39, 58-64).

Deputy Neal was present when the canine tracked Golston to a structure, which he

described as "abandoned" and "dangerous." He stated the back door was open, the windows were broken out, there were holes in the roof and the floors were rotted out, and there was no electricity or water. When Deputy Merckle found the hatchet between the mattresses, he turned it over to Deputy Neal, who logged it into the Sheriff's Department's evidence room. (TT, pp. 68-69, 71-74; R., pp. 39-40, 42-45).

The circuit court found Golston had a reasonable expectation of privacy in the structure, but the officers had a valid arrest warrant for Golston and the canine tracked him to the structure. Finding the officers acted reasonably in light of the arrest warrant and information known to them at the time they entered the structure, the court found the hatchet was admissible. (TT, pp. 94-105; R., pp. 65-76).

The victim testified she had a relationship with Golston for approximately five years prior to March 22, 2008. During their relationship, Golston lived with her "off and on," and kept personal belongings at her house, including clothing, shoes and a toothbrush. On March 22, 2008, he got angry with her about a male friend who helped her do some things around the house that day, and started hitting her. She managed to get outside the house and into her car, but he drug her out of the car, threw her on the ground, and continued hitting her "many, many, many times." (TT, pp. 120-126; R., pp. 78-84).

She testified her eyes were closed during much of the beating so she did not know what he was using to hit her, but at one point she opened them and saw Golston holding a hatchet over her head. He did not hit her with the hatchet, but brought it down slowly and rubbed it all over her skin. During the assault, Golston told her he should kill her. (TT, pp. 126-127; R., pp. 84-85).

When Golston finally stopped beating the victim, he left her on the ground outside her house, even though she begged him not to leave her outside. After he left, she crawled inside the house, and onto a mattress lying on the floor. She stayed there until a neighbor found her the next morning and called for help. (TT, pp. 128-131; R., pp. 86-89).

Due to the extent of her facial trauma, emergency medical personnel took the victim to Palmetto Richland because it had a better trauma center. At the hospital, the doctor determined she did not have any broken bones in her face, but he could not get her eyes open enough to evaluate any damage to her sight. (TT, pp. 131-133, State's Exhibits 13, 16, 17, 22, 23, 24, 25 [Photographs]; R., pp. 89-91).¹

The hospital gave the victim medication for pain, and sent her home with her daughter, with subsequent treatment by an eye specialist. The victim's sight eventually returned to a certain extent, but she had to get glasses, which she did not wear prior to the beating. (TT, pp. 133-135; R., pp. 91-93).

Deputy Blake testified about responding to the call about a possible assault at the victim's house, the victim's physical condition when he arrived, and her statement that Golston beat her after an argument. He stated he found some of the victim's hair on the ground in front of the house, and just outside the door he found a firewood log approximately eighteen inches long and three inches in diameter, with strands of hair embedded in the bark. He also testified he obtained the arrest warrant for Golston, and was present when the canine tracked Golston to the structure. (TT, pp. 165-169, 172-178, 180-184, 200-205; R., pp. 107-

¹State's Exhibits 3-8 and 11-25 [Photographs] will be transported to the Court for consideration.

111, 114-120, 122-126, 142-147).

Deputy Merckle also testified about responding to the call at the victim's house, her condition when he arrived, and her statement Golston was the one who beat her. He also testified about the search for Golston, the canine tracking Golston to the structure, and his discovery of the hatchet between two mattresses inside. (TT, pp. 186-197; R, pp. 128-139).

A hospital emergency room nurse testified she was present when the victim was brought to the hospital. The victim had facial pain and swelling, with her eyes swollen shut, and a great amount of bruising. Based on the severity of her injuries, the doctor ordered trauma scans routinely done on patients with a significant amount of trauma, and was unable to do a sufficient eye exam due to the swelling around her eyes. The victim received morphine for severe pain while in the hospital, and a prescription for vicodin when she left the hospital. (TT, pp. 228-231; R., pp. 148-151).

The victim's son testified Golston started living with the victim around 2003. The son lived with the victim at that time, and he stated Golston was at the victim's residence ninety percent of the time. (TT, pp. 236-239; R., pp. 152-155).

By March 22, 2008, the son no longer lived with the victim, but the neighbor who found the victim that morning called him and said something had happened to his mother. He immediately went to the victim's residence, and almost did not recognize the victim because of the injuries to her face. He and his sister took care of the victim after she was released from the hospital, and it took several weeks for the swelling around her eyes to subside enough for her to see well enough to do anything for herself. (TT, pp. 240-258; R., pp. 156-174).

Golston testified he lived in the structure described by the officers, and spent the night with the victim sometimes. On the night of March 21, 2008, he was at the victim's house until 8:30 or 9:00 p.m., and then went to the structure and fell asleep. He got up around midnight and returned to the victim's house. (TT, pp. 287-291; R., pp. 180-184).

He stated when he knocked on the door, the victim came outside and was "furious." Without any provocation, she jumped on him and clawed him in the face, so he "slapped her" on both sides of her face. When the victim fell down, he walked into the house to check on his face., then "picked the hatchet up" and went back outside. The victim called him to help her get up, and he helped her off the ground and up to the porch, but the front door was locked. He then left the victim laying on the front step on a pile of wood, and went back to the structure. (TT, pp. 291-298, 302-303; R., pp. 184-191, 195-196).

During the jury charge conference, Golston requested charges on self-defense, and on CDV, as well as assault and battery, as lesser included offenses of CDVHAN. The circuit court granted the request for a self-defense charge, but denied the request as to CDV and assault and battery, finding the evidence did not support those charges. Specifically, the court found Golston was either guilty of CDVHAN based on the victim's testimony, or he was not guilty by reason of self-defense based on his testimony. (TT, pp. 305-309; R., pp. 197-201).

In response, Golston argued:

[t]he jury is given unfettered power to believe all or even some parts of the testimony or no parts of the testimony as the deciders of fact. Therefore, Your Honor, it could be conceivable in their weighing of the facts, they could find the elements of the lesser-included offenses met but the principal offense not met.

(TT, pp. 309-310; R., pp. 201-202). The court again found the evidence as presented did not support jury charges on CDV or assault and battery. (TT, pp. 310-316; R. pp. 202-208).

The jury convicted Golston of CDVHAN, and the circuit court sentenced him to ten years incarceration. (TT, pp. 353, 358-368; R., pp. 221, 222-232).

ARGUMENT

I. The indictment sufficiently alleged criminal domestic violence of a high and aggravated nature, and Appellant had ample notice of the charge against him.

Golston asserts the language in the indictment was insufficient to charge CDVHAN, and the circuit court erred in allowing the case to proceed on CDVHAN rather than CDV. This contention is patently meritless.

An indictment is merely a notice document. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 500 (2005). The true test of the sufficiency of an indictment is not whether it could be made more definite and certain; rather, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. *Id.* The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged. *Id.*; see also State v. Baker, 2010 WL 2472172,*2 (S.C. App. 2010).

On its face, an indictment referencing the specific code section allegedly violated sufficiently apprises the defendant of the crime for which he is being prosecuted. See State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61, 62 (1980). “While the court should focus primarily on charging language in the body of the indictment, a caption or title which is consistent with the language in the body of the indictment may be considered in conjunction with the body in determining the sufficiency of the indictment as a whole.” State v. Means,

367 S.C. 374, 626 S.E.2d 348, 354 (2006).

Causing physical harm or injury to a person's own household member, or offering or attempting to cause such harm or injury, constitutes CDV in South Carolina. S.C. Code §16-25-20 (Supp. 2009). A person who violates §16-25-20 with a deadly weapon, or causes serious bodily injury to the victim, is guilty of CDVHAN. S.C. Code §16-25-65(A) (Supp. 2009). Thus, CDVHAN incorporates the elements of CDV, with the additional element of a deadly weapon or serious bodily injury.

Both the caption and body of the indictment at issue in this case specifically referenced S.C. Code §16-25-65, and the caption also specifically indicated the offense charged was CDVHAN. The body of the indictment alleged the victim was a household member, Golston caused or attempted to cause physical harm to her by striking her with closed fists and a wooden log, and using a hatchet to create further fear of imminent peril; specifically, he hit the victim "an undetermined amount of times with closed fists and a **wooden log** approximately 18" in length and 3" in diameter and used a **hatchet** to rub on the victim's arms and threaten her." (Indictment No. 2009-GS-32-5027; R., pp. 233-234) (emphasis added). Clearly a wooden log and a hatchet constitute deadly weapons when used to inflict or threaten injury.

Considered as a whole, the indictment was more than sufficient to put Golston on notice he was charged with CDVHAN. Therefore, the circuit court properly allowed the case to proceed on that charge.

II. The circuit court did not abuse its discretion in admitting the hatchet found by officers when they entered a structure to search for Appellant and place him under arrest pursuant to a valid arrest warrant.

Golston also contends the circuit court erred in admitting the hatchet Deputy Merckle found between two mattresses lying on the floor of what the officers believed was an abandoned structure in which Golston was hiding. Even assuming Golston had a recognizable expectation of privacy in the dilapidated structure, the officers reasonably believed he was inside, they entered to execute a valid arrest warrant, and discovered the hatchet while searching places where he could hide.

The admissibility of evidence is within the sound discretion of the trial judge, and the appellate court is limited to determining whether the trial court abused its discretion. State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009) (trial court's decision to admit or exclude testimony will not be reversed absent a prejudicial abuse of discretion); State v. Price, 368 S.C. 494, 629 S.E.2d 363, 365 (2006) (same); State v. Rice, 375 S.C. 302, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the ruling is based on an error of law, or a factual conclusion without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2005); Rice, 652 S.E.2d at 415. On appeal from a motion to suppress evidence based on Fourth Amendment grounds, appellate court review is limited to determining whether any evidence supports the circuit court's decision. State v. Bowman, 366 S.C. 485, 623 S.E.2d 378, 386 (2005); State v. Moore, 377 S.C. 299, 659 S.E.2d 256, 259 (Ct. App. 2008).

As a threshold matter, Golston did not have a reasonable expectation of privacy in a dilapidated building, with open doors, knocked out windows and huge holes in the roof.

(TT, pp. 49-52, 71-72, 192-195, 202-203, State's Exhibits 3 through 8 [Photographs]; R., pp. 20-23, 42-43, 134-137, 144-145). See Matter of Bazen, 275 S.C. 436, 272 S.E.2d 178 (1980) (defendant did not have a reasonable expectation of privacy in an open garage). There was evidence he stayed in different places, did not keep his belongings in the structure, and had basically lived with the victim for some time. (TT, pp. 120-122, 236-239; R., pp. 78-). Therefore, Golston had essentially abandoned the structure, and he did not have an expectation of privacy therein. See California v. Greenwood, 486 U.S. 35 (1988) (abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279, 281 (1995) (same).

Even if Golston had an expectation of privacy in the structure, the police entered to execute a valid arrest warrant, and they could lawfully search any place in the structure where Golston might be hiding. A valid arrest warrant implicitly grants police limited authority to enter a suspect's residence when there is reason to believe the suspect is within. State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981) (citing Payton v. New York, 445 U.S. 573[(1980)]). "The lawfulness of entry into a private residence by law enforcement officers rests solely upon the information possessed by the officers at the time entry is effected." State v. Asbury, 328 S.C. 187, 493 S.E.2d 349, 351 (1997) (Officers' entry into residence was lawful because they had reason to believe defendant was there based on information from a neighbor that he left early in the morning, they arrived at the residence just after daybreak, a light was on inside and the kitchen window was open.); see also United States v. Lauter, 57 F.3d 212 (2d Cir.1995) (Officers had reason to believe defendant was in his apartment based on a tip that he moved into the windowless apartment during the weekend,

he was unemployed, and he typically slept late.).

The officers in this case had ample reason to believe Golston might be in the structure. Witnesses saw Golston go in the direction of the structure, and the police dog tracked Golston directly to its open back door. Deputy Merckle testified he looked between the mattresses because he knew from experience that people hide under mattresses.² (TT, p. 52; R., p. 23). Thus, there was ample reason to believe Golston might be inside the house when officers got there, their entry into the house and search of places he might be hiding was proper, and the circuit court did not abuse its discretion in admitting the hatchet as evidence.

²Golston contends the officer could not have reasonably believed he was hiding under the mattress because there was "no hump or bump which might indicate a person was there." Given the dilapidated condition of the structure, there could well have been a hole in the floor or the bottom mattress in which Golston could hide without having a visible "hump or bump" in the top mattress

III. The circuit court properly refused to give a jury charge on criminal domestic violence because the evidence presented at trial did not support such a charge.

Golston also contends the circuit court erred in denying his request for a jury charge on CDV as a lesser included offense. As the circuit court found, the evidence presented at trial did not support a CDV jury charge.

