

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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S.C. SUPREME COURT

Appeal from Spartanburg County

Honorable Larry B. Hyman, Circuit Court Judge

BERT WAYNE FOSTER,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2016-001667

APPENDIX

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1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SPARTANBURG) COURT OF GENERAL SESSIONS

3
4 STATE OF SOUTH CAROLINA,) TRANSCRIPT
5 PLAINTIFF,) OF
6 VS.) RECORD
7 BERT WAYNE FOSTER,) 10-GS-42-1308
8 DEFENDANT.) 10-GS-42-1309
9

10 December 15th, 2010
11 Spartanburg, South Carolina
12

13 B E F O R E:

14 THE HONORABLE ROGER L. COUCH, Judge, and a jury.

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

16 ABEL GRAY and DAN CUDE
17 ASSISTANT SOLICITORS
18 Attorneys for the State

19 MELINDA BUTLER
20 ESQ.
21 Attorney for the Defendant
22

23
24 PAMELA E. GREEN
25 Circuit Court Reporter
Seventh Judicial Circuit

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SOLICITOR GRAY: Your Honor?

THE COURT: Yes, sir.

SOLICITOR GRAY: If I may, Your Honor. I wanted to --
for the Court's information, this is Mrs. Maria White here.
She's interpreting for one of our victims.

THE COURT: All right.

SOLICITOR GRAY: I just wanted the Court, let the Court
know that's what she's doing here.

THE COURT: Okay. I understand.

All right. Does that individual intend to be a witness
in the case?

SOLICITOR GRAY: Yes, sir, Your Honor. He's one of the
victims. He's gonna be a witness in the case.

THE COURT: All right. Why don't I go ahead and have
her sworn, and that way we'll have that taken care of, and
he'll be aware of what's going on in the trial.

Come forward, ma'am, right here to the clerk. Please
swear, swear her as an interpreter.

(WHEREUPON, the interpreter was placed under oath at
this time.)

THE COURT: Your name is?

INTERPRETER: Maria White.

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

1 All right. We're on the record in the case of The
2 State versus Bert Wayne Foster. I have before me two
3 indictments. The indictments are in Case Number
4 10-GS-42-1308 and 1309. Both of, are for the offense of
5 armed robbery.

6 Now, Ms. Butler, has your client been arraigned on the
7 charges?

8 MS. BUTLER: Your Honor, I don't know if he's been
9 formally arraigned. I know that he had a formal preliminary
10 hearing.

11 THE COURT: All right. Well, he should of been
12 arraigned. But in case he hasn't, let's take care of that
13 at this time.

14 Mr. Foster, please stand.

15 (Defendant complies.)

16 THE COURT: Please swear Mr. Foster for me.

17 (WHEREUPON, the defendant was placed under oath at this
18 time.)

19 THE COURT: Mr. Foster, you're before me, as I
20 indicated, on two charges of armed robbery. What I'm going
21 to do at this time, I'm going to read the indictments to
22 you. I will be asking you how you wish to plead on those
23 charges. Should you decide to plead not guilty to the
24 charges, I will be inquiring of you as to how you wish to be
25 tried.

1 Do you understand that, sir?

2 DEFENDANT: Yes, sir.

3 THE COURT: All right. The first indictment I'm going
4 to go over with you is in Case Number 10-GS-42-1308. That
5 is for armed robbery.

6 The indictment states that Bert Wayne Foster did, in
7 Spartanburg County, on or about September 21 of 2009, while
8 armed with a pistol or other deadly weapon, weapon, or while
9 engaged alleging, either by actions or words, that he was
10 armed while using a representation of a deadly weapon or any
11 object which a person present during the commission of the
12 robbery reasonably believed to be a deadly weapon,
13 feloniously take from the person or presence of Rigoberto
14 Sanchez, by means of force, violence, and/or intimidation,
15 goods or monies of Rigoberto Sanchez. Such goods or monies
16 being described as follows: Keys, cell phone, and U.S.
17 Currency, with the intent to deprive the owner permanently
18 of such property in violation of Section 16-11-330(a) of the
19 Code of Laws of South Carolina, 1976 as amended, against the
20 peace and dignity of the State and contrary to such statute
21 made and provided.

22 NOW, Mr. Foster, did you understand that indictment?

23 DEFENDANT: Yes, sir.

24 THE COURT: You have the right to plead either guilty
25 or not guilty to that indictment.

1 How do you wish to plead?

2 DEFENDANT: Not guilty.

3 THE COURT: Do you wish to be tried by jury?

4 DEFENDANT: Yes, sir.

5 THE COURT: All right. God grant you a speedy delivery
6 on that charge.

7 The next charge is Case Number 10-GS-42-1309. That
8 indictment is also for armed robbery. That indictment
9 states that Bert Wayne Foster did, in Spartanburg County, on
10 or about September 21 of 2009, while armed with a pistol or
11 other deadly weapon, or while engaging, alleging, either by
12 action or words, he was armed while using a representation
13 of a deadly weapon or any object which a person present
14 during the commission of the robbery reasonably believed to
15 be a deadly weapon, feloniously take from the person or the
16 presence of Freddie Robinson, Junior, by means of force
17 violence and/or intimidation, goods or monies of Freddie
18 Robinson, Junior. Such goods or monies being described as
19 follows: Beer, keys, cell phone, and U.S. Currency, with
20 the intent to deprive the owner permanently of such property
21 in violation of Section 16-11-330(a) of the Code of Laws of
22 South Carolina, 1976 as amended, against the peace and
23 dignity of the State, and contrary to the statute in such
24 case made and provided.

25 Mr. Foster, did you understand the indictment that I

1 just read?

2 DEFENDANT: Yes, sir.

3 THE COURT: You have the right to plead either guilty
4 or not guilty to that indictment.

5 How do you wish to, to plead?

6 DEFENDANT: Not guilty.

7 THE COURT: Do you wish to be tried by jury?

8 DEFENDANT: Yes, sir.

9 THE COURT: And God grant you a speedy delivery on that
10 charge as well. Thank you, sir. You can be seated.

11 (Defendant complies.)

12 THE COURT: Now, I do -- I am aware that the defense
13 has made, has a motion in limine. It looks like there are
14 five issues to be considered in this motion. What I intend
15 to do is go forward and select a jury. We'll take up the
16 motions before we swear the jury and begin the trial.

17 Any objection to that process, Mr. Gray?

18 SOLICITOR GRAY: No, sir, Your Honor.

19 THE COURT: Any objection, Ms. Butler?

20 MS. BUTLER: No, sir.

21 THE COURT: All right. I've received from both sides
22 of the case request for voir dire questions.

23 Does the State have any objection to the defense's
24 questions?

25 SOLICITOR GRAY: No, sir, Your Honor.

1 THE COURT: Does the defense have any objection to the
2 State's request?

3 MS. BUTLER: No, sir, Your Honor.

4 THE COURT: All right. Anything the State would like
5 to bring up before we begin jury selection in the matter?

6 SOLICITOR GRAY: No, sir, Your Honor.

7 THE COURT: Anything the defense would like to bring up
8 before we begin jury selection?

9 MS. BUTLER: No, sir, Your Honor.

10 THE COURT: All right. Bring the jury panel in.

11 INTERPRETER: Your Honor?

12 THE COURT: Yes, ma'am.

13 INTERPRETER: I would love to ask you if you'd be kind
14 to make pauses when you speak so I will be able to---

15 THE COURT: I'm sorry?

16 INTERPRETER: I would love if you be kind to speak a
17 little slow so I could interpret.

18 THE COURT: I'll try to slow down a little bit.

19 INTERPRETER: Please.

20 THE COURT: Thank you.

21 INTERPRETER: Thank you.

22 THE COURT: Estimated length of trial?

23 SOLICITOR GRAY: I would -- probably, Your Honor, maybe
24 a day.

25 THE COURT: Well, when you say a day, that would be all

1 of today and tomorrow or --?

2 SOLICITOR GRAY: I don't think---

3 THE COURT: We won't get started with the trial today
4 until probably 11:00, 11:30. We've got to do motions in
5 limine.

6 SOLICITOR GRAY: Yes, sir, we have about five -- we
7 have six or seven witnesses and one requires the
8 interpreter.

9 THE COURT: All right.

10 SOLICITOR GRAY: But our case in chief---

11 THE COURT: The reason I'm asking, there's a juror who
12 has a doctor's appointment tomorrow afternoon. I need to
13 excuse that juror if this case could go into tomorrow
14 afternoon.

15 MS. BUTLER: The defense only plans to call one
16 witness, but the number of witnesses the State has, it might
17 go into at least lunchtime tomorrow.

18 THE COURT: I'm gonna excuse that juror then. 213 will
19 be excused for this trial.

20 MS. BUTLER: Thank you, Your Honor.

21 SOLICITOR GRAY: I think it also depends on the
22 weather, Your Honor.

23 THE COURT: I understand.

24 (WHEREUPON, the following takes place within the
25 presence of the jury.)

1 THE COURT: Thank you, sir.

2 Good morning, ladies and gentlemen. We're about to
3 begin jury selection in the next case. As, as I told you
4 yesterday, I am going to go over, or day before yesterday,
5 I'm going to go over with you the indictments in this case.
6 The indictments, again, are the documents that bring the
7 case before this Court. It informs this Court of the charge
8 to be tried. It informs the defendant of the charges that
9 have been lodged against him. Indictments can not be used
10 by a jury in determining the guilt or the innocence of the
11 defendant. They simply are the documents that bring the
12 case before the court.

13 There are two indictment in the case that we're about
14 to try, and that is the case of the State of South Carolina
15 versus Bert Wayne Foster. The first indictment that I'm
16 going to go over with you is Case Number 2010-GS-42-1308.
17 The charge is for the offense of armed robbery.

18 The indictment that's before the Court reads that Bert
19 Wayne Foster did, in Spartanburg County, on or about
20 September 21 of 2009, while armed with a pistol or other
21 deadly weapon or while alleging, either by action or words,
22 he was armed while using a representation of a deadly weapon
23 or any object which a person present during the commission
24 of the robbery reasonably believed to be a deadly weapon,
25 feloniously take from the person or presence of Rigoberto

1 Sanchez by means of force, violence, and/or intimidation,
2 goods or monies of Rigoberto Sanchez such goods or monies
3 being described as follows: keys, cell phone, and U.S.
4 Currency, all with the intent, excuse me, with the intent to
5 deprive the owner permanently of such property in violation
6 of Section 16-11-30(a) of the Code of Laws of South
7 Carolina, 1976 as amended, against the peace and dignity of
8 the State and contrary to the statute in such case made and
9 provided.

10 The second indictment that is before this Court is in
11 Case Number 2010-GS-42-1309. It is also for the offense of
12 armed robbery. The indictment states that Bert Wayne Foster
13 did, in Spartanburg County, on or about September 21 of
14 2009, while armed with a pistol or other deadly weapon, or
15 while alleging, either by action or words, he was armed
16 while using a representation of a deadly weapon or any
17 object which a person present during the commission of the
18 robbery reasonably believed to be a deadly weapon
19 feloniously take from the person or presence of Freddie
20 Robinson, Junior, by means of force, violence, and/or
21 intimidation, goods or monies of Freddie Robinson, Junior.
22 Such goods or monies being described as follows: Beer,
23 keys, cell phone, and U.S. Currency, with the intent to
24 deprive the owner permanently of such property in violation
25 of section 16-11-330(a) of the Code of Laws of South

1 Carolina, 1976 as amended, against the peace and dignity of
2 the State and contrary to the statute in such case made and
3 provided.

4 All right. Those are the two indictments in the case.
5 I, again, go over those with you for the purpose of you
6 understanding what is been alleged and so that you can more
7 fully answer the questions that I'm about to ask.

8 Now, as was the case yesterday or day before yesterday,
9 it's necessary that you be sworn in order that we assure
10 ourselves that the answers to the questions you're about to
11 give will be truthful, honest, and complete.

12 So, at this time, Madam Clerk, I'd ask that you please
13 swear the prospective jury panel.

14 (WHEREUPON, the jury panel was placed under oath at
15 this time.)

16 THE COURT: I'm gonna ask that counsel approach briefly
17 along with the interpreter.

18 (WHEREUPON, a bench conference was held out of the
19 hearing of the jury at this time.)

20 THE COURT: All right. Ladies and gentlemen, let me
21 explain. One of the victims in the case is, does not speak
22 English well, and, so, we have an interpreter for that
23 person. I'm gonna let them move over here so that they
24 don't disturb you folks while they're doing the
25 interpretation. I can see that that was a problem over on

1 this side. So, they're gonna have a seat over here where
2 they're not quite as close to you while those
3 interpretations take place.

4 But under the law of the state, victims, alleged
5 victims are allowed to be present and be aware of what goes
6 on in their, their trials. And, so, we want to be sure that
7 he is able to do that. So, I'm gonna try to accommodate
8 everybody so that you folks can hear better and he can get
9 his interpretations. So, that's what we're doing at this
10 point in time.

11 Now, before I begin my questioning I want to be sure
12 that you're aware of the names of the, and identities of the
13 attorneys that are involved in the trial of this case.

14 First of all, for the state, if you'll introduce
15 yourself please.

16 SOLICITOR GRAY: Thank you, Your Honor.

17 My name is Abel Gray. I'm an assistant solicitor for
18 the Seventh Circuit.

19 SOLICITOR CUDE: My name is Dan Cude. I'm also an
20 assistant solicitor.

21 THE COURT: All right. And, Mr. Gray, if you would,
22 please introduce the alleged victims in the case.

23 SOLICITOR GRAY: Yes, sir, Your Honor.

24 Mr. Freddie Robinson, Junior.

25 THE COURT: Sir, if you'll stand and turn and face the

1 jury panel, Mr. Freddie Robinson, Junior.

2 SOLICITOR GRAY: And Mr. Rigoberto Sanchez.

3 THE COURT: Mr. Sanchez, if you'll stand for me.

4 (The victims comply.)

5 THE COURT: Thank you very much. You can be seated.

6 Now, I'll ask that the attorney for the defense

7 introduce herself.

8 MS. BUTLER: Thank you, Your Honor.

9 My name is Melinda Butler. I'm an attorney with the

10 Butler Law Firm.

11 THE COURT: And, if you would, please introduce the
12 defendant.

13 MS. BUTLER: This is Bert Wayne Foster.

14 THE COURT: Sir, if you'll stand, turn, and face the
15 jury panel for me.

16 (Defendant complies.)

17 THE COURT: Thank you very much. You can be seated.

18 (Defendant complies.)

19 THE COURT: All right. We'll follow the same procedure

20 as before. I'll ask questions. If you have a response,

21 I'll be asking that you stand. I do need to get your name

22 and juror number on the record before I, I receive any

23 response that you might have to my questions.

24 All right. The first question I has, have, has any

25 member of the jury panel ever been related by blood, by

1 marriage, or are you related by blood to the defendant, Bert
2 Wayne Foster, if that's true, please stand.

3 (No response.)

4 THE COURT: Has any member of the jury panel ever had a
5 close personal or a social relationship with the defendant,
6 Bert Wayne Foster, if that's true, please stand.

7 (No response.)

8 THE COURT: Has any member of the jury panel ever been
9 related by marriage or are you related by blood to either of
10 the alleged victims, Rigoberto Sanchez or Freddie Robinson,
11 Junior, if that's true, please stand.

12 (No response.)

13 THE COURT: Has any member of the jury panel ever had a
14 close personal or a social relationship with either of the
15 individuals identified as alleged victims, again, Rigoberto
16 Sanchez, or Freddie Robinson, Junior, if that's true, please
17 stand.

18 (No response.)

19 THE COURT: Now, has any member of the jury panel ever
20 been represented by any of the attorneys that are involved
21 in this case or have they ever been, appeared on the other
22 side of some legal matter from you, if that's true, please
23 stand.

24 (No response.)

25 THE COURT: Has any member of the jury panel ever been

1 related by marriage or are you related by blood or have you
2 had a close personal or a social relationship with any of
3 the attorneys that are involved in the trial of this case,
4 if that is true, please stand.

5 (Juror responds.)

6 THE COURT: Yes, sir, I need your name and number.

7 JUROR: Michael Laughter, Juror Number 90.

8 THE COURT: Yes, sir.

9 JUROR: My son goes to school with Mr. Gray's daughter.

10 THE COURT: All right, sir. Would that fact affect
11 your ability to be fair and impartial---

12 JUROR: No, sir.

13 THE COURT: ---in this trial?

14 JUROR: No, sir.

15 THE COURT: Thank you, sir. You may be seated.
16 Anyone else?

17 THE COURT: I'm going to go over a list of individuals
18 that have been identified to me as potential witnesses in
19 this case. If they are present in the courtroom I'm going
20 to ask that they stand and turn and face you so that you can
21 place a face with the name. Not all of them necessarily
22 will be present in the courtroom at this time.

23 First of all, Investigator Ritchie Foster with the
24 Spartanburg County Sheriff's Office.

25 (Witness stands.)

1 THE COURT: Thank you, sir. You can be seated.

2 (Witness complies.)

3 THE COURT: Investigator Micah Horton with the
4 Spartanburg County Sheriff's Office.

5 Deputy Chris Brumlow with the Spartanburg County
6 Sheriff's Office.

7 (Witness stands.)