The trial court is required to charge the law as determined from the evidence presented at trial, and should give any charge supported by the evidence. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241 (1996); State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977); State v. Brown, 362 S.C. 258, 607 S.E.2d 93, 95 (Ct. App. 2004). A jury charge that does not fit the facts of the case may confuse the jury. State v. Blurton, 352 S.C. 203, 573 S.E.2d 802, 804 (2002). The trial court's refusal to give a requested charge must be both erroneous and prejudicial to warrant reversal, and failure to give requested jury charges is not prejudicial error where the charges given afford the proper test for determining the issues. State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298, 303-304 (2002).

An indictment for a greater offense gives the trial court jurisdiction to charge and convict a defendant of any lesser included offense, but a lesser included offense jury charge is required only when the evidence warrants such an instruction. State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730, 731 (1979) ("[a]n instruction should not be given unless justified by the evidence."); State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140, 143 (Ct. App. 2005). In determining whether the evidence requires a lesser included offense charge, the trial court views the facts in a light most favorable to the defendant, and is required to charge a lesser included offense only if there is evidence from which the jury could infer the defendant

committed the lesser offense rather than the greater. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430, 431 (1996); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784, 785 (1986); State v. Hernandez, 386 S.C. 655, 690 S.E.2d 582, 585 (Ct. App. 2010). The mere contention the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement of some evidence tending to show the defendant was only guilty of the lesser offense. State v. Geiger, 370 S.C. 600, 635 S.E.2d 669, 674 (Ct. App. 2006)

In addressing Golston's request for a charge on CDV and/or simple assault and battery, the circuit court specifically found the evidence presented did not support a charge on either offense. As viewed by the court, the victim's testimony indicated Golston beat her repeatedly and inflicted serious bodily injury; but Golston claimed he only hit the victim after her unprovoked attack on him, and therefore, he acted in self-defense and was not guilty of any crime. Golston's argument before the circuit court was the jury could believe only parts of the State's case, and find he was only guilty of the lesser charge. (TT, pp. 307-314; R., pp. 199-206).

Golston contends on appeal the jury could have found he did not use a weapon, or that the victim did not suffer serious bodily injury because she had no broken bones, no cuts requiring stitches, and no "permanent damage to her eye as she said she could see." He also asserts the jury could have disbelieved the victim's testimony that she was afraid he was going to kill her. A cursory review of the evidence reveals the absurdity of these assertions.

The extent of the victim's injuries is undisputed. She testified she was in terrific pain from the beating, and had to crawl inside her house after Golston left her injured on the ground. She could not see well because of the swelling in her face and around her eyes, and

had trouble breathing. (TT, pp. 125-135; R., pp. 83-93). Her account of her injuries was substantiated by the photographs entered as evidence, as well as testimony from the officers who came to the scene, the victim's son, and the trauma nurse who was on duty when the victim was brought into the emergency room by ambulance. (TT, pp. 168-169, 172-173, 187-188, 228-231, 242-248, 252-258, State's Exhibits 11-25 [Photographs]; R., pp. 110-111, 114-115, 129-130, 148-151, 158-164, 168-174). The fact the victim had no broken bones or deep cuts requiring stitches is a blessing, not a loophole for Golston to escape the legal consequences of his actions.

Further, contrary to Golston's assertion, the victim did sustain permanent damage to her eyesight. She testified, without contradiction, that she did not have to wear glasses before the assault. After the assault, however, the only thing the doctors could do to help her remaining sight was to give her glasses, which really did not help. (TT, p. 135; R., p. 93).

In essence, Golston's only argument is the jury might not have believed all of the State's evidence. As discussed above, that contention, standing alone, is not sufficient to justify a lesser included offense charge. Geiger, 635 S.E.2d at 674. The circuit court properly reviewed the evidence, and its determination the evidence presented indicated Golston was either guilty of CDVHAN, or not guilty based on self-defense, is amply supported by the record.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

ALAN WILSON
Attorney General

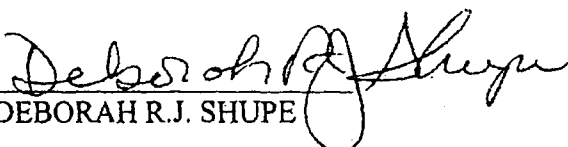
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ATTORNEYS FOR RESPONDENT

June 10, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

BENNIE GOLSTON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and 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."

ALAN WILSON
Attorney General

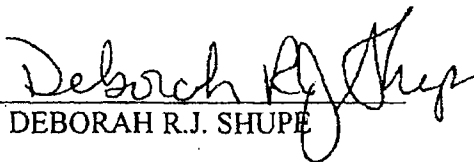
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ATTORNEYS FOR RESPONDENT

June 10, 2011

STATE OF SOUTH CAROLINA

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Appeal From Lexington County
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THE STATE,

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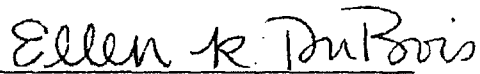
PROOF OF SERVICE

I, Ellen R. DuBois, certify I served the Final Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant, Esquire
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I further certify that all parties required by Rule to be served have been served.

This 10th day of June, 2011.


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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Bennie Golston, Appellant.

Appellate Case No. 2009-127766

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Published Opinion No. 4984
Heard May 13, 2012 – Filed June 6, 2012

AFFIRMED

Appellate Defender LaNelle Cantey DuRant, of
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Attorney General Alan Wilson, Chief Deputy Attorney
General John W. McIntosh, Senior Assistant Deputy
Attorney General Salley W. Elliott, Assistant Attorney
General Deborah R.J. Shupe, all of Columbia; and
Solicitor Donald V. Myers, of Lexington, for
Respondent.

FEW, C.J.: Bennie Golston appeals his conviction for criminal domestic violence of a high and aggravated nature (CDVHAN). His primary contention on appeal is

that the trial court erred in declining to charge the jury on criminal domestic violence (CDV) as a lesser-included offense. We affirm.

I. Facts and Procedural History

Golston and the victim lived together "off and on" for approximately five years. On the morning of March 22, 2008, a neighbor found the victim lying on a mattress in her house. Her breathing was shallow and her face was so swollen that she could not open her eyes. The neighbor called 911, and deputies and paramedics came to the victim's house. According to the deputies who responded to the scene, the victim told them Golston attacked her the previous night using his fists, a log, and a hatchet. The victim's adult son also came to her house. Her face was so swollen that he did not recognize her. The son testified:

I went into the house, went to the back, and I saw my momma laying there. That was my momma but that wasn't my momma. I wasn't prepared for that. I worked at Rocket Rescue¹ for about two years, and I've seen wrecks with fatalities. I've never seen anybody's face swollen like that. If she hadn't talked, I wouldn't have known that was my momma.

The paramedics drove the victim to a hospital, where doctors ordered a CAT scan and a blood test for internal trauma. Although the CAT scan revealed no bone fractures and the blood test results were normal, a nurse testified "the doctor documented that she was so swollen he couldn't do the type of exam that he wanted to do to make sure that she could have vision." The victim left the hospital that night with her children. Over the next few days, she continued to have difficulty breathing and could not feed or bathe herself. The swelling continued to prevent her from opening both of her eyes. She was able to open her right eye after four or five days, but she could not open her left eye for about a week and a half. When she finally was able to open her eyes and doctors examined them, she began wearing glasses for the first time.

Golston was indicted and tried for CDVHAN. At trial, the State and Golston presented conflicting accounts of the incident. The victim testified Golston came

¹ It is not clear from the record what the son meant by "Rocket Rescue," but it appears the phrase is a colloquialism for emergency medical services companies.

home between 11:00 p.m. and midnight, smelling of alcohol, and told her he should beat her up for allowing another man inside "our home" earlier that day.² Golston hit her "many, many, many times" in the face with his fists. She managed to get outside to her car, but he pulled her out of the car before she could start it. As she lay on the ground, Golston straddled her and continued beating her in the face. As he hit her, Golston said that she disrespected him by letting another man into the house and that he should kill her. She thought she was going to die. Golston then raised a hatchet over the victim, brought it down slowly, and rubbed the blade on her skin. While he rubbed the blade on her, he again said he should kill her. She begged him not to strike her with the hatchet. He raised the hatchet over his head, but then dropped it and walked away. The victim could not stand up and asked Golston for help. He started to pick her up, but then shoved her back to the ground and left.

Golston testified to a different version of events. According to his testimony, when he arrived at the house, the victim met him outside and was furious. She said "I'm going" and began walking off. As she walked away, Golston followed her and said, "Where you going? You ain't going nowhere." Without provocation, the victim then turned around, jumped on him, and clawed his face with her fingernails, cutting his face. He testified, "I slapped her, both sides of the face" and "she fell." He then went into the house, washed his face, and retrieved his hatchet. When he went back outside, she asked him for help getting up. He placed the hatchet on her car, helped her walk back to the house, and left.

Golston requested a jury charge on CDV as a lesser-included offense of CDVHAN.³ He also requested a charge on self-defense. The trial court found that depending on whether the jury believed the State or Golston, he either was guilty of CDVHAN or acted in self-defense and thus was not guilty. The trial court therefore charged the jury on self-defense but not on CDV. The jury found Golston guilty, and the trial court sentenced him to ten years in prison.

² The other man was a longtime friend of the victim. He and his wife had helped the victim move furniture that day.

³ Golston also requested a charge on simple assault and battery, but does not challenge on appeal the trial court's decision not to charge it.

II. CDV as a Lesser-Included Offense of CDVHAN

A person is guilty of CDV when the State proves he either "cause[d] physical harm or injury to [his] own household member," or "offer[ed] or attempt[ed] to cause physical harm or injury to [his] own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A), (B) (Supp. 2011). A person is guilty of CDVHAN when, in addition to proving CDV, the State proves one of the aggravating circumstances set forth in subsection 16-25-65(A) of the Code, such as that the defendant's conduct "result[ed] in serious bodily injury to the victim." § 16-25-65(A)(1) (Supp. 2011).

In most prosecutions for CDVHAN, there will be evidence the defendant committed acts which constitute only CDV in addition to acts which constitute CDVHAN. In this case, for example, Golston's statement to the victim "you ain't going nowhere" and his admitted "slap[ping] her face" could be found by a jury to amount only to CDV and not CDVHAN. However, the mere existence of evidence that Golston committed these acts in addition to other acts which could constitute CDVHAN, such as beating the victim with his fists so severely that her own son could not recognize her and she could not open one of her eyes for ten days, does not warrant a jury charge on simple CDV. Rather, to warrant a jury charge on the lesser offense, the evidence viewed as a whole must be such that the jury could conclude the defendant is guilty of the lesser offense *instead of* the indicted offense. *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) ("A trial judge is required to charge the jury on a lesser included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed."). In other words, the existence of evidence that Golston committed simple CDV in addition to CDVHAN does not warrant the charge. There must be evidence from which the jury could conclude the defendant committed only the lesser offense. *See State v. Brown*, 269 S.C. 491, 495-96, 238 S.E.2d 174, 176 (1977) ("The trial judge committed no error in refusing to charge simple assault and battery since there was no evidence tending to show appellant was only guilty of the lesser offense.").

Therefore, the task of the trial court in deciding whether to charge the lesser offense, and of this court reviewing that decision on appeal, is to examine the record to determine if there is evidence upon which the jury could find the

defendant was guilty of the lesser offense, but not guilty of the greater offense.⁴ In this case, the jury could have found Golston not guilty of any offense if it determined the State failed to prove he was the person who assaulted the victim, or failed to disprove at least one element of self-defense.⁵ It is also possible the jury could have determined Golston committed some act which constituted CDV. However, there is no evidence in the record that anyone else caused injury to the victim. Therefore, if the State proved Golston committed CDV, then he was necessarily the person whose attack caused all of the victim's injuries. There is no evidence in the record upon which the jury could have found that those injuries were not "serious bodily injur[ies]" under subsection 16-25-65(A)(1). Under these circumstances, it was not possible for the jury to find Golston guilty of CDV but not guilty of CDVHAN.

Golston makes several arguments in support of his position that the charge should have been given. First, he argues simply that whether the victim's injuries were "serious" under subsection 16-25-65(A)(1) is a question of fact, and if the jury found the injuries were not serious, he could be guilty only of CDV. In support of this argument, Golston points out the phrase "serious bodily injury" is not defined in the statute,⁶ indicating the Legislature's intent that the question be decided by a

⁴ In making this inquiry, we are mindful that Golston had no burden of proof. However, we are not permitted to speculate that the jury might not have believed some of the evidence that was presented. *See State v. Franks*, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) ("The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense.").

⁵ As to the State's burden to disprove self-defense, see *State v. Bixby*, 388 S.C. 528, 553-54, 698 S.E.2d 572, 585-86 (2010) (stating self-defense consists of four elements, and when a defendant raises that defense, the State bears the burden of disproving at least one of the elements beyond a reasonable doubt).

⁶ "Serious bodily injury" is defined in another section of the Code as "a physical condition which creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 23-31-400(A)(2) (2007). We do not decide whether that definition applies to subsection 16-25-65(A)(1). However, even if we decided it did, we do not believe there is any evidence in the record that the victim's injuries

jury. We agree there will be many instances in which the question is one for the jury. However, just as in situations where minor injuries cannot possibly be found by a jury to be serious, and therefore the defendant cannot be guilty of CDVHAN, we find the victim's injuries in this case cannot possibly be found not to be serious. The only evidence in the record is that the blows to the victim's face caused swelling so severe that her son could not recognize her, she had difficulty breathing and feeding herself for several days, and she could not open one of her eyes for ten days. The doctors were so concerned by the severity of the injuries to her face that they ordered a CAT scan and testing for internal trauma. The beating caused such severe swelling that doctors were initially unable to examine her eyes, but when they could, they found permanent injury in that she had to wear glasses for the first time. We disagree with Golston that a jury could possibly find these injuries were not serious.

Golston also argues the jury could have found the State failed to prove two other aggravating circumstances: "an assault and battery which involves the use of a deadly weapon" under subsection 16-25-65(A)(1), and "an assault . . . which would reasonably cause a person to fear imminent serious bodily injury or death" under subsection 16-25-65(A)(2). Additionally, as to the serious bodily injury aggravating circumstance, Golston argues the victim did not suffer any broken bones, she did not permanently lose her eyesight, and there was no evidence she sustained cuts or required stitches. We find it unnecessary to address these arguments because, as we have explained, the only evidence in the record is that the injuries the victim did sustain were serious, and thus the State necessarily proved at least one aggravating circumstance—serious bodily injury. The fact that there may be conflicting evidence as to other aggravating circumstances, or that there may be other serious bodily injuries the victim did not sustain, does not affect the existence of some serious bodily injury, and therefore the necessity that, on these facts, Golston was either not guilty or guilty of CDVHAN.

Because there is no evidence to support a conclusion that the victim did not suffer "serious bodily injury," it was not possible for the jury to find Golston guilty of CDV instead of CDVHAN. The trial court properly refused to charge CDV.

do not meet that definition, as she suffered temporary serious disfigurement to her face, protracted loss of the use of her eyes from the swelling, and permanent impairment of vision.

III. Other Issues

Golston also argues the trial court erred in rejecting his challenge to the sufficiency of his indictment and in denying his motion to suppress evidence of the hatchet deputies found in his house while executing a warrant for his arrest. We disagree and affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

As to the challenge to the sufficiency of the indictment: *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) (stating the primary purposes of an indictment are to apprise the defendant "of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted").

As to the motion to suppress: *State v. Loftin*, 276 S.C. 48, 51, 275 S.E.2d 575, 576 (1981) ("A valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence 'when there is reason to believe the suspect is within.'" (quoting *Payton v. New York*, 445 U.S. 573, 603 (1980))); *United States v. Green*, 599 F.3d 360, 375-76 (4th Cir. 2010) ("Where law enforcement officers possess an arrest warrant and probable cause to believe a suspect is in his home, the officers may enter and search anywhere in that residence in which the suspect might be found.") (citing *Maryland v. Buie*, 494 U.S. 325, 332-33 (1990)); *State v. Morris*, 395 S.C. 600, 605, 720 S.E.2d 468, 471 (Ct. App. 2011) (stating on appeal of the denial of a motion to suppress, this court reviews a trial court's legal conclusions for clear error and factual findings under the any-evidence standard).

IV. Conclusion

We find there is no evidence in the record upon which the jury could have found Golston committed CDV instead of CDVHAN, and therefore the trial court properly refused to charge CDV as a lesser-included offense. We affirm.

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

Opinion No. 4984

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on June 6, 2012. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Golston argued three issues on appeal: (1) the trial court erred in denying appellant's motion to proceed solely on a charge of criminal domestic violence (CDV) instead of criminal domestic violence of a high and aggravated nature (CDVHAN) because the language of the indictment was insufficient for CDVHAN but described the charge of CDV as contained in S.C. Code Section 16-25-20; (2) the trial court erred in admitting a hatchet which was seized from the

residence of appellant in violation of his Fourth Amendment rights because the officers did not have a search warrant; (3) the trial court erred in refusing to charge the jury on the lesser included charge of CDV when there was evidence of CDV,

The Court of Appeals affirmed the trial court on the three issues. On Issue One, the Court of Appeals held that the primary purpose of the indictment was to apprise the defendant of the elements of the offense, and to decide whether to plead guilty or stand trial. On Issue Two, the Court ruled that a valid arrest warrant grants the police the limited authority to enter a suspect's residence when the suspect is within. On Issue three, the Court held that because there was no evidence to support a conclusion that the victim did not suffer "serious bodily injury," it was not possible for the jury to find Golston guilty of CDV instead of CDVHAN, and that the trial court properly refused to charge CDV.

The Court of Appeals misapprehended the issues.

ISSUE ONE: On March 22, 2008, a neighbor found the victim, Mrs. Johnson, lying on a mattress in the bedroom with injuries to her face, and her eyes were swollen shut. R. 17, ll. 8 – 25; R. 18, ll. 1 – 25; R. 19, ll. 1 – 15.

Ms. Jones called 911. When the police arrived, they asked Ms. Johnson what happened. She told them that "Bennie" beat her when they had an argument the night before. R. 17, ll. 1 – 22.

Ms. Johnson testified that she and Golston had been in a relationship about five years, and that he stayed with her "off and on." Sometimes he stayed the entire week and other times he would stay maybe two nights at her house. He had some personal belongings there. R. 77, ll. 10 – 25; R. 78, ll. 1 – 25; R. 79, ll. 1 – 25.

On March 22, 2008, Ms. Johnson had a man and his wife who were friends of hers do some work on the house, since she was moving her mother's furniture into her house. R. 80, ll. 1 – 25. She said that Golston became jealous of the man. R. 81, ll. 1 – 25; R. 82, ll. 1 – 25. That night,

she said that Golston was drinking and did not know what he was doing when he started hitting her with his fists. R. 83, ll. 1 – 25; R. 84, ll. 1 – 25; R. 85, ll. 1 – 25. She said he did not hit her with a hatchet but rubbed the steel over her skin. R. 85, ll. 6 – 15. She managed to get back into the house when he left. She went to sleep. She awoke when her neighbor, Gail Jones, came in. R. 86, ll. 1 – 25; R. 87, ll. 1 – 25; R. 88, ll. 1 – 25.

During part of her testimony, Ms. Johnson admitted that that she talked to the police the morning of March 22, 2008, but that she did not remember telling them that no weapons were used in the assault on her. R. 175, ll. 16 – 25; R. 176, ll. 1 – 25; R. 177, ll. 1 – 16.

Gail Jones testified that she was in Ms. Johnson's bedroom with her when the police questioned Ms. Johnson. Ms. Jones told the court that Ms. Johnson told the police approximately three times that no weapons were used against her in the attack. R. 178, ll. 11 – 25; R. 179, ll. 1 – 9.

Deputy Kevin Blake testified that he responded to the call along with Deputy Michael Merckle. He said that Ms. Johnson was hit with a piece of firewood and he found a piece of firewood with hair on it at the residence. However, he did not have an analysis done on the hair. R. 35, ll. 4 – 25; R. 36, ll. 1 – 25; R. 37, ll. 1 – 25; R. 38, ll. 1 – 25; R. 39, l. 1 – 11; R. 126, ll. 15 – 25; R. 127, ll. 1 – 2.

After the police were called, Ms. Johnson was taken to the trauma center at Palmetto Richland Hospital. R. 89, l. 1 – 25; R. 90, ll. 1 – 25. Jennifer Watson, the emergency room nurse testified that Ms. Johnson was alert and could communicate when she arrived. The blood work was normal; the C.A.T. scans showed no fractures. She testified that Ms. Johnson had no broken bones, although there was a large amount of swelling and that her eyes were swollen shut. R. 148, ll. 1 – 25; R. 149, ll. 1 – 29; R. 150, ll. 1 – 24. She spent a few hours at the ER during the day and was discharged. R. 150, ll. 25; R. 151, ll. 1 – 12.

Bennie Golston said that the night of the incident, Ms. Johnson became furious with him, and then she was leaving. When he told her to stay, she turned, jumped on him, and began clawing him in the face. She clawed him on both sides of his nose and cut his lip all the way through. He admitted that he slapped her, and she fell. He went into the house and got a hatchet. When he got outside, she was talking to him so he knew she was okay. He put the hatchet on the car and left. R. 180, ll. 16 – 25; R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 25; R. 185, ll. 1 – 25; R. 186, ll. 1 – 25; R. 187, ll. 1 – 25; R. 188, ll. 1 – 11.

Defense counsel made a pretrial motion, before the jury was sworn, that the language of the indictment was insufficient for the charge of CDVHAN, but was sufficient for CDV, and that appellant was prepared to go forward on the CDV. He explained that the language in the indictment was the language of Section 16-25-20(a)(1) which was the language for CDV. He argued that the statute for CDVHAN in Section 16-25-65 included more elements for high and aggravated than the CDV language. R. 2, ll. 24 – 25; R. 3, ll. 1 – 25; R. 4, ll. 1 – 25.

The assistant solicitor argued that S.C. Code Section 16-25-65 was referenced in the body of the indictment, and that appellant knew what he was being charged with. . R. 5, ll. 1 – 25.

Defense counsel argued that the CDVHAN statute used the terms such as “the use of a deadly weapon”, and “serious bodily injury,” and “fear of death or serious bodily injury.” This language was not in the indictment. R. 35, ll. 1 – 19.

The judge cited the cases of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) and State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), which basically held that “an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.” He said the court must look at the indictment in view of all the surrounding circumstances. R. 6, ll. 24 – 25; R. 7, ll. 1 – 25.

The judge continued by stating that the indictment included some language of the CDV statute 16-25-20, but it also included the statute number for CDVHAN of 16-25-65. And, he continued, that 16-25-65 referred back to 16-25-20 which made it part of 16-25-65. He denied the motion. R. 8, ll. 1 – 25; R. 9, ll. 1 – 25.

Section 16-25-20 provides:

(A) It is unlawful to: (1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

Indictment 2009-GS-32-05027, which charged Golston with CDVHAN, read:

At a court of General Sessions, convened on May 2009, the Grand Jurors of Lexington County present upon their oath: That Bennie Golston did in Lexington County, South Carolina on or about March 22, 2008, (1) cause physical harm or injury to a family or household member, and/or (2) offer or attempt to cause physical harm or injury to a family or household member with apparent present ability under circumstances reasonably creating fear of imminent peril, namely Myrtle Johnson, by striking the victim an undetermined amount of times with closed fists and a wooden log approximately 18" in length and 3" in diameter and used a hatchet to rub on the victim's arms and threaten her, in violation of Section 16-25-65 of South Carolina Code of Laws (1976) as amended.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Supreme Court held that in determining whether an indictment meets the sufficiency standard, the court must look at the

indictment with a practical eye in view of all the surrounding circumstances. If an objection to an indictment to an indictment is timely made, the circuit court should judge the sufficiency of the indictment by determining whether: (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Id.; Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005).

An indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime, or so plainly that the nature of the offense charged may be easily understood. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006).

The trial judge cited the case of State v. McCloud, 354 S.C. 40, 579 S.E.2d 534 (Ct. App. 2003), where the defendant had argued that the indictment failed to specify circumstances for CDVHAN. It cited the statute just as it did in Golston's case. The body of the indictment in McCloud read as follows: "That Douglas Edward McCloud did in Fairfield County on or about June 16, 2000 commit an act of violence against Kernisha L. Golden, by striking her in the face with his closed fist, also hit her in the head and pulled her hair and scratched her neck." The Supreme Court held that the averments in the indictment were sufficient to notify McCloud that he as charged with causing serious bodily injury to the victim.

McCloud, *supra*, is distinguished from Golston's case because Golston's indictment contained the exact language for simple CDV from Section 16-25-20. Then it included other descriptions which could fit into the CDV statute. However, Golston's indictment did not contain all of the elements for CDVHAN as listed in 16-25-65. The indictment did not include the words "the use of a deadly weapon" and did not specify "serious bodily injury." The indictment in McCloud did state that he committed an "act of violence." Although Golston's indictment described a "log,"

this did not necessarily mean a deadly weapon in the typical sense especially without "serious bodily injury" being mentioned.

The Court of Appeals erred in finding that the indictment was sufficient as the trial judge stated that the indictment contained language of both the CDV statute and the CDVHAN statute. This was confusing to Golston and the jury.

ISSUE TWO: Officer Michael Merckle and Officer Kevin Blake testified they went together to look for Golston. Officer Merckle said they received word that Golston was on the porch of a neighbor. He was not there when they arrived so they called the K-9 tracking dogs. The dog led them to Golston's house. R. 19, ll. 5 – 25; R. 20, ll. 1 – 25.

Officer Merckle described it as an "abandoned house." He said the house was completely dilapidated with no power, no water, and all the windows were broken out. He said the interior was so "hazardous" that they would not take the dog in for fear he would be hurt. He did not believe anyone lived there. R. 21, ll. 1 – 25.

Officer Merckle at first said they thought Golston might be hiding in the house. However, he admitted that he did not know if Golston would actually be in the house. R. 31, ll. 1 – 22.