8 THE COURT: Thank you.

9 Of course, you've met Mr. Freddie Robinson, and I won't
10 make him stand and Mr. Sanchez.

11 Mr. Mauricio Sanchez.

12 Deputy Robert Duncan with the Spartanburg County
13 Sheriff's Office.

14 (Witness stands.)

15 THE COURT: Investigator, Investigator J.M. Nix with
16 the Spartanburg County Sheriff's Office.

17 Deputy Dave Evett with the Spartanburg County Sheriff's
18 Office.

19 Miss Kasey Davis.

20 Mr. Steven Rogers.

21 Mr. Adam Suchil.

22 Did I say that right?

23 SOLICITOR GRAY: Yes, sir.

24 THE COURT: Suchil. It's S-U-C-H-I-L.

25 Miss Shannon Varner.

1 Investigator Robert Shaffer with the Spartanburg County
2 Sheriff's Office.

3 And Cassie Cardoza.

4 Now, as to the individuals that I just identified as
5 potential witnesses in this case, has any member of the jury
6 panel ever been related by marriage or are you related by
7 blood or have you ever had a close personal or a social
8 relationship with any of the individuals that I just named
9 as potential witnesses in this trial, if that's true, please
10 stand.

11 (Juror responds.)

12 THE COURT: Ma'am, I need your name and number.

13 JUROR: Kathy Mullkey, 242.

14 THE COURT: Yes, sir.

15 JUROR: I know the three officers that are here present
16 today.

17 THE COURT: Yes, ma'am, I believe your husband is in
18 the Sheriff's Office, is that right?

19 JUROR: Yes, sir.

20 THE COURT: Would that fact affect your ability to be
21 fair and impartial between the parties in this trial?

22 JUROR: Absolutely not.

23 THE COURT: All right. Thank you, ma'am. You can be
24 seated.

25 Anyone else?

1 (Juror responds.)

2 THE COURT: Yes, sir, I need your name and number.

3 JUROR: Bryan Evans, 45.

4 THE COURT: Yes, sir.

5 JUROR: I, I'm going back to Freddie. I, for some
6 reason, his face is familiar and I don't -- I can't
7 recollect where I know him from, but---

8 THE COURT: So, you may of been an acquaintance of his
9 in the past?

10 It registers with you, is that what you're telling me?

11 JUROR: (Nods affirmatively.)

12 THE COURT: You have to answer me verbally. We got to
13 get it on the record.

14 JUROR: Yes.

15 THE COURT: All right. Thank you, sir.

16 Now, would that fact affect your impartiality in the
17 trial however?

18 JUROR: No.

19 THE COURT: Thank you. You can be seated.

20 Has any member of the jury panel ever been arrested
21 for, charged with, or convicted of a crime involving either
22 theft, possession of a pistol or weapon, robbery or armed
23 robbery of any type, or any similar offense in any State
24 Court such as General Sessions Court, Family Court,
25 Magistrate's Court, and or City Court, if that's true,

1 please stand.

2 (Juror responds.)

3 THE COURT: Yes, sir, I need your name and number.

4 JUROR: Ken Moore, 110.

5 THE COURT: Yes, sir, your situation.

6 JUROR: I was charged with simple or illegal possession
7 of a firearm.

8 THE COURT: All right, sir. That case was not
9 prosecuted to a conviction?

10 JUROR: No, sir.

11 THE COURT: Okay. So, the charges were dropped at some
12 point?

13 JUROR: Yes, sir.

14 THE COURT: All right. Would that fact affect your
15 ability to be fair and impartial in this trial?

16 JUROR: No, sir.

17 THE COURT: All right. Thank you, sir.
18 Anyone else?

19 (Juror responds.)

20 JUROR: Yes, sir. Paul Ostickler, 223.

21 THE COURT: Yes, sir.

22 JUROR: The same thing. I had been arrested for or
23 charged with illegal possession of a firearm.

24 THE COURT: All right. And that case was, never went
25 to a conviction?

1 JUROR: Correct.

2 THE COURT: Now, would that affect your impartiality in
3 a trial?

4 JUROR: No.

5 THE COURT: Thank you, sir.

6 Anyone else?

7 (No response.)

8 THE COURT: Is there any member of the jury panel or
9 any member of your immediate family that's currently being
10 prosecuted in any case being handled by the Seventh Circuit
11 Solicitor's Office or any other prosecuting authority in the
12 state of South Carolina, if that's true, please stand.

13 (No response.)

14 THE COURT: Has any member of the jury panel ever been
15 arrested by the Spartanburg County Sheriff's Department, if
16 that's true, please stand.

17 (No response.)

18 THE COURT: Has any member of the jury panel or a
19 member of your immediate family ever been employed by or
20 volunteered with any law enforcement agency?

21 That would include city, county, state or federal, if
22 or have they ever been so employed with any victim or
23 witness assistance program, if that's true, please stand.

24 (Jurors respond.)

25 THE COURT: Yes, ma'am, your name and number?

1 JUROR: Kathy Mullkey, 242. My husband is a deputy
2 sheriff for Spartanburg County.

3 THE COURT: All right. Would that affect your
4 impartiality, ma'am?

5 JUROR: No, sir.

6 THE COURT: Thank you. You can be seated.
7 Sir, your name and number?

8 JUROR: Jason Davis, Juror Number 32. One of my
9 relatives is a prison guard.

10 THE COURT: All right. How close a relative might that
11 be?

12 JUROR: In like marriage in family.

13 THE COURT: All right. Would that affect your---

14 JUROR: No.

15 THE COURT: ---impartiality?

16 Thank you, sir.

17 Name and number please?

18 JUROR: Timothy Landers, 87.

19 THE COURT: Yes, sir.

20 JUROR: My brother-in-law is a police officer.

21 THE COURT: All right. Would that affect your
22 impartiality in this case?

23 JUROR: No, sir.

24 THE COURT: What agency is he a police officer with?

25 JUROR: I can't remember the county.

1 THE COURT: All right. It's a county -- is it in South
2 Carolina?

3 JUROR: It's in Spartanburg County, yes, sir.

4 THE COURT: Oh, he's in Spartanburg County.

5 JUROR: Yes, sir.

6 THE COURT: Okay. Thank you, sir. You can be seated.
7 Yes, ma'am, your name and number?

8 JUROR: Christy Adams, 1. My brother-in-law is a
9 retired police officer and investigator for Spartanburg
10 County.

11 THE COURT: All right.

12 JUROR: And he was the police chief in Cowpens.

13 THE COURT: And would that affect your impartiality in
14 this trial?

15 JUROR: No, sir.

16 THE COURT: Thank you, ma'am.

17 Sir, your name and number?

18 JUROR: Dave Demorest, Juror Number 199. My son worked
19 for Trey Gowdy during his campaign this summer and I know
20 Trey Gowdy.

21 THE COURT: All right. Would that affect your
22 impartiality in the trial?

23 JUROR: No, sir.

24 THE COURT: Thank you, sir.

25 Is there any member of the jury panel who is related by

1 blood or marriage or close personal friends with any person
2 who now or has been employed or volunteered with any city,
3 state, or federal prosecutor's office, again, or any victim
4 or witness assistance program administrated by a
5 prosecutor's office?

6 Sir, we have your response.

7 Anyone else?

8 (Juror responds.)

9 THE COURT: Yes, sir, your name and number?

10 JUROR: Charles Jackson, 75.

11 THE COURT: Yes, sir.

12 JUROR: Solicitor Trey Gowdy and the Clerk of Court,
13 Hope Blackley, are members of my church.

14 THE COURT: All right. And would that affect your
15 impartiality in this trial?

16 JUROR: No, sir.

17 THE COURT: Thank you, sir. You can be seated.

18 Anyone else?

19 (No response.)

20 THE COURT: Is there any member of the jury panel who
21 has particular strong views or opinions regarding crimes
22 that might involve the use of guns or weapons, if that's
23 true, please stand.

24 (No response.)

25 THE COURT: Has any member of the jury panel gathered

1 any information outside of this courtroom such that it may
2 have caused you to form or express an opinion about any
3 matter or issue that might be involved in the trial of this
4 case, if that is true, please stand.

5 (No response.)

6 THE COURT: Is there any member of this jury panel who
7 is aware of any bias or prejudice that you might have for or
8 against either the State or the defense in this matter, if
9 that's true, please stand.

10 (No response.)

11 THE COURT: Is there any member of the jury panel who
12 was a member of the Grand Jury that may have issued the
13 indictments in this case?

14 The indictments were issued on February the 18th of
15 2010. That's in both cases.

16 If that's true, please stand.

17 (No response.)

18 THE COURT: Is there any member of the jury panel who
19 is a member of or a contributor to any group which has as
20 its primary concern the promotion of law enforcement and/or
21 victims rights?