Officer Kevin Blake testified that he obtained an arrest warrant for Golston after they talked to Ms. Johnson. On his way back to the incident location with the warrant, he heard the call that Golston was seen in the area. They went to Golston's house to serve the arrest warrant. R. 58, ll. 1 – 25; R. 59, ll. 1 – 25; R. 60, ll. 1 – 25; R. 61, ll. 1 – 8.

The two officers went through the house looking for Golston but did not find him there. They looked where they thought a person might hide. Officer Merckle looked in between two mattresses stacked on top of each other because he said he had found people hiding between mattresses. R. 22, ll. 1 – 25; R. 23, ll. 1 – 25; R. 24, ll. 1 – 5. However, he testified on cross

examination that the mattresses were flat on the floor, and the mattress was not "humped" up at all. There was no lump in the mattress. R. 32, ll. 1 – 15.

When he lifted the mattress, Officer Merckle found a hatchet which he took into evidence as he thought this might be the hatchet the victim described as used in the assault. However, he admitted that the hatchet found had a rubber handle and Ms. Johnson described the hatchet as having a wooden handle. R. 24, ll. 1 – 20; R. 34, ll. 1 – 10.

Defense counsel argued that the house was Golston's residence, and therefore he had an expectation of privacy in the house. R. 67, ll. 18 – 25. Two of Golston's nieces, Gail Jones and Bambi Gray, testified that he had lived at the house many years. R. 48, ll. 1 – 25; R. 49, ll. 1 – 25; R. 50, ll. 1 – 25; R. 51, ll. 1 – 5. Golston testified that he lived in the house and had built a brick wall around a mobile home unit. R. 53, ll. 1 – 25. He explained that the house was damaged by several storms, and he did not have the money to repair it. R. 54, ll. 1 – 25; R. 55, ll. 1 – 14; R. 180, ll. 16 – 25; R. 181, ll. 1 – 25. He denied that he lived permanently with Ms. Johnson. R. 55, ll. 15 – 25.

The state argued that Golston had no expectation of privacy in the house. The officers believed it was unlivable. The state argued there was no Fourth Amendment violation as the officers "just happened" to find the hatchet which was clearly being hidden. The state argued that the house was abandoned. R. 65, ll. 13 – 25; R. 66, ll. 1 – 25; R. 67, ll. 1 – 17. The judge ruled that Golston had an expectation of privacy in the house but that it was reasonable for the officers to search given the condition of the house, and that the officers could execute the arrest warrant. He ruled that the hatchet was admissible. R. 71, ll. 15 – 25; R. 72, ll. 1 – 25; R. 73, ll. 1 – 25; R. 74, ll. 1 – 25; R. 75, ll. 1 – 25; R. 76, ll. 1 – 6.

The Fourth Amendment to the United States Constitution provides that the people have a right to be secure in their persons and homes against unreasonable searches and seizures, and no

warrants shall issue, but with probable cause, supported by oath and affirmation, describing the place to be searched and the things to be seized.

In Payton v. New York, 445 U.S. 573 (1980), the United States Supreme Court ruled that a valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence "when there is reason to believe the suspect is within." This ruled was followed by the South Carolina Supreme Court in State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981).

The officers testified that they believed the house was abandoned. Officer Merckle said he did not know if Golston would be inside. They did not have a search warrant but Officer Merckle searched between the mattresses when there was no hump or lump which might indicate a person was there.

The search was a violation of Golston's Fourth Amendment rights and the hatchet should have been suppressed. The hatchet and "log" were used to show the element of "aggravation" to enhance the offense from CDV to CDVHAN.

The Court of Appeals misapprehended the issue as there was not sufficient probable cause for the police to enter as Golston had an expectation of privacy in the home.

ISSUE THREE: Defense counsel requested the judge to charge the jury on the lesser included charge of CDV. R. 199, ll. 1 – 25. The judge ruled that the evidence did not support a charge of CDV because Ms. Johnson's version of the evidence required a CDVHAN based on the use of a deadly weapon and serious bodily injury. And Golston claimed self-defense. Therefore, the judge refused to charge the lesser included CDV. R. 200, ll. 1 – 25; R. 201, ll. 1 – 5.

The judge explained that the law to be charged was determined by the evidence presented at trial. He recognized that the jury has the power and responsibility to rule on the credibility of the witnesses that testified. He stated that the case was CDVHAN and Golston was either guilty or not. R. 201, ll. 13 – 25; R. 202, ll. 1 – 25; R. 203, ll. 1 – 25.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 433 S.E.2d 848, 849 (1993). A request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, 305 S.C. at 447, 409 S.E.2d at 392 (1991). The test for determining if a crime is a lesser included offense of another crime is whether the greater of the two offenses includes all the elements of the lesser offense. State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. (2001).

CDV was clearly a lesser included offense of CDVHAN because the statute for CDVHAN, Section 16-25-65 references the statute for CDV, Section 16-25-20. Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

There was a reasonable probability that the jury may have determined that her injuries were not serious bodily injuries because she had no broken bones; no evidence of any cuts or stitches required; and no permanent damage to her eyes as she said she could see. R. 90, ll. 1 – 25; R. 91, ll. 1 – 18; R. 92, ll. 1 – 25; R. 93, ll. 1 – 25; R. 94, ll. 1 – 12.

She told the officers, according to the witness Gail Jones because Ms. Johnson did not remember, that no weapons were used in the assault. She testified that she was not hit with the hatchet. R. 85, ll. 1 – 10; R. 179, ll. 1 – 25; R. 177, ll. 1 – 25; R. 178, ll. 1 – 25; R. 179, ll. 1 – 8. Ms. Johnson never testified that Golston hit her with the piece of firewood. R. 77 – 103. Officer Blake testified that she was hit with a piece of firewood. R. 114, ll. 1 – 25.

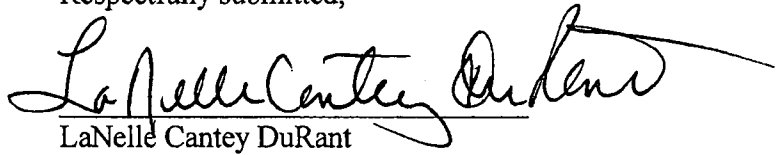
Ms. Johnson did testify that she was afraid that Golston was going to kill her. R. 95, ll. 1 – 21. However, the jury would determine her credibility. The judge should have charged the lesser included offense of CDV because there was evidence from which the jury could reasonably find CDV.

If Golston slapped her as he said, but the jury disbelieved self-defense, then that would be evidence of the lesser offense of simple CDV. The victim never testified that Golston used a weapon. The police officer was the only one who said that she was hit with the firewood or “log”. Therefore, the log or the use of a weapon would be an issue for the jury.

The Court of Appeals misapprehended the issue because the definition of serious bodily injury is not defined in the statute for this offense. Therefore, this was a question for the jury.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 19th day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

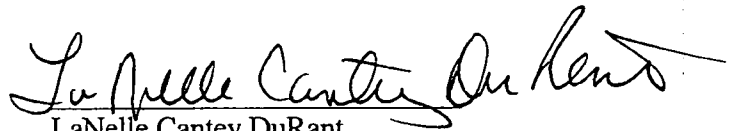
V.

BENNIE GOLSTON,

APPELLANT

CERTIFICATE OF SERVICE

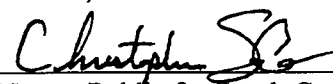
The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, this 21st day of June, 2012.



LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 21st day
of June, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021.

The South Carolina Court of Appeals

The State, Respondent,

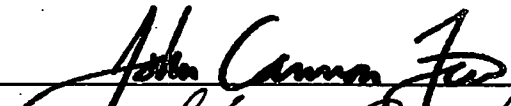
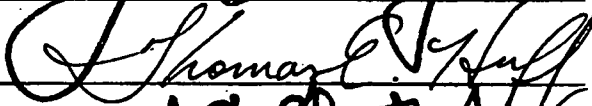
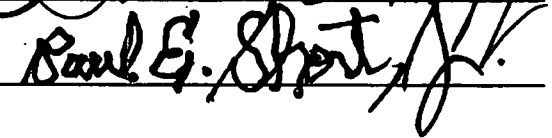
v.

Bennie Golston, Appellant.

Appellate Case No. 2009-127766

ORDER DENYING PETITION FOR REHEARING

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

	C.J.
	J.
	J.

Columbia, South Carolina

cc:

LaNelle Cantey DuRant

Alan Wilson

John W. McIntosh

Salley W. Elliott

Deborah R.J. Shupe

FILED

September 13, 2012

STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Lexington County

R. Knox McMahon, Circuit Court Judge

Opinion No. 4984 (S.C. Ct. App. filed 6/6/2012)

09-GS-32-05027.

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

APPELLATE CASE NO. 2012-213149

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS

LANELLE CANTEY DURANT
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the petition for rehearing was made and finally ruled on by the Court of Appeals on September 13, 2012.

QUESTION PRESENTED

Did the Court of Appeals err in affirming the trial court in declining to charge the jury on the lesser included charge of CDV when there was evidence of CDV?

STATEMENT OF THE CASE

Procedural History

In May 2009, the Lexington County Grand Jury indicted Bennie Golston on the charge of criminal domestic violence of a high and aggravated nature (CDVHAN). On May 13 – 14, 2009, Golston proceeded to trial before the Honorable R. Knox McMahon and a jury. He was represented by Matthew C. Buchanan, Esquire, and David M. Mauldin, Esquire. The state was represented by Rhonda W. Patterson and Kate E. Whetstone. The jury found Golston guilty as indicted. Judge McMahon sentenced Golston to the maximum sentence of ten years imprisonment. Golston's attorney filed a notice of appeal. The Court of Appeals affirmed Golston's conviction and sentence on June 6, 2012. State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. filed June 6, 2012). App. 1. Golston's appellate counsel filed a petition for rehearing on June 21, 2012. The Court of Appeals issued an Order on September 13, 2012 denying the petition for rehearing. App. 20. This petition for writ of certiorari to the Court of Appeals follows.

Relevant Facts

On March 22, 2008, movers approached the home of Myrtle Johnson in Lexington to deliver furniture from her deceased mothers' home in New Jersey. However, when the movers did not get an answer to their knock on the door, they went to the home of a nearby neighbor, Gail Jones. When Ms. Jones entered the home of Ms. Johnson, she found Ms. Johnson lying on a mattress in the bedroom with injuries to her face, and her eyes were swollen shut. R. 17, ll. 8 – 25; R. 18, ll. 1 – 25; R. 19, ll. 1 – 15.

Ms. Jones called 911. When the police arrived, they asked Ms. Johnson what happened. She told them that "Bennie" beat her when they had an argument the night before. R. 17, ll. 1 – 22.

Ms. Johnson testified that she and Golston had been in a relationship about five years, and that he stayed with her "off and on." Sometimes he stayed the entire week and other times he would stay maybe two nights at her house. He had some personal belongings there. R. 77, ll. 10 – 25; R. 78, ll. 1 – 25; R. 79, ll. 1 – 25.

On March 22, 2008, Ms. Johnson had a man and his wife who were friends of hers do some work on the house, since she was moving her mother's furniture into her house. R. 80, ll. 1 – 25. She said that Golston became jealous of the man. R. 81, ll. 1 – 25; R. 82, ll. 1 – 25. That night, she said that Golston was drinking and did not know what he was doing when he started hitting her with his fists. R. 83, ll. 1 – 25; R. 84, ll. 1 – 25; R. 85, ll. 1 – 25. She said he did not hit her with a hatchet but rubbed the steel over her skin. R. 85, ll. 6 – 15. She managed to get back into the house when he left. She went to sleep. She awoke when her neighbor, Gail Jones, came in. R. 86, ll. 1 – 25; R. 87, ll. 1 – 25; R. 88, ll. 1 – 25.

During part of her testimony, Ms. Johnson admitted that that she talked to the police the morning of March 22, 2008, but that she did not remember telling them that no weapons were used in the assault on her. R. 175, ll. 16 – 25; R. 176, ll. 1 – 25; R. 177, ll. 1 – 16.

Gail Jones testified that she was in Ms. Johnson's bedroom with her when the police questioned Ms. Johnson. Ms. Jones told the court that Ms. Johnson told the police approximately three times that no weapons were used against her in the attack. R. 178, ll. 11 – 25; R. 179, ll. 1 – 9.

Deputy Kevin Blake testified that he responded to the call along with Deputy Michael Merckle. He said that Ms. Johnson was hit with a piece of firewood and he found a piece of firewood with hair on it at the residence. However, he did not have an analysis done on the hair. R.

35, ll. 4 – 25; R. 36, ll. 1 – 25; R. 37, ll. 1 – 25; R. 38, ll. 1 – 25; R. 39, l. 1 – 11; R. 126, ll. 15 – 25; R. 127, ll. 1 – 2.

After the police were called, Ms. Johnson was taken to the trauma center at Palmetto Richland Hospital. R. 89, l. 1 – 25; R. 90, ll. 1 – 25. Jennifer Watson, the emergency room nurse testified that Ms. Johnson was alert and could communicate when she arrived. The blood work was normal; the C.A.T. scans showed no fractures. She testified that Ms. Johnson had no broken bones, although there was a large amount of swelling and that her eyes were swollen shut. R. 148, ll. 1 – 25; R. 149, ll. 1 – 29; R. 150, ll. 1 – 24. She spent a few hours at the ER during the day and was discharged. R. 150, ll. 25; R. 151, ll. 1 – 12.

Bennie Golston testified that he did not live permanently with Ms. Johnson, but they had a relationship and he slept there sometimes. R. 55, ll. 15 – 25. He said that the night of the incident, Ms. Johnson became furious with him, and then she was leaving. When he told her to stay, she turned, jumped on him, and began clawing him in the face. She clawed him on both sides of his nose and cut his lip all the way through. He admitted that he slapped her, and she fell. He went into the house and got a hatchet. When he got outside, she was talking to him so he knew she was okay. He put the hatchet on the car and left. R. 180, ll. 16 – 25; R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 25; R. 185, ll. 1 – 25; R. 186, ll. 1 – 25; R. 187, ll. 1 – 25; R. 188, ll. 1 – 11.

ARGUMENT

The Court of Appeals erred in affirming the trial court in declining to charge the jury on the lesser included charge of CDV when there was evidence of CDV.

Defense counsel requested the judge to charge the jury on the lesser included charge of CDV. R. 199, ll. 1 – 25. The judge ruled that the evidence did not support a charge of CDV because Ms. Johnson's version of the evidence required a CDVHAN based on the use of a deadly weapon and serious bodily injury. And Golston claimed self-defense. Therefore, the judge refused to charge the lesser included CDV. R. 200, ll. 1 – 25; R. 201, ll. 1 – 5.

The judge explained that the law to be charged was determined by the evidence presented at trial. He recognized that the jury has the power and responsibility to rule on the credibility of the witnesses that testified. He stated that the case was CDVHAN and Golston was either guilty or not. R. 201, ll. 13 – 25; R. 202, ll. 1 – 25; R. 203, ll. 1 – 25.

Section 16-25-20, the CDV statute, provides:

(A) It is unlawful to: (1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Section 16-25-65, the statute for CDVHAN, provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

The Court of Appeals held that because there was no evidence to support a conclusion that the victim did not suffer "serious bodily injury," it was not possible for the jury to find Golston guilty of CDV instead of CDVHAN, and that the trial court properly refused to charge CDV. The Court of Appeals misapprehended the issues.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 433 S.E.2d 848, 849 (1993). A request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, 305 S.C. at 447, 409 S.E.2d at 392 (1991). The test for determining if a crime is a lesser included offense of another crime is whether the greater of the two offenses includes all the elements of the lesser offense. State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. (2001).

CDV was clearly a lesser included offense of CDVHAN because the statute for CDVHAN, Section 16-25-65 references the statute for CDV, Section 16-25-20. Section 16-25-65 provides:

- (A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

There was a reasonable probability that the jury may have determined that her injuries were not serious bodily injuries because she had no broken bones; no evidence of any cuts or stitches required; and no permanent damage to her eyes as she said she could see. R. 90, ll. 1 – 25; R. 91, ll. 1 – 18; R. 92, ll. 1 – 25; R. 93, ll. 1 – 25; R. 94, ll. 1 – 12.

She told the officers, according to the witness Gail Jones because Ms. Johnson did not remember that no weapons were used in the assault. She testified that she was not hit with the hatchet. R. 85, ll. 1 – 10; R. 179, ll. 1 – 25; R. 177, ll. 1 – 25; R. 178, ll. 1 – 25; R. 179, ll. 1 – 8. Ms. Johnson never testified that Golston hit her with the piece of firewood. R. 77 – 103. Officer Blake testified that she was hit with a piece of firewood. R. 114, ll. 1 – 25.

Ms. Johnson did testify that she was afraid that Golston was going to kill her. R. 95, ll. 1 – 21. However, the jury would determine her credibility. The judge should have charged the lesser included offense of CDV because there was evidence from which the jury could reasonably find CDV.

If Golston slapped her as he said, but the jury disbelieved self-defense, then that would be evidence of the lesser offense of simple CDV. The victim never testified that Golston used a weapon. The police officer was the only one who said that she was hit with the firewood or “log”. Therefore, the log or the use of a weapon would be an issue for the jury.

The Court of Appeals misapprehended the issue because the definition of serious bodily injury is not defined in the statute for this offense. Therefore, the Legislature intended for this to be a question for the jury. The Court of Appeals ruled that the victim’s injuries were serious bodily injury. However, Ms. Johnson was not hospitalized and spent only a few hours in the emergency room of the hospital and was released. R. 150, ll. 25 – R. 151, ll. 12. The Court wrote that she suffered permanent injury to here yes as she had to wear glasses for the first time. However, there was no evidence presented that the change in her vision was caused by the incident. There was no evidence as to when she had her last eye examination. R. 93, ll. 11 – 25.

CONCLUSION

Based on the above, certiorari should be granted, the conviction and sentence reversed, and the case remanded for a new trial.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER.

This 13th day of December, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
R. Knox McMahon, Circuit Court Judge

Opinion No. 4984 (S.C. Ct. App. filed 6/6/2012)
09-GS-32-05027.

THE STATE,

RESPONDENT,

V.

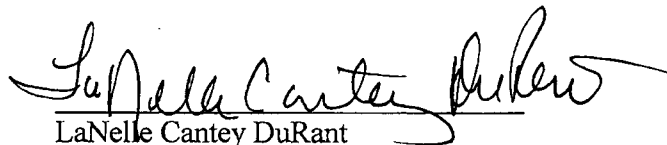
BENNIE GOLSTON,

APPELLANT

APPELLATE CASE NO. 2012-213149

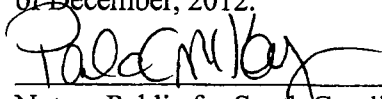
CERTIFICATE OF SERVICE

I certify that a true copy of the petition for writ of certiorari to the Court of Appeals and a copy of the appendix, in this case has been served on Deborah R.J. Shupe, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201; and the S.C. Court of Appeals, this 13th day of December, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 13th day
of December, 2012.

 (L.S.)
Notary Public for South Carolina
My Commission Expires: July 24, 2022

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2012-213149

THE STATE,

Respondent,

vs.

BENNIE GOLSTON,

Petitioner.

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

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Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

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ATTORNEYS FOR RESPONDENT

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QUESTION PRESENTED

Did the Court of Appeals properly affirm the circuit court's denial of Golston's request for a jury charge on the lesser offense of criminal domestic violence in light of the undisputed evidence regarding the extent of the victim's injuries?

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On May 12, 2009, the Lexington County Grand Jury indicted Appellant Bennie Golston ("Golston") on one count of criminal domestic violence of a high and aggravated nature ("CDVHAN"), in violation of S.C. §16-25-65 (Supp. 2007). (Record on Appeal [R.], pp. 233-234). The case was called for a jury trial on May 13, 2009, before the Honorable R. Knox McMahon, Circuit Court Judge.

The victim testified she had a relationship with Golston for approximately five years prior to March 22, 2008. During their relationship, Golston lived with her "off and on," and kept personal belongings at her house, including clothing, shoes and a toothbrush. On March 22, 2008, he got angry with her about a male friend who helped her do some things around the house that day, and started hitting her. She managed to get outside the house and into her car, but he drug her out of the car, threw her on the ground, and continued hitting her "many, many, many times." (R., pp. 78-84).

She testified her eyes were closed during much of the beating so she did not know what he was using to hit her, but at one point she opened them and saw Golston holding a hatchet over her head. He did not hit her with the hatchet, but brought it down slowly and rubbed it all over her skin. During the assault, Golston told her he should kill her. (R., pp. 84-85).

When Golston finally stopped beating the victim, he left her on the ground outside her house, even though she begged him not to leave her outside. After he left, she crawled inside the house, and onto a mattress lying on the floor. She stayed there until a neighbor found her the next morning and called for help. (R., pp. 86-89).

Master Deputy Kevin Blake ("Deputy Blake"), of the Lexington County Sheriff's Department, testified he responded to the call about a possible assault at the victim's house on March 22, 2008. He stated the victim's face was "extremely swollen, eyes swollen shut," her speech was "labored," and she was in pain. The victim told him Golston beat her after an argument. He further testified he found some of the victim's hair on the ground in front of the house, and just outside the door he found a firewood log approximately eighteen inches long and three inches in diameter, with strands of hair embedded in the bark. Based on the victim's statements and the evidence found at the scene, Deputy Blake obtained an arrest warrant for Golston. (R., pp. 107-111, 114-120, 122-126, 142-147).

Master Deputy Michael Merckle ("Deputy Merckle") also testified about responding to the call at the victim's house, her condition when he arrived, and her statement Golston was the one who beat her. He stated the victim was in "pretty bad shape," her face was "swollen and distorted," and her speech and breathing was "labored." (R., pp. 128-139).

Due to the extent of her facial trauma, emergency medical personnel took the victim to Palmetto Richland because it had a better trauma center. At the hospital, the doctor determined she did not have any broken bones in her face, but he could not get her eyes open enough to evaluate any damage to her sight. The hospital gave her medication for pain, and sent home with her daughter, with subsequent treatment by an eye specialist. The victim's sight eventually returned to a certain extent, but she had to get glasses, which she did not wear prior to the beating. (R., pp. 89-93, State's Exhibits 13, 16, 17, 22, 23, 24, 25

[Photographs]).¹

A hospital emergency room nurse testified she was present when the victim was brought to the hospital. The victim had facial pain and swelling, with her eyes swollen shut, and a great amount of bruising. Based on the severity of her injuries, the doctor ordered trauma scans routinely done on patients with a significant amount of trauma, and was unable to do a sufficient eye exam due to the swelling around her eyes. The victim received morphine for severe pain while in the hospital, and a prescription for vicodin when she left the hospital. (R., pp. 148-151).

The victim's son testified Golston started living with the victim around 2003. The son lived with the victim at that time, and he stated Golston was at the victim's residence ninety percent of the time. (R., pp. 152-155).

By March 22, 2008, the son no longer lived with the victim, but the neighbor who found the victim that morning called him and said something had happened to his mother. He immediately went to the victim's residence, and almost did not recognize the victim because of the injuries to her face. He and his sister took care of the victim after she was released from the hospital, and it took several weeks for the swelling around her eyes to subside enough for her to see well enough to do anything for herself. (R., pp. 157-174).

Golston testified he spent the night with the victim sometimes, and on the night of March 21, 2008, he was at the victim's house until 8:30 or 9:00 p.m. He left, but returned to the victim's house around midnight. (R., pp. 180-184).

¹State's Exhibits 3-8 and 11-25 [Photographs] were transported to the Court of Appeals for consideration.

He stated that when he knocked on the door, the victim came outside and was "furious." Without any provocation, she jumped on him and clawed him in the face, so he "slapped her" on both sides of her face. When the victim fell down, he walked into the house to check on his face, then "picked the hatchet up" and went back outside. The victim called him to help her get up, and he helped her off the ground and up to the porch, but the front door was locked, so he left the victim laying on the front step on a pile of wood. (R., pp. 184-191, 195-196).

During the jury charge conference, Golston requested a jury charge on self-defense. He also requested charges on CDV and assault and battery as lesser included offenses of CDVHAN. The circuit court granted the request for a self-defense charge, but denied the requests as to CDV and assault and battery, finding the evidence did not support those charges. Specifically, the court found Golston was either guilty of CDVHAN based on the victim's testimony, the extent of her injuries, and the threat of a deadly weapon, or based on his testimony, he was not guilty of any crime by reason of self-defense. (R., pp. 197-201).

In response, Golston argued:

[t]he jury is given unfettered power to believe all or even some parts of the testimony or no parts of the testimony as the deciders of fact. Therefore, Your Honor, it could be conceivable in their weighing of the facts, they could find the elements of the lesser-included offenses met but the principal offense not met.

(R., pp. 201-202). The court again found the evidence as presented did not support jury charges on CDV or assault and battery. R., pp. 202-208).

The jury convicted Golston of CDVHAN, and the circuit court sentenced him to ten years incarceration. (R., pp. 221, 222-232). This appeal followed.

The South Carolina Court of Appeals affirmed Golston's conviction, holding the evidence did not support a jury charge on the lesser CDV offense in light of the extent of the victim's injuries, which clearly constituted "serious bodily injur[ies] under subsection 16-25-65(A)(1)." (Appendix, pp. 1-7).² By Order filed September 13, 2012, the Court denied Golston's Petition for Rehearing. (Appendix, p. 20). On December 13, 2012, Golston filed a Petition for Writ of Certiorari to the Court of Appeals.

²The Court of Appeals also addressed Golston's appellate arguments regarding the sufficiency of the indictment and suppression of a hatchet found when officers entered a structure while searching for Golston to execute the arrest warrant. Those issues are not raised in Golston's Petition for Writ of Certiorari, and therefore, are deemed abandoned. *See Jinks v. Richland County*, 355 S.C. 341, 585 S.E.2d 281, 283 (2003) (issues not argued in a party's brief are deemed abandoned).