22 These groups would include, but not be limited to
23 Mothers Against Drunk Driving, Students Against Drunk
24 Driving, Citizens Against Violent Crime, the South Carolina
25 Troopers Association, the South Carolina Sheriff's

1 Association, the Fraternal Order of Police, or similarly
2 situated or oriented organizations.

3 If that is true, please stand.

4 (Jurors respond.)

5 THE COURT: Yes, ma'am, name and number?

6 JUROR: Kathy Mullkey, 242. I'm a member of the
7 Sheriff's Spouse Association.

8 THE COURT: Would that affect your impartiality in the
9 trial, ma'am?

10 JUROR: No, sir.

11 THE COURT: Thank you.

12 Yes, ma'am, your name and number?

13 JUROR: Susan Huggins, Number 42. I contribute to the
14 Troopers Association and also to the state---

15 THE COURT: Would that affect your impartiality in the
16 trial, ma'am?

17 JUROR: No, sir.

18 THE COURT: Thank you. You can be seated.

19 Does any member of this jury panel know of any reason
20 whatsoever why he or she should not serve as a juror in this
21 case with particular emphasis being placed on your ability
22 to be both fair and impartial to both the state and the
23 defense, if that's true, please stand.

24 (No response.)

25 THE COURT: Any additional questions from the state?

1 SOLICITOR GRAY: No, sir, Your Honor.

2 THE COURT: Any additional questions from the defense?

3 MS. BUTLER: No, sir, Your Honor.

4 THE COURT: All right. I'll declare then -- and I
5 believe there was one juror, that number was 213.

6 Is that right?

7 Juror 213 please stand.

8 (Juror complies.)

9 THE COURT: I understand you have a medical issue
10 tomorrow, is that right?

11 JUROR: Yes, sir.

12 THE COURT: All right. Sir, I'm going to excuse you
13 for that reason. I think this case will take into tomorrow.
14 And, so, we're not going to place you on this panel. I'll
15 make the parties aware of that. You can be seated though,
16 sir.

17 I'll declare then that the jury panel is qualified to
18 serve in this case as now constituted.

19 Again, I will be asking the clerk to prepare a list of
20 potential jurors in this case.

21 In this case, the defense -- the State will have five
22 strikes. The defense will have ten strikes. We will pick
23 one alternate with the State having one strike, the defense
24 having two strikes.

25 All right. Madam Clerk, you may begin the jury

1 selection process.

2 Again, when your name and number is called, come down
3 front to the bailiff, turn and face the back of the
4 courtroom. Bring with you any personal belongings that you
5 have with you.

6 You may proceed, Mrs. Camp.

7 (WHEREUPON, a jury panel was selected at this time.)

8 THE COURT: Now we will be selecting the alternate.

9 Again, the State has one strike. Defense has two.

10 (WHEREUPON, an alternate juror was selected at this
11 time.)

12 THE COURT: Any objection to the jury selection process
13 from the State?

14 SOLICITOR GRAY: No, sir, Your Honor.

15 THE COURT: Any from the defense?

16 Ma'am?

17 MS. BUTLER: Your Honor, I would have a motion to make
18 outside the presence of the jury.

19 THE COURT: All right. I'll ask that you return the
20 jury panel to the assembly room for me please.

21 These jurors will be asked to step back into the jury
22 room.

23 (WHEREUPON, the following takes place outside the
24 presence of all jurors.)

25 THE COURT: Yes, ma'am, you may make your motion.

1 MS. BUTLER: Yes, Your Honor. I would like to make a
2 Batson motion to ask the State to explain their, their
3 choosing to excuse two of the jurors. Specifically -- beg
4 your pardon. Beg the Court's indulgence, Your Honor.

5 (Pause.)

6 MS. BUTLER: I had on my notes that there were two
7 similar situated jurors that I wasn't sure why the State
8 struck one, and, and then not the other. But I'm not sure
9 which juror it was, Your Honor. I will, I will strike my
10 motion at this time.

11 THE COURT: Okay. So, you're not, you're not gonna go
12 forward with the motion?

13 MS. BUTLER: No, sir. Thank you, Your Honor.

14 THE COURT: All right.

15 (Pause.)

16 THE COURT: All right. While we have the -- I'll let
17 these people get situated. Then we'll start.

18 (Pause.)

19 THE COURT: As soon as I get the jury situated we'll
20 take up the motions in limine.

21 (WHEREUPON, the following takes place within the
22 presence of the jury.)

23 THE COURT: All right. Ladies and gentlemen, we've
24 resolved the questions concerning jury selection, and you
25 are the panel that has been selected in this case. Just

1 wanted to give you a little bit of information before we
2 proceed.

3 There's some matters that I do have to take up with the
4 attorneys before we actually begin the trial of this case.
5 I don't expect that to take an extended period of time. So,
6 I'm going to allow you to retire to the jury room while I
7 deal with those issues, and then, once they've been
8 completed, we'll bring you back in and actually start the
9 trial of this case.

10 I will caution you, you know very little about this
11 case other than what's been charged, and you've been
12 selected as fair and impartial and open minded jurors in
13 this matter. I'm going to caution you not to begin to
14 discuss anything about this case, even among yourselves,
15 during this break. You'll find that during the trial I'll
16 give you those same instructions everytime you leave the
17 courtroom because I hope you understand even the most
18 innocent conversation that you might have among yourselves
19 could, if it involves the issues involved in this case or
20 the personalities or anything else about this case, may
21 cause you to begin to make up your mind concerning the
22 issues involved in this case, and I want you to keep an open
23 mind and a clear mind concerning those issues until you've
24 heard all the arguments of counsel, all the evidence, and
25 I've charged you concerning the law, and then and only then

1 begin to discuss this case among yourselves and begin to
2 make up your mind when I've instructed you to begin your
3 deliberations. So, I'll caution you, during this break, as
4 in any other break, and I'll instruct you not to begin to
5 discuss the case, even among yourselves, until I've asked
6 you to do so.

7 Now, when you come back into the jury room, I notice
8 people trying to get the seat that they were in. There's no
9 assigned seating. Just go in the, fill in the seats as you
10 come in. Later on you'll find I'll appoint a foreperson of
11 the jury, and I do that at the close of the trial. Not the
12 beginning of the trial. And then that person will be seated
13 in this front seat where the young lady in the blue top is
14 seated.

15 Ma'am, you are the alternate. An exception in your
16 case, you're always seated in that seat. So, if you'll come
17 in last, you'll always fall into that seat and be able to
18 have a seat there. So, only the alternate has an assigned
19 seat until I appoint a foreperson. So, just fill in the
20 seats. You'll be fine when you come back in.

21 All right. We're gonna take a break. The bailiffs
22 will make you comfortable. If you need something, let them
23 know. If there's a smoker among you, smoking has to take
24 place outside of the courthouse. They'll accompany you
25 outside while you do that if you wish to have a cigarette

1 during this break.

2 Thank you very much and you may retire to the jury
3 room.

4 (WHEREUPON, the following takes place outside the
5 presence of the jury.)

6 THE COURT: All right. I have before me motions in
7 limine from the defense.

8 MS. Butler, you may take those up at this time.

9 MS. BUTLER: Yes, thank you, Your Honor.

10 Your Honor, we would -- the first motion is to
11 determine the admissibility or existence of any tangible
12 evidence. There's none been presented. Just---

13 THE COURT: I'll hear from the State.

14 SOLICITOR GRAY: Thank you, Your Honor.

15 The only evidence I believe that was ever listed was
16 some bandannas that were picked up, and we don't intend to
17 use those at all---

18 THE COURT: All right.

19 SOLICITOR GRAY: ---in the case, Your Honor. We can't
20 establish who they belong to or---

21 THE COURT: All right. There appears to be no tangible
22 evidence that they intend to introduce during the trial.

23 MS. BUTLER: Thank you, Your Honor.

24 The next motion is simply a motion to determine if the
25 State has complied with Rule 5 and Brady.

1 THE COURT: All right. Will the State confirm that
2 Rule 5 and, and Brady have been complied with?

3 SOLICITOR GRAY: Yes, sir, Your Honor. There's been
4 continuing discovery motion. As the Court is well aware, if
5 we get anything new we provide it immediately up until, I
6 believe, as recently as yesterday. There was nothing
7 inculpatory or exculpatory in the document that Mr. Cude
8 sent over to her office, but he sent it anyway---

9 THE COURT: All right.

10 SOLICITOR GRAY: ---in an abundance of caution.

11 THE COURT: So, it's your representation you fully
12 complied?

13 SOLICITOR GRAY: Yes, sir, Your Honor.

14 THE COURT: All right. Thank you.

15 Number three.

16 MS. BUTLER: Yes, Your Honor. A motion to determine
17 the prior record of the defendant, if any, that the State
18 would intend to introduce should the defendant choose to
19 testify.

20 THE COURT: State's position on that?

21 SOLICITOR GRAY: Yes, sir, Your Honor. I believe
22 there's 2007 convictions for Mr. Foster under 609 that would
23 come into play here, and one is for burglary third degree
24 first offense. It carries over, over a year. There's
25 nothing prejudicial about that situation. It involves

1 obviously invasion of someone's privacy, theft in that
2 matter. There's also an accompanying petty larceny that
3 we're seeking to introduce, which has some of the same
4 elements in this situation, asportation of items that do not
5 belong to the defendant in this case. Also it's within the
6 ten year time period, Your Honor.

7 THE COURT: All right.

8 MS. BUTLER: Thank you, Your Honor.

9 The next motion is the motion to determine the
10 existence and admissibility of any statements that the
11 defendant may have made. I don't think that there's
12 statement -- there is a statement that he signed, but
13 nothing.

14 SOLICITOR GRAY: No, no confessions, no Jackson v.
15 Denno hearing is necessary, Your Honor.

16 THE COURT: All right. So, you don't have any
17 statements that you intend to use at this time?

18 SOLICITOR GRAY: Not to law enforcement, no, Your
19 Honor. Nothing written, Your Honor.

20 THE COURT: All right.

21 SOLICITOR GRAY: There will be statements made during
22 the course of the activities made by other individuals who
23 were with the defendant at the time, but nothing taken
24 down---

25 THE COURT: I understand.

1 SOLICITOR GRAY: ---or written down by law enforcement.

2 THE COURT: Nothing from law enforcement.

3 All right.

4 SOLICITOR GRAY: Your Honor, I don't think there's been
5 an out-of-court identification by the victims. We would
6 just check and make sure with the motions.

7 (Pause.)

8 SOLICITOR GRAY: That is correct, Your Honor.

9 THE COURT: Okay.

10 SOLICITOR GRAY: Thank you.

11 THE COURT: That should conclude the motions.

12 Any other motions that are not listed on the written
13 documents?

14 MS. BUTLER: No, sir, Your Honor.

15 THE COURT: All right. Are there any other matters
16 that the Court needs to take up before we begin the actual
17 trial of the case, from the state's prospective?

18 SOLICITOR GRAY: No, sir, Your Honor. Nothing from the
19 State.

20 THE COURT: And from the defense, the defense's
21 prospective?

22 MS. BUTLER: No, sir, Your Honor.

23 THE COURT: All right. Bring the jury in.

24 You come back down and have a seat or you can remain up
25 there. However you'd like to do it. It may be -- do you

1 need him down there?

2 SOLICITOR GRAY: No, sir, Your Honor.

3 THE COURT: All right. You might want to sit in these
4 front two seats. You'll have a better view of what's going
5 on when the jury and the, and the witness stand I believe.

6 (WHEREUPON, the following takes place within the
7 presence of the jury.)

8 THE COURT: All right. The record will reflect that
9 the jury has returned to the courtroom, and at this time it
10 is necessary that you take another oath. You've been sworn
11 a couple of times concerning information that you provided
12 to the Court. This time you're going to be sworn in as
13 jurors in this case concerning your duties and your
14 responsibilities as jurors.

15 So, Madam Clerk, please swear the prospective jury
16 panel for me.

17 (WHEREUPON, the jury panel was placed under oath at
18 this time.)

19 THE COURT: Now, if there was any juror that failed or
20 refused to take the oath just administered by the clerk,
21 please stand.

22 (No response.)

23 THE COURT: The record will reflect that all jurors
24 have now been sworn for purposes of this trial.

25 Now, ladies and gentlemen, before we begin the trial

1 there's some matters that I want to go over with you. I see
2 that I do have maybe one person who is, was on a jury that
3 I've had this week, and perhaps you've served in another
4 courtroom. But probably, for most of you, this is the first
5 time that you've served on an actual jury in the trial of a
6 case, and, as such, there's some matters that I want to go
7 over with you concerning the procedure that we'll follow,
8 your duties and responsibilities, as well as the duties and
9 the responsibilities of other parties that will be involved
10 in the trial of this case.

11 For those of you who've never been on a jury before,
12 probably most of what you know about service on a jury you
13 might of learned from such sources as books or television
14 shows or movies that you've watched, perhaps from your
15 schooling. And while those sources of information are
16 interesting, and in the case of television, and the movies
17 and books, they're quite entertaining. They have
18 interesting story lines. They have twisting plots. They
19 have a time frame in which they begin and which they end.
20 In the case of television it's always interesting to me that
21 they're able to have an event occur, an arrest occur, a,
22 trial occur, and it's all ended within an hour and they
23 still have time for commercials.

24 So, you probably can tell they take some literary
25 license with what they do because it's intended for your

1 entertainment. I'll tell you that what you're engaged in
2 today is intended for anything but your entertainment.

3 what you're engaged in is a serious matter. It's a
4 fundamental part of our democracy where citizens are called
5 from your day-to-day lives and brought into the courtroom
6 and placed in an important decision making position
7 concerning matters of importance both to the State and to
8 the defendant whose been charged with the commission of a
9 crime.

10 what you're engaged in is a search for the truth. It's
11 an effort to see that justice is done between the parties
12 that come before this Court. This courtroom is a place of
13 honor and it's dedicated to the preservation of citizen's
14 rights through the Constitution and the laws of both this
15 state and of the United States.

16 Now, the attorneys that are going to be appearing in
17 front of you are here to present their client's cases. I'm
18 sure they'll do an admirable job in presenting those cases
19 to you. But first and foremost, those attorneys are also
20 officers of this Court. At some point in time they appeared
21 before a tribunal in this State. They took an oath to
22 assist you in your search for the truth. For that reason
23 you can expect that they'll act in a reasonable,
24 professional, and an ethical manner in the presentation of
25 their cases before this Court and before you both today and

1 it appears into tomorrow.

2 I'll remind you too that you have now come before this
3 Court. You've taken an oath. You're expected to act in a
4 reasonable and a professional and an ethical manner in the
5 discharge of your duties as jurors before this Court. I've
6 told you earlier, I'll tell you again, that I thank you very
7 much for your willingness to step forward and serve because
8 if it weren't for citizens such as yourselves who were
9 willing to do so our system couldn't function as it was
10 designed by our forefathers in the law and the Constitution
11 of this state and the United States. So, again, thank you
12 for your willingness to serve.

13 Now, I've already gone over with you the indictments in
14 this case. I'm not going to read them again. You're aware
15 of what the charges are that are before this Court. Again,
16 those indictments are simply the documents that bring the
17 case before this Court. They are the allegations. They
18 inform us of the allegations to be tried. They inform both
19 sides of the allegations to be tried, and in the case of the
20 defendant, the allegations that have been made against the
21 defendant. To that -- and, again, indictments can't be used
22 by you in any method or fashion in determining the guilt or
23 the innocence of a defendant in this matter.

24 Now, to those indictments the defendant has pled not
25 guilty. Under the law and under the Constitution of this

1 state, that plea places the burden upon the State. That
2 burden is upon the State throughout the trial, and that
3 burden is to prove the defendant's guilt beyond a reasonable
4 doubt. It's the State's burden to prove the elements of the
5 crime alleged by proof, again, beyond a reasonable doubt.
6 I'll discuss that concept with you in more detail when I
7 charge you concerning the law and that occurs at the close
8 of the trial.

9 Now, your purpose then, as jurors, is to find and
10 determine the facts of this case, and I will tell you you
11 are the sole judges of the facts in this case. I will serve
12 as the presiding officer during this trial, and as the
13 presiding officer of the trial it's my responsibility to
14 rule on questions of the appropriateness of evidence that's
15 been presented, the appropriateness of questions that have
16 been asked. It's my responsibility further to see that the
17 proper procedure is followed in the presentation of this
18 trial before you.

19 I will tell you that you should not take from anything
20 that I do in the discharge of my duties as the presiding
21 officer in this trial to indicate to you, in any manner or
22 fashion whatever, that I have an opinion one way or the
23 other as to how you determine the facts in this case.
24 You're the sole judges of the facts in this case. For that
25 reason the law does not allow me an opinion on that subject,

1 and I can assure you I have no opinion as to how you
2 determine the facts in this case. It's especially important
3 that you perform your duties of determining the facts in
4 this case diligently and conscientiously because, under our
5 system of justice, ordinarily there's no means by which an
6 erroneous determination of facts made by a jury can ever be
7 changed or overturned.

8 Now, the same law that makes you the sole judges of the
9 facts also makes me the sole judge of the law in this case.
10 The law, as I will give it to you at the close of the trial,
11 is the only law that, under your oath, you can use in making
12 a decision in this case. I will tell you, if you walked
13 into the courtroom today with a notion as to what the law is
14 or what that law ought to be, those notions should be left
15 outside of the jury room when you begin your deliberations.
16 It's your responsibility, under your oath, to take the law
17 exactly as I give it to you, apply it to the facts then as
18 you have found them to be, that will put you in a position
19 to issue a just and a true verdict under the law for the
20 parties that are involved in this case.