ARGUMENT

The Court of Appeals properly affirmed the circuit court's denial of Golston's request for a jury charge on the lesser offense of criminal domestic violence because the evidence presented at trial did not support such a charge.

Golston contends the Court of Appeals "misapprehended the issue" regarding his request for a jury charge on the lesser offense of CDV, because "serious bodily injury" is not defined in the CDV statute, which he argues indicates a legislative intent that the issue be a question for the jury. As the circuit court and Court of Appeals found, the evidence presented at trial did not support a CDV jury charge.

The trial court is required to charge the law as determined from the evidence presented at trial, and should give any charge supported by the evidence. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241 (1996); State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977); State v. Brown, 362 S.C. 258, 607 S.E.2d 93, 95 (Ct. App. 2004). A jury charge that does not fit the facts of the case may confuse the jury. State v. Blurton, 352 S.C. 203, 573 S.E.2d 802, 804 (2002). The trial court's refusal to give a requested charge must be both erroneous and prejudicial to warrant reversal, and failure to give requested jury charges is not prejudicial error where the charges given afford the proper test for determining the issues. State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298, 303-304 (2002).

An indictment for a greater offense gives the trial court jurisdiction to charge and convict a defendant of any lesser included offense, but a lesser included offense jury charge is required only when the evidence warrants such an instruction. State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730, 731 (1979) ("[a]n instruction should not be given unless justified by

the evidence.”); State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140, 143 (Ct. App. 2005). In determining whether the evidence requires a lesser included offense charge, the trial court views the facts in a light most favorable to the defendant, and is required to charge a lesser included offense only if there is evidence from which the jury could infer the defendant committed the lesser offense rather than the greater offense. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430, 431 (1996); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784, 785 (1986); State v. Hernandez, 386 S.C. 655, 690 S.E.2d 582, 585 (Ct. App. 2010). The mere contention the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement of some evidence tending to show the defendant was only guilty of the lesser offense. State v. Geiger, 370 S.C. 600, 635 S.E.2d 669, 674 (Ct. App. 2006)

In addressing Golston's request for a charge on CDV and simple assault and battery, the circuit court specifically found the evidence presented did not support a charge on either offense.³ As viewed by the court, the victim's testimony indicated Golston hit her repeatedly and inflicted serious bodily injury; but Golston claimed he only slapped the victim twice in response to her unprovoked attack on him, and therefore, he acted in self-defense and was not guilty of any crime. Golston's express argument before the circuit court was the CDV charge was warranted because the jury could believe only parts of the State's case, and find he was only guilty of the lesser charge. (R., pp. 199-206).

As he did before the Court of Appeals, Golston contends the jury could have found he did not use a weapon, or the victim did not suffer serious bodily injury because she did

³Golston does not challenge the circuit court's denial of his request for a simple assault and battery charge.

not have any broken bones or cuts requiring stitches, and suffered no “permanent damage to her eye as she said she could see.” He also asserts the jury could have disbelieved the victim’s testimony that she was afraid Golston was going to kill her. (Petition, pp. 8-9). A cursory review of the evidence reveals the absurdity of these assertions.

The extreme nature of the victim’s injuries cannot be seriously disputed. She testified Golston hit her many times, she was in terrific pain from the beating, and had to crawl inside her house after Golston left her injured on the ground. She could not see well because of the swelling in her face and around her eyes, and had trouble breathing. (R., pp. 83-93). The victim’s account of her injuries was amply substantiated by the photographs entered as evidence, as well as testimony from the officers who came to the scene, the victim’s son, and the trauma nurse who was on duty when the victim was brought into the emergency room by ambulance. (R., pp. 110-111, 114-115, 129-130, 148-151, 158-164, 168-174, State’s Exhibits 11-25 [Photographs]). The fact the victim had no broken bones or deep cuts requiring stitches is a blessing, not a loophole for Golston to escape the legal consequences of his actions.

Further, contrary to Golston’s assertion, the victim did sustain permanent damage to her eyesight. She testified, without contradiction, that she did not have to wear glasses before the assault. After the assault, however, the only thing the doctors could do to help her remaining sight was to give her glasses, which really did not help. (R., p. 93).

In essence, Golston’s only argument remains simply that the jury might not have believed all of the State’s evidence. As discussed above, that contention, standing alone, is not sufficient to justify a lesser included offense charge. Geiger, 635 S.E.2d at 674.

Taking Golston's contention to its logical conclusion, a CDV jury charge would be required in every CDVHAN case, regardless of the evidence, because the State must always prove the underlying elements of S.C. Code §16-25-20(A) (Supp. 2011), in addition to the evidence regarding any aggravating factors (deadly weapon and/or serious bodily injury) from S.C. Code §16-25-65(A) (Supp. 2011). Thus, even if the victim in this case had suffered multiple broken bones, cuts requiring stitches and/or complete vision loss, the CDV charge would be required simply because the State had to prove the victim was Golston's "own household member" under §16-25-20 (A) in order to proceed with the CDVHAN charge. Such a requirement is contrary to the well established law in South Carolina that a lesser included offense should be charged only if the evidence supports a jury finding that the defendant is guilty of the lesser to the exclusion of the greater offense. The evidence in this case simply could not support a finding that Golston was guilty of CDV to the exclusion of CDVHAN.

The circuit court properly reviewed the evidence, and its determination the evidence presented indicated Golston was either guilty of CDVHAN, or not guilty based on self-defense, is amply supported by the record. The Court of Appeals applied the appropriate standard of review in affirming the circuit court ruling, and therefore, the Petition for Writ of Certiorari to the Court of Appeals should be denied.

CONCLUSION

Based on the foregoing, Respondent respectfully submits the Petition for Writ of Certiorari to the Court of Appeals should be denied.

Respectfully submitted,

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

SALLEY W. ELLIOTT
Senior Assistant Deputy Attorney General

DEBORAH R.J. SHUPE
Senior Assistant Deputy Attorney General

DONALD V. MYERS
Solicitor, Eleventh Judicial Circuit

BY:


DEBORAH R.J. SHUPE
S.C. Bar No. 5098

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ATTORNEYS FOR RESPONDENT

December 31, 2012

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

On Petition for Writ of Certiorari to the Court of Appeals
Appeal from Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge
Appellate Case No. 2012-213149

THE STATE,

Respondent,

vs.

BENNIE GOLSTON,

Petitioner.

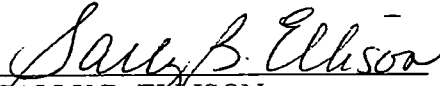
PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Return to Petition for Writ of Certiorari to the Court of Appeals on Petitioner by depositing two copies in the United States mail, postage prepaid, addressed to:

LaNelle Cantey DuRant
Assistant Appellate Defender
South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, SC 29211-1589

I further certify that all parties required by Rule to be served have been served.

This 31st day of December, 2012.


SALLY B. ELLISON
Legal Assistant

Office of Attorney General
Post Office Box 11549
Columbia, SC 29211
(803) 734-3727

The Supreme Court of South Carolina

The State, Respondent,

v.

Bennie Golston, Petitioner.

Appellate Case No. 2012-213149

Lower Court Case No. 2009GS3205027

ORDER

Petitioner seeks a writ of certiorari to review the Court of Appeals' decision in *State v. Golston*, 399 S.C. 393, 732 S.E.2d 175 (Ct. App. 2012). We deny the petition.


C.J.
FOR THE COURT

Columbia, South Carolina

December 5, 2013

cc:

LaNelle Cantey DuRant, Esquire

Deborah R.J. Shupe, Esquire

Alan Wilson, Esquire

The Honorable Jenny Kitchings

The Honorable Beth Carrigg

RECEIVED

DEC -5 2013

OFFICE OF
APPELLATE DEPT.

FILED

2013 DEC 27 P 2:51

STATE OF SOUTH CAROLINA

County of LEXINGTONBETH A. CARRICO
CLERK OF COURT
LEXINGTON

In the Court of Common Pleas

ORIGINAL

BENNIE GOLSTON

Full name and prison number (if any) of Applicant,

vs.

STATE OF SOUTH CAROLINA

Name of Respondent.

APPLICATION FOR
POST-CONVICTION RELIEFBENNIE GOLSTON

2013 CP 3204474

INSTRUCTIONS — READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make it clear to which question any such continued answer refers.

Since every application must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken *in forma pauperis*, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay the fees and costs of the proceedings. When the application is completed, the original shall be mailed to the Clerk of Court for the County in which applicant was convicted.

1. Place of detention EVANS CORRECTIONAL INSTITUTION.
2. Name and location of Court which imposed sentence LEXINGTON COUNTY COURT OF
GENERAL SESSIONS
3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
 - (a) 2009-GS-32-5027, CDVHAN
 - (b) 2009-GS-32-5029
 - (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
 - (a) MAY 13-14-2009
 - (b) _____
 - (c) _____

FILED

2013 DEC 27 P 2:58

5. Check whether a finding of guilty was made

- (a) after a plea of guilty _____
- (b) after a plea of not guilty *** _____
- (c) after a plea of nolo contendere _____

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

6. Did you appeal from the judgment of conviction or the imposition of sentence?

YES

7. If you answered "yes" to (6), list

(a) the name of each Court to which you appealed:

i. SOUTH CAROLINA COURT OF APPEALS

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. AFFIRMED CONVICTION AND SENTENCE.

ii. _____

iii. _____

(c) the date of each such result:

i. JUNE, 6 2012

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. PUBLISHED OPINION NO-4984

ii. _____

iii. _____

8. If you answered "no" to (6), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

9. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

(a) TRIAL COUNSEL WAS INEFFECTIVE (SEE ATTACHMENT)

(b) _____

(c) _____

10. State concisely and in the same order the facts which support each of the grounds set out in (9):

(a) TRIAL COUNSEL WAS INEFFECTIVE (SEE ATTACHMENT)

(b) _____

(c) _____

FILED

11. Prior to this application have you filed with respect to this conviction

- (a) any petition in a State Court under South Carolina Law? DIRECT APPEAL 2012 SEP 27 P 2: 58
- (b) any petitions in State or Federal Courts for habeas corpus or post-convictions relief? NO.
- (c) any petitions in the United States Supreme Court for certiorari other than already specified in (7)? NO.
- (d) any other petitions, motions or applications in this or any other Court?

AFTER DIRECT APPEAL DENIAL, FILED A REHEARING MOTION.

12. If you answered "yes" to any part of (11), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. REHEARING IN THE COURT OF APPEALS
- ii. _____
- iii. _____
- iv. _____

(b) the name and location of the Court in which each was filed:

- i. SOUTH CAROLINA COURT OF APPEALS
- ii. _____
- iii. _____
- iv. _____

(c) the disposition thereof:

- i. DENIED FILED: JUNE 21 2012, DENIED SEPT, 13 2012
- ii. _____
- iii. _____
- iv. _____

(d) the date of each such disposition:

- i. SEPTEMBER, 13 2012.
- ii. _____
- iii. _____
- iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

- i. NO.
- ii. _____
- iii. _____
- iv. _____

13. Has any ground set forth in (9) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

FILED

2013 DEC 27 P 2:53

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, KY

14. If you answered "yes" to (13), identify:

(a) which grounds have been presented:

- i. _____
- ii. _____
- iii. _____

(b) the proceedings in which each ground was raised:

- i. _____
- ii. _____
- iii. _____

15. If any ground set forth in (9) has not previously been presented to any Court, State or Federal, set forth the ground, and state concisely the reasons why such ground has not previously been presented:

(a) INEFFECTIVE ASSISTANCE OF COUNSEL IS AN ISSUE FOR PCR.

(b) _____

(c) _____

16. Were you represented by an attorney at any time during the course of:

(a) your arraignment and plea? _____

(b) your trial, if any? YES(c) your sentencing? YES(d) your appeal, if any, from the judgment of conviction or the imposition of sentence? YES

(e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____

17. If you answered "yes" to one or more parts of (16), list:

(a) the name and address of each attorney who represented you

i. TARIN JOHNSON, ATTORNEY AT LAW.ii. LANELLE C. DURANT, APPELLANT DEFENDER

iii. _____

(b) the proceedings at which each such attorney represented you:

i. TRIAL AND SENTENCING.ii. DIRECT APPEAL AND REHEARING.

iii. _____

18. State clearly the relief you seek in filing this application.

REVERSE THIS CONVICTION BECAUSE THERE WAS A LACK OF
SUFFICIENT EVIDENCE SEE JACKSON V. VIRGINIA 99 S.Ct
2799.

19. Are you now under sentence from any other court that you have not challenged?

NO.

FILED

STATE OF SOUTH CAROLINA

County of LEXINGTON.

VERIFICATION 27 P 2:58

BETH A. CARRIG
CLERK OF COURT

I, BENNIE GOLSTON, being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

BENNIE GOLSTON

SWORN to and subscribed before me this _____

day of _____, 19 ____

Notary Public (L.S.)