21 Now, until I advise you to begin, begin your
22 deliberations, I've already explained to you and I will
23 caution you not to begin any discussions concerning this
24 case. I will also caution you that you have made an oath or
25 you have given an oath to decide the case based upon the

1 evidence and the law.

2 Now, I will tell you the only evidence that you're
3 going to hear about this matter will be testimony given by
4 witnesses who've been sworn to tell the truth who will be
5 testifying from this witness stand, and any other documents
6 or other evidence that's put into the record of the trial
7 through that testimony. For that reason it would be highly
8 improper for you to try to gather any information concerning
9 this case from any other source whatsoever. That includes
10 media reports, that includes sources such as the Internet,
11 because those sources of information quite often contain
12 information that is not admissible under the rules of
13 evidence that govern courtrooms, and, therefore, should not
14 be considered by you in reaching a verdict in this case.

15 So, during the trial, I will caution you not to listen
16 to, watch, or read any media reports concerning this case.
17 Don't attempt to gather any information from any other
18 source in, by any other means. Again, your oath is to
19 decide the case based on the evidence, and the only place
20 you'll receive or get evidence in this case will be in this
21 courtroom during the trial. Again, I'll caution you, as we
22 go along on that subject, to be sure that you understand
23 that you should not attempt to gather any information from
24 any other source in this case, in this matter.

25 Now, I'm going to tell you that it's your solemn

1 responsibility, at the close of this trial, to determine the
2 guilt or the innocence in this case, and your verdict must
3 be based solely upon the evidence presented to you during
4 the trial. For that reason I'm going to ask you try not to
5 let your thoughts wonder during the case. Try to pay
6 attention to what goes on in the courtroom, what is said,
7 what is done. Because, at the close of the trial, it will
8 be your responsibility to be able to meet with your fellow
9 jurors and discuss the testimony that you've heard, and be
10 able to deliberate concerning the issues that have been
11 placed before you.

12 So, again, pay attention to what goes on in the
13 courtroom. I'll try to take breaks from time to time to
14 keep you refreshed and so that you don't become too, too
15 glazed over. But, again, pay attention to what goes on in
16 the courtroom because you have the right to use anything
17 that's in the record of this case in deciding this case when
18 it's submitted to you.

19 Now, the procedure that we'll follow, when we start,
20 I'm going to allow the attorneys to make an opening
21 statement. That's a statement to you about what the case is
22 about. Perhaps they will mention what they expect to prove
23 during those opening statements.

24 After that we'll receive the testimony in this case.
25 I've told you the burden of proof is upon the State.

1 Therefore, the State will go first both in the opening
2 statements and go first in the presentation of the evidence
3 before you. Once all the evidence is presented, we will
4 have closing arguments or statements, and that will be
5 followed by my charge concerning the law in this case.

6 Now, the statements made by attorneys both at the
7 beginning of the trial and at the end of the trial, those
8 are not evidence because, again, the only evidence that
9 you'll hear will be the testimony of the witnesses who've
10 been sworn to tell the truth who will be testifying before
11 you on the witness stand. The opening statement, again,
12 serves to tell you what the case is about. The closing
13 statements serves to allow them to sum up the evidence that
14 you've heard from their client's prospective. But, again,
15 statements made by lawyers during the trial do not
16 constitute evidence, and, therefore, should not be used by
17 you directly in determining the guilt or the innocence of a
18 defendant before this Court.

19 Now, from time to time during the trial, I've told you
20 already, I'm the presiding officer of the trial. It may
21 become necessary for me to have an argument or a discussion
22 with the attorneys concerning the admissibility of a piece
23 of evidence or the appropriateness of a question that's
24 being asked. If it's my belief that those discussions might
25 involve something that is not admissible or shouldn't be

1 considered by you in reaching a verdict I may ask you,
2 during those discussions, to go back to your jury room. I
3 will tell you now please don't take from the fact that I've
4 asked you to step back to your jury room during those
5 discussions to indicate, again, that I have an opinion
6 concerning the facts and how you determine them. It's
7 simply me doing my duty, and my duty is to see that you
8 decide the case solely upon properly admitted evidence that
9 complies with the rules of evidence that govern the courts.

10 So, I will make that determination, and if I decide the
11 information is not admissible, I'll make that ruling when
12 you return to the courtroom. If I decide it is admissible,
13 then we'll allow it in and we'll go forward. But, again,
14 the fact that I've asked you to step out of the courtroom
15 shouldn't be taken by you to indicate that I have an opinion
16 one way or the other about the facts of the trial of the
17 case.

18 Now, I've told you that you are the sole judges of the
19 facts in this case. I will tell you, therefore, you have to
20 be, by necessity, the sole judges of the credibility or
21 believability of the witnesses who will be testifying, and
22 that's what credibility means. It means believability. And
23 I will ask you and instruct you, use your own good common
24 sense in making that determination. You make common
25 sensical decisions everyday about what you choose to believe

1 and what you choose not to believe.

2 I will tell you, as the sole judges of the facts, you
3 can believe all of what a witness tells you, part of what a
4 witness tells you. You have the right to believe none of
5 what a witness tells you. You have the right to believe one
6 witness against all the others who might testify, and you
7 have the right to believe all the others against one.

8 In making your common sense judgments concerning
9 credibility, you can consider such factors as whether or not
10 a witness has a stake in the outcome of the case, whether or
11 not the witness has a bias or prejudice one way or the
12 other, whether or not a witness had the actual ability to
13 know the facts about which the witness testified, and some
14 people think, most importantly, you have the right and the
15 ability to observe the witnesses as they testify. That's
16 the reason the witness stand is always directly in front of
17 the jury box, so you can observe them as they testify, the
18 way they speak, the way they deliver the testimony. Take
19 all of those factors into consideration, to the degree you
20 think is proper, and make a judgment as to the credibility
21 or believability of each and every witness that testifies
22 during the trial.

23 Again, you are the sole judges of credibility and
24 believability. You also are the sole judges of the weight
25 or the value that you assign to every witness' testimony

1 during the trial. So, again, pay close attention as the
2 testimony is given so that you can make those judgments as
3 to the testimony that you have heard.

4 Now, I've already told you that I appoint the
5 foreperson of the jury at the close of the trial. The
6 foreperson has no greater say in the outcome of the case
7 than any other juror. I will tell you, at the close of the
8 trial, I'll tell you now, your verdict, before you can reach
9 a verdict, each and every one of you has to agree. In other
10 words, it has to be unanimous before a verdict can be
11 reached. For that reason, every juror has an equal say in
12 the outcome of the case as far as what verdict is reached
13 because all of you must agree on the verdict before it
14 becomes the verdict of the jury.

15 The foreperson has no greater say in that process. The
16 foreperson is the person who presides over deliberations.
17 If you have questions during deliberations, that foreperson
18 will put them in writing and submit them to me, and I'll
19 give that person the verdict form to be filled out, and
20 they'll fill out the verdict form and sign it once a
21 unanimous verdict has been reached. So, again, I appoint
22 the foreperson at the close of the trial, and I'll do that
23 during my charge on the law.

24 Now, I want to be sure that I haven't violated anyone's
25 rights in my opening comments to you, does the State have an

1 objection to my opening statements?

2 SOLICITOR GRAY: No, sir, Your Honor.

3 THE COURT: Does the defense have any objection?

4 MS. BUTLER: No, sir, Your Honor.

5 THE COURT: All right. At this point in time, I told
6 you that we'll begin the trial again with opening
7 statements. Again, the State has the burden of proof
8 throughout the trial. They'll go first followed by the
9 defense. Then we'll present the evidence. Again, the State
10 going first because of the burden of proof, followed by any
11 evidence that the defense chooses to put up, and then we
12 will have closing statements or arguments, and I will, after
13 that, charge you concerning the law. Once that's been
14 completed I'll turn the case over to you for your
15 deliberations.

16 So, at this time we will begin with the opening
17 statements.

18 The State may proceed.

19 Mr. Cude, are you gonna make the opening statement?

20 SOLICITOR CUDE: Yes, Your Honor.

21 THE COURT: You may proceed.

22 SOLICITOR CUDE: Good morning, ladies and gentlemen.

23 We're here today because the defendant is charged with
24 two counts of armed robbery. This is what the evidence will
25 show.

1 September 21st, 2009, the victim, Freddie Robinson, was
2 walking home on Seminole Drive here in Spartanburg County.
3 He was accosted by men who came out of a black Dodge Durango
4 who robbed him at gunpoint. He contacted police. He was
5 robbed that night of a cell phone and his wallet.

6 Later that night, the other victim, Mr. Rigoberto
7 Sanchez, was robbed at his home on Prince Street here in
8 Spartanburg County. He and his cousin were robbed by men
9 armed with guns who got out of a black Dodge Durango. They
10 were robbed of cell phones, of the cash they had on them,
11 and of keys.

12 Now, the Spartanburg County Sheriff's Department
13 charged multiple people with this crime. You're gonna hear
14 testimony from some of those other codefendants admitting
15 their involvement in this armed robbery, and they're also
16 gonna tell you that the defendant, Bert Wayne Foster, also
17 committed these armed robberies. At the close of this trial
18 the State is gonna return and argue for a verdict of guilty.

19 Thank you.

20 THE COURT: Yes, ma'am, you may proceed for the
21 defense, Ms. Butler.

22 MS. BUTLER: Thank you, Your Honor.

23 THE COURT: Yes, ma'am.

24 MS. BUTLER: Good morning, ladies and gentlemen of the
25 jury.

1 First of all, I just have to reiterate what Judge Couch
2 has already said in your service. Thank you for your
3 service in this matter. Without the men and women of the
4 jury who are willing to serve, then we wouldn't be able to
5 exercise our fundamental right of the right to a trial by
6 jury. So, thank you very much for that service.

7 My name is Melinda Butler. I am an attorney. I
8 represent Bert Wayne Foster in this matter. Mr. Gray and
9 Mr. Cude represent the State in this matter, and there's a
10 couple things that I just need to talk with you briefly
11 before we get into the testimony that you're gonna hear
12 today.

13 There is -- there's a right that we have. There's a
14 phrase considered to most lay people, it's a phrase, and
15 it's innocent until proven guilty. Well, that phrase is
16 actually a very fundamental right of our society in what the
17 United States is built upon, that you're innocent until
18 proven guilty. So, just because, when you woke up this
19 morning and you read the newspaper or you, you watched
20 Channel 7 News last night, and you saw that, that your
21 neighbor, John Smith, was arrested, the news said he was
22 arrested for burglary, and you thought to yourself or you
23 said to your spouse or your friend on the phone I can't
24 believe John Smith committed the burglary.

25 Well, what you just did was you violated that

1 fundamental right of innocent until proven guilty when you
2 thought, just because somebody was arrested, that they
3 committed, that they, that they committed the crime.
4 There's a difference between, a huge difference between
5 being arrested and actually committing a crime.

6 To be arrested, there's a very low standard that has to
7 be reached. To be convicted of committing a crime, there's
8 a very high standard that has to be reached, that standard
9 will be discussed later, and I think Judge Couch has already
10 touched on, and that's proof beyond a reasonable doubt.

11 The arrest, in and of itself, is not evidence that a
12 person is guilty of a crime. You can't consider that as
13 evidence that a person is guilty of a crime. I'm asking you
14 to please take into consideration all the testimony that you
15 hear during this trial before you make up your mind of
16 whether Mr. Foster actually committed this crime that he's
17 arrested for.

18 You're gonna hear testimony of several people today.
19 You have to consider, in that testimony, the person's
20 interest in this matter.

21 What is their interest in testifying in this case?

22 Were they just a, were they the officer that, that
23 wants to prove his case is the way that he wrote it out to
24 be?

25 Are they the persons that were charged in the crime?

1 Do they have an interest in the matter?

2 Their interest will make a big difference as to their
3 testimony, and that's why I'm asking you just to consider,
4 when the person takes the stand, consider to yourself where
5 does this person fit into this whole matter that we're
6 discussing today?

7 And as you consider that, consider what interest that
8 person has in the outcome of this trial. And as you do,
9 just remember, don't make any decisions until you've heard
10 all the evidence and until the judge has told you at the end
11 that you can now consider the guilt or the innocence.

12 Thank you.

13 THE COURT: The State may call its first witness.

14 SOLICITOR GRAY: Thank you, Your Honor.

15 The State calls Freddie Robinson, Junior.

16 THE COURT: Sir, if you'll come forward to my left here
17 and be sworn in.

18 FREDDIE ROBINSON, JUNIOR, having been
19 first duly sworn, testified as follows:

20 THE COURT: Have a seat please. And once you're
21 seated, sir, state your name for the record.

22 WITNESS: I'm Freddie Robinson, Junior.

23 THE COURT: Mr. Gray, your witness.

24 SOLICITOR GRAY: Thank you, Your Honor.

25 THE COURT: Yes, sir.

Freddie Robinson - Direct examination
by Solicitor Gray

1 DIRECT EXAMINATION

2 BY SOLICITOR GRAY:

3 Q Mr. Robinson, where do you live?

4 A 369 Seminole Drive.

5 Q How long have you lived there, Mr. Robinson?

6 A About five years.

7 Q On two, 2009, I believe September 21st, was there an
8 incident involving you and some individuals?

9 A Yes, I was walking my cousin, she's an older lady,
10 home.

11 Q Would you please slow down and speak up, Mr. Robinson?

12 A Oh, I was walking my cousin, she's an older lady, I was
13 walking her home, and it's about 8:30 and I was walking her
14 home. Then I seen her when she got to the end of the road.
15 I say is you all right. She say yeah. So, I was on my way
16 walking back, it was a black vehicle, S.U.V., came out from
17 the side, and I thought they was gonna stop and probably ask
18 for some directions. But then the dude say hey, man, you
19 about to get jacked. And when I turned around like this, he
20 pulled a gun and he said don't be no hero. Then a tall
21 black guy got out the other side, and he told me to get my
22 wallet and my cell phone, and they took my, the beer and
23 stuff that I had out of my possession.

24 Q Now, please could you describe what these individuals
25 were wearing?

Freddie Robinson - Direct examination
by Solicitor Gray

1 A They had on some dark jeans, dark covers with a black
2 hood with a red bandanna around their face.

3 Q Now, are you sure you can tell if they were black or
4 white---

5 A Mostly---

6 Q ---or light skinned or---

7 A The guy -- the one with, holding the gun was the light
8 skinned guy, and the tall black guy was slim. He came out
9 from the other side.

10 Q Was he dark skinned or light skinned?

11 A The tall one was dark skinned, but the one pulled the
12 gun was light skinned, was real light.

13 Q The one that pulled the gun was light skinned?

14 A Right.

15 Q But you couldn't really make a---

16 A I couldn't---

17 Q ---positive identification of anybody?

18 A I couldn't make it because they was covered up.

19 Q Now, my understanding also, you said it was
20 eight o'clock?

21 A Yes, it's about -- no, it's about 8:30.

22 Q 8:30?

23 A Cause when I got home, the police got there about, I
24 say about quarter till 9:00 or nine o'clock. That's when
25 I---

Freddie Robinson - Direct examination
by Solicitor Gray

- 1 Q But you---
- 2 A ---went out to report it?
- 3 Q Was it dark at this time when you---
- 4 A Yes.
- 5 Q Was it dark when this incident happened---
- 6 A Yes.
- 7 Q ---also?
- 8 A Yes, it was dark.
- 9 Q Was it well lit where this incident happened?
- 10 A No, the light was -- it's right by that church on the
- 11 corner, but the light was on that side. But when it came
- 12 around the curve, it's dark around the curve that come from
- 13 the bushes.
- 14 Q Now, how many individuals came up to you and took your
- 15 items?
- 16 A Two.
- 17 Q Two?
- 18 A Right.
- 19 Q One was short and one was tall?
- 20 A Right.
- 21 Q Now, the items that they took from you, did they have a
- 22 weapon on you when they took these items?
- 23 A No, I ain't had no weapon.
- 24 Q Did they have a weapon?
- 25 A Yes, they had a gun. A black -- I figured it was like

Freddie Robinson - Direct examination
by Solicitor Gray

- 1 a 9-millimeter or a .380 handgun, something like that.
- 2 Q Did both individuals have a handgun?
- 3 A No, just one.
- 4 Q Just one?
- 5 A Right.
- 6 Q This one individual pointed a handgun directly at you,
- 7 correct?
- 8 A Yes.
- 9 Q And did both individuals say something or just one?
- 10 A Just one.
- 11 Q And what---
- 12 A The one with the gun.
- 13 Q And what did this individual say?
- 14 A He say you, old man, you about to get jacked, don't be
- 15 no hero, and then when I came in there, the tall guy came
- 16 out, took all of my possessions, and told me to turn around,
- 17 and then he got up, and then he sped away.
- 18 Q Now, what possessions were taken from you?
- 19 A My wallet, my cell phone, and I had some beer, and some
- 20 money, money that was in my wallet.
- 21 Q They stole beer from you?
- 22 A Yes.
- 23 Q How many beers did you have?
- 24 A I had about a six pack.
- 25 Q And they stole a six pack?