2013 CP 3204474

My Commission Expires: _____

**APPLICATION TO PROCEED WITHOUT PREPAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, BENNIE GOLSTON, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security therefor.

Bennie Golston
Applicant

SWORN or affirmed to and subscribed before me this

_____ day of _____, 19 ____

Notary Public

ORIGINAL

FORM 5

FILED

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2013 DEC 27 P 2:54

BENNIE GOLSTON 260-924

Full name and prison number (if any) of Applicant.

J. A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

v.

APPLICATION FOR

State of South Carolina

POST-CONVICTION RELIEF

2013 CP 3204474

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention MAC DOUGALL CORRECTIONAL
2. Name and location of Court which imposed sentence COUNTY OF LEXINGTON
3. Name(s) of co-defendant(s) (if any) MYRTLE JOHNSON
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) TRANSCRIPT OF RECORD 09-GS-5027
 - (b) COURT OF GENERAL SESSIONS
 - (c) COUNTY OF LEXINGTON
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) MAY 13-14-2009
 - (b) 10 YEAR

- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty ✓ 2 Year
- (b) after a plea of not guilty X
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence YES
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. DIVISION ON APPELLATE INDIGENT DEFENSE
- ii. SOUTH CAROLINA COMMISSION
- iii. 1330 Lady STREET SUITE 401 COL SC 29211
- (b) the result in each such Court to which you appealed:
- i. THE COURT OF APPEALS MISAPPREHENDED THE
- ii. ISSUE BECAUSE THE DEFINITION OF SERIOUS
- iii. BODILY INJURY IS NOT DEFINED IN THE STATUTE
- (c) the date of each such result:
- i. _____
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. THE DOCTOR DOWMANT EVIDENCE
- ii. DOE NOT SO SERIOUS BODILY INJURY
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) _____
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully: THE COURT OF APPEALS MISAPPREHENDED THE ISSUE BECAUSE THE DEFINED IN THE STATUTE OF SERIOUS BODILY INJURY IS NOT DEFINED OF SERIOUS FOR THIS OFFENSE

FILED

2013 DEC 27 P 2:54

BETHA GARRICO
CLERK OF COURT
CHARLOTTE NC

REVISED 3/2004

- (a) WRI WITH HOLDING EVIDENCE CRITICAL TO
 (b) A CRIMINAL INVESTIGATION
 (c) _____
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING
 (b) TO OBJECT TO LACK OF REMEDIAL ARGUMENT
 (c) COUNSEL WAS INEFFECTIVE FOR NOT SHOWING MY PICTOR
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? YES
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? NO
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? NO
 (d) any other petitions, motions or applications in this or any other Court? _____
13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:
 (a) the specific nature thereof:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. _____
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. _____
 ii. _____
 iii. _____

FILED
 2013 DEC 27 P 2:54
 CATHA A. DARRIGG
 CLERK OF COURT
 LEXINGTON, SC

- iv. _____
- (d) the date of each such disposition: FILED
- i. DECEMBER 13TH 2017
- ii. PETITION FOR WRIT OF HABEAS CORPUS TO THE
- iii. COUNT OF APPEALS
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. CONSPIRACY TO OBSTRUCT JUSTICE AND
- ii. PENJURY TEAM NEEDED TO COVER THEIR CRIMES
- iii. OF A SECRET
- iv. CHARGES OF MULTIPLE COUNTS POINTS
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
- YES
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. SERIOUS BODILY INJURY IS NOT DEFINED
- ii. THE STATUTE FOR THIS OFFENSE
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. COUNSEL WAS INEFFECTIVE MEDICAL REPORT
- ii. UPHOLD CONVICTION WITH DIRECT EVIDENCE WAS IN
- iii. REPLY INCIDENT
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) SECTION 16-25-65 THE STATUTE FOR OBSTRUCTION
- (b) PROVIDES A PERSON WHO VIOLATES 16-25-2014
- (c) _____
17. Were you represented by an attorney at any time during the course of:
- MATTHEW C. BUGHAWAN

- (a) your arraignment and plea? REPORT WAS CHANGED AND ALTERED
- (b) your trial, if any? INVESTIGATION OF THIS CASE
- (c) your sentencing? COVER UP
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? LEGAL HISTORY MEDICAL TEST REPORTS
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? MEDICAL TEST REPORT

18. If you answered "yes" to one or more parts of (17), list:

- (a) the name and address of each attorney who represented you:

- i. MATTHEW C. BUCHANAN ASST. PUBLIC DEFENDER
- ii. LANELLE CONTEY DUMANT APPELLATE
- iii. _____

- (b) the proceedings at which each such attorney represented you:

- i. _____
- ii. _____
- iii. _____

19. State clearly the relief you seek in filing this application:

THE DOCTOR REPORT INEFFECTIVE COUNSEL

20. Are you now under sentence from any other court that you have not challenged?

NO

FILED
2013 DEC 27 P 2:54
BETH A. CARRIG
CLERK OF COURT
KANSAS

ORIGINAL

STATE OF SOUTH CAROLINA)

County of)

VERIFICATION)

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

BENNIE GOLSTON

SWORN to and subscribed before me this _____
day of _____, 2_____.

Notary Public (L.S.)

My Commission Expires: _____

BETH A. CARRIG
CLERK OF COURT
LEXINGTON SC

2013 DEC 27 P 2:54

FILED

2013 CP 3204474

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

ORIGINAL

I, _____, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Benni Holston
Applicant

SWORN or affirmed to and subscribed before me this
_____ day of _____, 2_____.

Notary Public

My Commission Expires: _____

FILED
2013 DEC 27 P 2:54
BETH A. CARRIGE
CLERK OF COURT
LEWISTON, ME

2013 CP 3204474

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Bennie Golston,

Applicant,

v.

State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

2013-CP-32-04474

RETURN

In response to the post-conviction relief (PCR) application filed December 27, 2013, the Respondent would show this Court:

I.

Applicant is no longer confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Clerk of Court for Lexington County.¹ Applicant was indicted at the May 2009 term of the Lexington County Grand Jury for Criminal Domestic Violence of a High and Aggravated Nature (2009-GS-32-5027). Applicant was represented by David M. Mauldin and Matthew C. Buchanan, Esquires. Applicant proceeded to trial before the Honorable R. Knox McMahon on May 13-14, 2009. The jury found Applicant guilty as indicted. Judge McMahon sentenced Applicant to ten (10) years confinement.

Applicant filed a timely notice of appeal. Assistant Appellate Defender LaNelle Canty DuRant of the South Carolina Commission on Indigent Defense represented Applicant on his appeal. Applicant, through counsel, filed an Initial Brief of Appellant on April 26, 2010. The State filed its Initial Brief of Respondent on November 10, 2010. A Final Brief of Appellant was submitted on June 17, 2011. The South Carolina Court of Appeals heard arguments on May 13,

¹ Applicant was released from the South Carolina Department of Corrections' custody on August 1, 2013.

2012. Applicant's conviction and sentence were affirmed by the South Carolina Court of Appeals. State v. Golston, 399 S.C. 393, 732 S.E.2d 175 (2012). Applicant then filed a Petition for Rehearing on June 19, 2012 which was denied on September 13, 2012. Applicant then filed a Petition for Writ of Certiorari on December 13, 2012. The State filed its return on December 31, 2012. The South Carolina Supreme Court denied the petition on December 5, 2013. The remittitur was issued on December 11, 2013.

II.

In his current application for post-conviction relief Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. Ineffective assistance of counsel.

Respondent notes that Applicant states he has attached supporting documentation to his application, but there was no attachment to the application as received by the Attorney General's Office.

For the purpose of this Return, the Respondent incorporates the Clerk of Court records and the South Carolina Department of Corrections' records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

III.

In a post-conviction relief action, the Applicant bears the burden of proving the allegations in their application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, the Applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Strickland v. Washington, 466 U.S. 668, (1984); Butler, 334 S.E.2d 813.

The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. The courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. 668. The Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 386 S.E.2d 624 (1989).

The reviewing court applies a two-pronged test in evaluating allegations of ineffective assistance of plea counsel. First, the Applicant must prove that counsel's performance was deficient. Under this prong, the court measures an attorney's performance by its "reasonableness under professional norms." Cherry, 300 S.C. at 117, 386 S.E.2d at 625, citing Strickland. Second, counsel's deficient performance must have prejudiced the Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Cherry, 300 S.C. at 117-18, 386 S.E.2d at 625.

The Respondent submits that Applicant cannot satisfy either requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, the Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Respondent denies each allegation that is not expressly admitted, qualified or explained.

V.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claims of ineffective assistance of counsel.

(signatures on following page)

Respectfully submitted,

ALAN M. WILSON
Attorney General

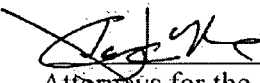
JOHN W. McINTOSH
Chief Deputy Attorney General

KAREN C. RATIGAN
Senior Assistant Deputy Attorney General

J. CLAYTON MITCHELL
Staff Attorney

P.O. Box 11549
Columbia, S.C. 29211

By:


Attorneys for the Respondents

Columbia, South Carolina

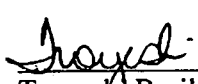
June 13, 2014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE ELEVENTH CIRCUIT
COUNTY OF LEXINGTON	)	
	)	
	)	2013-CP-32-04474
	)	
BENNIE GOLSTON	)	
	)	
Applicant,	)	
	)	
vs	)	AFFIDAVIT OF SERVICE BY MAIL
	)	
STATE OF SOUTH CAROLINA,	)	
	)	
Respondent	)	
_____	)	

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Kristy Grafton Goldberg
1720 Main St, Suite 301
Columbia, SC 29201

DATED this 13th day of June, 2014

 Troyesh Brailey, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA)
COUNTY OF LEXINGTON)

BENNIE GOLSTON)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
2013-CP-32-04474

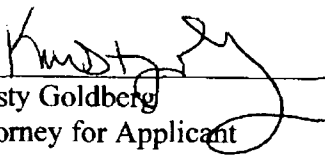
ORIGINAL

**AMENDED APPLICATION
FOR POST CONVICTION RELIEF**

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Ineffective assistance of trial counsel - trial counsel failed to object or request a directed verdict when the State failed to offer the victim's medical records as evidence to prove the victim's injuries.
- (b) Ineffective assistance of trial counsel – trial counsel failed to object when the Emergency Room Nurse testified.
- (c) Ineffective assistance of trial counsel – trial counsel failed to offer evidence of Applicant's booking photo and victim's medical records for the jury to review.
- (d) Ineffective assistance of trial counsel – trial counsel failed sufficiently argue that the Defendant and Victim were not living together at the time of the alleged incident.


Kristy Goldberg
Attorney for Applicant

2013 JUN 13 1:20 PM
CLERK OF COURT
COUNTY OF LEXINGTON
SOUTH CAROLINA

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 9TH day of April, 2015

2015 APR 13 12:00 PM
CLERK OF COURT
LEXINGTON, SC

SOUTH CAROLINA)
COUNTY OF LEXINGTON)

BENNIE GOLSTON)

Applicant,)

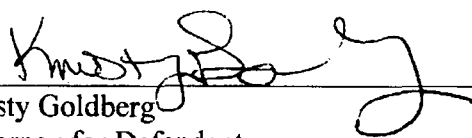
vs.)

STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
2013-CP-32-04474

CERTIFICATE OF SERVICE

I certify that on this date I served the Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549.


Kristy Goldberg
Attorney for Defendant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 9th day of April, 2015

RECEIVED
CLERK OF COURT
LEXINGTON
APR 13 2015

ORIGINAL

STATE OF SOUTH CAROLINA)
 COUNTY OF LEXINGTON)
)
 BENNIE GOLSTON)
)
 Applicant,)
)
 vs.)
)
)
 STATE OF SOUTH CAROLINA,)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 2013-CP-32-04474

ICP/K

SECOND AMENDED APPLICATION
 FOR POST CONVICTION RELIEF

CLERK OF COURT
 JESSICA CORPUS
 2015 OCT -1 AM 11:18

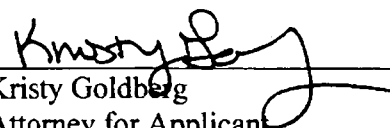
2015 OCT -1 AM 11:18

FILED

Based upon further investigation and research, the Post-Conviction Relief Application filed on behalf of the above named Applicant is hereby Amended as follows:

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) Ineffective assistance of trial counsel - trial counsel failed to object or request a directed verdict when the State failed to offer the victim's medical records as evidence to prove the victim's injuries.
- (b) Ineffective assistance of trial counsel – trial counsel failed to object when the Emergency Room Nurse testified.
- (c) Ineffective assistance of trial counsel – trial counsel failed to offer evidence of Applicant's booking photo and victim's medical records for the jury to review.
- (d) Ineffective assistance of trial counsel – trial counsel failed to address the fact that the deputy altered his incident report.
- (e) Ineffective assistance of trial counsel – trial counsel failed sufficiently argue that the Defendant and Victim were not living together at the time of the alleged incident.
- (f) Ineffective Assistance of trial counsel – trial counsel failed to request a mistrial when the Court determined that the State's witnesses may have committed perjury in their testimony (See pages 351-352 of trial transcript).


 Kristy Goldberg
 Attorney for Applicant

Kristy Goldberg
 Law Office of Kristy Goldberg, LLC.
 1720 Main Street, Suite 303
 Columbia, SC 29201
 803-667-6633
 803-799-4059 (fax)
 kristy@kristygoldberglaw.com

Columbia, South Carolina

This 28th day of September, 2015

FILED

2015 OCT -1 AM 11:18

ETHAN A. CARRIAC
 CLERK OF COURT
 COLUMBIA, SC

ORIGINAL

487

SOUTH CAROLINA)
COUNTY OF LEXINGTON)

BENNIE GOLSTON)

Applicant,)

vs.)

STATE OF SOUTH CAROLINA,)
Defendant.)

IN THE COURT OF COMMON PLEAS
2013-CP-32-04474

16K

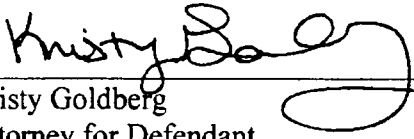
CERTIFICATE OF SERVICE

STH A. CARRIS
CLERK OF COURT
LEXINGTON, SC

2015 OCT -1 AM 11:18

FILED

I certify that on this date I served the Second Amended Application for Post-Conviction Relief in this case on The State of South Carolina by delivering a copy of this application to the Office of the Attorney General via U.S. mail at Post Office Box 11549, Columbia, South Carolina 29211-1549.



Kristy Goldberg
Attorney for Defendant

Kristy Goldberg
Law Office of Kristy Goldberg, LLC.
1720 Main Street, Suite 303
Columbia, SC 29201
803-667-6633
803-799-4059 (fax)
kristy@kristygoldberglaw.com

Columbia, South Carolina

This 28th day of September, 2015

1 State of South Carolina

Court of Common Pleas

2 County of Lexington

3

4 Bennie Golston,

) Transcript of Record

)

5 Applicant,

)

2013-CP-32-4474

vs.

)

6

)

The State of South Carolina,

)

7

8

9

December 9, 2015

Lexington, South Carolina

10

11 B E F O R E:

12 The Honorable D. Craig Brown, Judge

13

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

15 Patrick Schmeckpeper, Assistant Attorney General
Attorney for the State

16

17 Kristy G. Goldberg, Esquire
Attorney for Defendant

18

19

20

Stacy S. Johnson, RPR
Circuit Court Reporter

21

22

23

24

25

1	<u>I N D E X</u>	
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3	Bennie Golston	
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6	Matt Buchanan	
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1	<u>E X H I B I T S</u>			
2	<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EVD.</u>
3	Applicant's 1	Medical Records	4	12
4	Applicant's 2	Police Report	4	21
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P R O C E E D I N G S

(The following proceedings were held on December 9, 2015.)

(Applicant's Exhibit Numbers 1, 2 and 3 were marked for identification.)

THE COURT: All right. Who's the next Applicant?

MR. SCHMECKPEPER: The next Applicant is gonna be Bennie Golston and he's not incarcerated at this time.

THE COURT: Yes, sir.

MR. SCHMECKPEPER: Your Honor, may it please the Court? Bennie Golston v. State of South Carolina, 2013-CP-32-4474. Mr. Golston filed his application on December 7, 2013. He pled guilty -- or he was convicted, I'm sorry, on May 14, 2009, of criminal domestic violence of a high and aggravated nature. He was sentenced by Judge McMahon to ten years imprisonment. He appealed. Ultimately that appeal was denied by the South Carolina Court of Appeals. He's got several allegations today. I'm gonna turn it over to Ms. Goldberg.

THE COURT: Ms. Goldberg.

MS. GOLDBERG: Thank you, Your Honor. May it please the Court? Your file should have it in a second amended application that was filed on October 1st of 2015.

THE COURT: I did not see that yesterday. It is not in my packet of information.

1 **MS. GOLDBERG:** I have a copy. May I approach?

2 **THE COURT:** Yes.

3 **MS. GOLDBERG:** That is a copy of the clocked version.
4 That is the application we're going forward on today. And,
5 Your Honor, if -- unless Your Honor needs anything further,
6 I'll go ahead and call Mr. Golston as a witness.

7 **THE COURT:** All right. Go ahead.

8 **THE CLERK:** Raise your right hand.

9 BENNIE GOLSTON,
10 having been duly sworn, testified as follows:

11 **THE CLERK:** All right, sir. Will you, please, state
12 your name for the record.

13 **THE WITNESS:** My name is Bennie Golston.

14 DIRECT EXAMINATION

15 BY MS. GOLDBERG:

16 Q. You filed a PCR application based on your CDV hand
17 conviction; is that right?

18 A. That's right.

19 Q. When were you arrested on that charge approximately?

20 A. I was arrested in Lexington County. That was
21 March 22, 2008.

22 Q. After your arrest, did you stay in jail?

23 A. I stayed in jail.

24 Q. Until your trial in May of 2009?

25 A. We had a preliminary hearing.

- 1 Q. But you were never on bond?
- 2 A. No. I couldn't get a bond reduction.
- 3 Q. What sentence did you receive at trial?
- 4 A. Ten years.
- 5 Q. And you filed an appeal?
- 6 A. I filed.
- 7 Q. And it was denied; is that right?
- 8 A. It was -- through the whole process of me doing my
- 9 time, it was filed.
- 10 Q. It was filed. Did you file your PCR application while
- 11 you were still in prison or after you got out?
- 12 A. I filed it while I was in prison.
- 13 Q. When were you released from prison?
- 14 A. I don't remember the date.
- 15 Q. Do you remember the year?
- 16 A. Not really, no.
- 17 Q. Okay. If I said August 1, 2013, does that sound about
- 18 right?
- 19 A. Sounds about right.
- 20 Q. Were you released on -- into -- on parole or on
- 21 community supervision?
- 22 A. I maxed out.
- 23 Q. You maxed out completely?
- 24 A. Right.
- 25 Q. So when you were released from prison, you didn't have

1 any supervision?

2 A. No.

3 Q. Now since you have maxed out your sentence, you still
4 want to go forward with this PCR today?

5 A. I do.

6 Q. You understand that if your PCR is granted, you --
7 your charges would start over essentially and you would be
8 facing this domestic violence of a high and aggravated
9 nature all over again?

10 A. Yes.

11 Q. Okay. You'd have to decide whether to plea or go to
12 trial all over again?

13 A. Right.

14 Q. And that's what you're asking this Court to do, to
15 overturn your case?

16 A. Right.

17 Q. While you were in jail, who was your attorney?

18 A. I can't think -- I can't think of the name right off.

19 Q. You -- at some point was Matt Buchanan your attorney?

20 A. He was my attorney at the beginning.

21 Q. He was your attorney right after you were arrested?

22 A. Right.

23 Q. And the whole time this was pending he was always your
24 attorney?

25 A. Yes.

- 1 Q. Did he come to the jail to meet you with?
- 2 A. Huh?
- 3 Q. Did he come to the jail and have meetings with you?
- 4 A. He came to the jail.
- 5 Q. Did he meet with you often?
- 6 A. I think he was there two or three times.
- 7 Q. Did he share with you the discovery, like the police
- 8 reports and things?
- 9 A. No.
- 10 Q. Did you always want a trial in this case or did you
- 11 ever want to plead guilty?
- 12 A. I wanted a trial.
- 13 Q. From day one?
- 14 A. From day one.
- 15 Q. Did you and your lawyer discuss that?
- 16 A. No.
- 17 Q. Tell me about your conversations with your lawyer
- 18 about whether you would have a plea or a trial.
- 19 A. He just wanted me to plead guilty.
- 20 Q. Okay. Did he say why he wanted you to plead guilty?
- 21 A. No.
- 22 Q. Did you have a plea offer?
- 23 A. Yes.
- 24 Q. What was it?
- 25 A. Two years.

1 Q. When you went to trial, generally speaking, the
2 defense that was presented was a self-defense claim; is
3 that right?

4 A. Right.

5 Q. Okay. Also Mr. Buchanan argued that you and the
6 victim never cohabitated. Is that one of the issues that
7 was presented in your case?

8 A. We never lived together.

9 Q. Right.

10 A. We was together, but we never lived -- actually lived
11 together.

12 Q. Right. And also it was argued that her injuries
13 weren't severe enough to be a high and aggravated nature?

14 A. True.

15 Q. That kind of encompasses your entire defense?

16 A. Right.

17 Q. All of those things put together; is that right?

18 A. Right.

19 Q. And that's what you always wanted to present in trial?

20 A. Yes.

21 Q. You never denied being in a physical confrontation
22 with her?

23 A. No, I didn't.

24 Q. Okay. Did you help your lawyer prepare for trial or
25 did he ask for your help in any way?

1 A. No.

2 Q. Now in your amended application that was filed in
3 October of 2015, there's several allegations. And you've
4 seen a copy of the document I filed, correct?

5 A. Right.

6 Q. All right. And those -- that does encompass the
7 allegations you want to present?

8 A. Right.

9 **THE COURT:** Ms. Goldberg, hold on a minute. Before
10 you go further, I don't know if you need this. You handed
11 me three copies of this second amended application. I
12 don't need -- I thought it was three pages, but there's one
13 page.

14 **MS. GOLDBERG:** Oh, I think I just copied that first
15 page.

16 **THE COURT:** I didn't know if you needed that for your
17 direct examination.

18 **MS. GOLDBERG:** Thank you. That's fine.

19 BY MS. GOLDBERG:

20 Q. Mr. Golston, the first allegation is that you believe
21 that the State should have introduced the victim's medical
22 records to prove her injuries?

23 A. True.

24 Q. And that since they didn't your lawyer should have
25 asked that the case be dismissed or it should have been

1 thrown out in some way?

2 A. True.

3 Q. Can you explain that argument to the Judge? Can you
4 explain why the victim's medical records were relevant in
5 your case?

6 A. Well, the CAT scan said no breaks, bruises, fractures,
7 tears, no internal trauma, but that was the whole thing to
8 it that was tying me for her face being swolled up. But
9 that was the whole thing, the CAT scan showed everything,
10 why her face was swolled up. She had her mouth full of
11 rotten and infected teeth.

12 Q. Okay.

13 **MS. GOLDBERG:** I beg the Court's indulgence.

14 BY MS. GOLDBERG:

15 Q. Mr. Golston, have you seen the victim's medical
16 records in this case?

17 A. No.

18 Q. Have you looked at them?

19 A. No.

20 Q. You were just talking about what the CAT scan said.
21 How do you know that?

22 A. Oh, out of my transcript.

23 Q. Okay. All right. So you're just right now arguing
24 from what was said at trial?

25 A. Right.

1 Q. All right. You think that medical records should have
2 been offered into evidence to show that, correct?

3 A. Yeah, right.

4 **MS. GOLDBERG:** Okay. And at this point I think the
5 fair way to do this was defense and I have consented to
6 offer those medical records into evidence. I'm not gonna
7 question Mr. Golston about them at this point, but I'll
8 just mention that they are an exhibit in this case and hand
9 them up to the judge.

10 **MR. SCHMECKPEPER:** And I have no objection. I would
11 just object to Mr. Golston testifying to them if he's never
12 seen them before.

13 **THE COURT:** All right.

14 **MS. GOLDBERG:** Okay. I'll just to try to make it
15 clear, his statements.

16 (Applicant's Exhibit Number 1, medical records, were
17 admitted into evidence.)

18 BY MR. GOLDBERG:

19 Q. Mr. Golston, why -- and, again, just to make sure
20 we're on the same page, why it is do you think the State
21 has a responsibility to enter medical records into
22 evidence?

23 A. If you're gonna try me for serious bodily injury, how
24 are you gonna try me without the medical records?

25 Q. You think they were required to prove serious bodily

1 injury?

2 A. I do.

3 Q. Now along those same lines, in -- one of your
4 allegations in this hearing is that the State did offer
5 testimony as to medical injuries from an emergency room
6 nurse, Ms. Jennifer Watson --

7 A. (Nods head.)

8 Q. -- and you're alleging that your lawyer should have
9 objected to her testimony?

10 A. True.

11 Q. Okay. Explain why.

12 A. She was the emergency room nurse. The CAT scan had
13 already documented everything. She was not the eye nurse.
14 The eye -- she went to an eye specialist. He checked that
15 she was fine and went home.

16 Q. You believe her testimony would not be the best
17 evidence as to her injuries, is that what you're saying?

18 A. The effect it had on the jury. She said her eyes was
19 swolled completely shut. You don't see with your whole
20 eyeball, you only see with that little dot. She wasn't
21 qualified to make that statement.

22 Q. She wasn't qualified to say if someone's eyes were
23 swollen shut?

24 A. No, a medical professional who wasn't working with
25 eyes.