Freddie Robinson - Direct examination
by Solicitor Gray

1 A Yes.

2 Q At gunpoint?

3 A Right.

4 Q Mr. Robinson, do you know what type of vehicle this
5 was?

6 A If I'm not mistaken, it was a black Dodge Durango. I
7 know it was a Durango, but it was dark or black or burgundy.
8 It was a dark black Durango.

9 Q But besides the mask over their faces and their height,
10 you didn't get a really good look at them?

11 A No, the dude was -- he was short and kind of stocky,
12 and---

13 Q He was---

14 A ---I could see, I could see all of this part because it
15 was light. That's why I know if was kind of light. Like I
16 said, he was Mexican or white, but he wasn't no
17 African-American. But the tall guy, he was an
18 African-American guy.

19 Q All right. And you said it happened on Seminole Drive?

20 A Yes, Seminole Drive, September 21st, around 8:30.

21 Q 2009?

22 A 2009.

23 Q Thank you, sir. Please answer any questions Ms. Butler
24 may have for you.

25 A Okay.

Freddie Robinson - Direct examination
by Solicitor Gray

1 THE COURT: Your witness, ma'am.

2 MS. BUTLER: Thank you, Your Honor.

3 CROSS-EXAMINATION.

4 BY MS. BUTLER:

5 Q Mr. Robinson, you said that it was, it was dark on that
6 evening, correct?

7 A Yes, ma'am.

8 Q And you couldn't, you couldn't identify who robbed you,
9 is that correct?

10 A Right.

11 Q You were not able to identify.

12 And you -- do you remember when you were, when you were
13 first questioned that night that you told the officer that
14 came out that it was two black males that robbed you?

15 Do you remember that?

16 A No, ma'am, I told him that it was a, a black
17 African-American, and the dude was short, kind of light
18 skinned.

19 MS. BUTLER: I beg the Court's indulgence.

20 THE COURT: Yes, ma'am.

21 (Pause.)

22 MS. BUTLER: May I approach the witness, Your Honor?

23 THE COURT: Yes, you may.

24 Q Mr. Robinson, can you read this part right here---

25 A Yes, ma'am.

Freddie Robinson - Cross-examination
by Ms. Butler

1 Q ---to the jury?

2 SOLICITOR GRAY: Objection, Your Honor.

3 THE COURT: Just -- we're gonna need for you to
4 identify the document and see if he's familiar with it
5 beforehand.

6 Is that the nature of your objection?

7 SOLICITOR GRAY: Yes, sir, Your Honor.

8 THE COURT: All right.

9 MS. BUTLER: Yes, sir, thank you.

10 THE COURT: If you'll do that for us please.

11 MS. BUTLER: I apologize, Your Honor.

12 THE COURT: That's all right.

13 Q Can you tell us what this document says at the top of
14 it, Mr. Robinson?

15 A Talking about right here?

16 Q Yes.

17 A Document 120?

18 Q No.

19 And what does it say right here?

20 A Incident type.

21 Q And can you read us this number right here?

22 A The 2009091153.

23 Q And the date right here?

24 A 9/22/09.

25 Q And does it appear to be written by officer Brumlow?

Freddie Robinson - Cross-examination
by MS. Butler

1 A Yes, ma'am, that's what it says.

2 MS. BUTLER: Your Honor, the document -- let the record
3 reflect that the victim, Mr. Robinson, is read 2009091153 as
4 the document number.

5 SOLICITOR GRAY: Your Honor, I still have an objection
6 to this witness reading detective, Detective Brumlow's, I'm
7 assuming, incident report into the record, Your Honor.

8 THE COURT: Is this an incident report?

9 MS. BUTLER: Your Honor, it is, and it states what, it
10 states what Mr. Robinson stated.

11 THE COURT: Well, he's, he's testified as to what he
12 said. You, you can call that witness or you could, when he
13 testifies, ask him about what he wrote down. But this
14 gentleman didn't author that and he's not responsible for
15 the contents of that from what I understand.

16 Is that correct?

17 MS. BUTLER: He's not responsible for the contents, but
18 it is a statement that he made. He is testifying under
19 oath.

20 THE COURT: Yes, ma'am, and you've asked him if he made
21 the statement, and he's told you what he said.

22 MS. BUTLER: Yes, sir, and Rule 613 says that I can
23 impeach him with extrinsic evidence if he's made an
24 inconsistent statement.

25 THE COURT: Well, he -- so far it's not been proven

Freddie Robinson - Cross-examination
by Ms. Butler

1 that he's made an inconsistent statement. That's got to
2 come from the person who heard his statement. I'm gonna
3 sustain the objection at this time.

4 MS. BUTLER: Yes, sir. Thank you, Your Honor.

5 Q So, Mr. Robinson, the, the tall guy you're saying is
6 the one that came and took your possessions?

7 A Right, the one, he was tall and slim, the one where he
8 had the gun tote---

9 Q The tall guy?

10 A Yeah, told him---

11 Q Did the tall guy have the gun?

12 A No, he did not.

13 Q Okay. Thank you. That's all the questions I have.

14 THE COURT: Redirect?

15 SOLICITOR GRAY: Nothing further, Your Honor.

16 THE COURT: Sir, you may step down. Thank you very
17 much.

18 SOLICITOR GRAY: State's---

19 THE COURT: The State may call its next witness.

20 SOLICITOR GRAY: Thank you, Your Honor.

21 The State calls Investigator Brumlow.

22 THE COURT: Sir, come forward to my left and be sworn..

23 CHRIS BRUMLOW, having been first duly
24 sworn, testified as follows:

25 THE COURT: Have a seat in the witness stand, sir, and

Chris Brumlow - Direct examination
by Solicitor Gray

1 once you're seated state your name.

2 WITNESS: Investigator Christopher Brumlow of the
3 Spartanburg County Sheriff's Office.

4 THE COURT: Mr. Gray, your witness.

5 SOLICITOR GRAY: Thank you, Your Honor.

6 DIRECT EXAMINATION

7 BY SOLICITOR GRAY:

8 Q Investigator Brumlow, how long have you worked for the
9 Sheriff's Department?

10 A Over six years.

11 Q And what are your primary duties and responsibilities
12 there?

13 A At that particular point in time I was assigned to the
14 uniform patrol division, and essentially our
15 responsibilities was to answer calls for service that came
16 out through the Spartanburg County dispatch.

17 Q All right. Of -- September 21st, 2009, you're on
18 uniform patrol, did you receive a call---

19 A Yes, sir.

20 Q ---from dispatch?

21 A Yes, sir.

22 Q What time did you receive that call?

23 A I received that call at 8:12 in the p.m. and my time on
24 scene was approximately eight minutes later at 8:20 p.m.

25 Q Now, was it light outside or dark outside or sunny?

Chris Brumlow - Direct examination
by Solicitor Gray

1 A Well, it was, it was fairly dark especially in that
2 particular area of the county.

3 Q Thank you, sir.

4 And what area of the county was that?

5 A It was the Una Saxon community in Spartanburg County.

6 Q And that's where Seminole Drive is located?

7 A Yes, sir.

8 Q Once you arrived on site, who was present there?

9 A I made contact with a Mr. Freddie Robinson, Junior.

10 Q Now, you talked to Mr. Robinson about what had happened
11 to him, is that correct?

12 A Yes, sir, that is correct.

13 Q Did you also take a written statement from Mr.
14 Robinson?

15 A Yes, sir, I did.

16 Q Why did you take that written statement from Mr.
17 Robinson?

18 A Because it's always better to have a written statement
19 attached to the case when you make an incident report so
20 that way it, it shows exactly what, what may of occurred at
21 that particular day---

22 Q Now---

23 A ---in reference to that particular person.

24 Q Now, your incident report is merely, not merely, but a
25 summary, a summary, summary---

Chris Brumlow - Direct examination
by Solicitor Gray

1 MS. BUTLER: Objection, Your Honor.

2 THE COURT: The objection is?

3 MS. BUTLER: He's leading the officer in the
4 questioning.

5 THE COURT: Well, he hasn't completed the question yet.
6 So, I'm not sure that we've gone that far, but rephrase the
7 question.

8 MS. BUTLER: All right. Thank you.

9 Q Is your incident report the exact recitation of the
10 facts?

11 A Yes, sir, I, I write down exactly -- I write down what
12 was told to me at that particular moment in time.

13 Q At that particular moment?

14 A Yes, sir.

15 Q But you still follow it up with a written report and
16 other investigation also?

17 A Yes, sir, if I'm, if I'm unable to conduct a more
18 thorough investigation while on scene, then usually the
19 protocol is that it is forwarded up to a, to an investigator
20 that's more specialized in that particular area.

21 Q And this incident was classified as an armed robbery?

22 A Yes, sir.

23 Q And what were the alleged facts surrounding that armed
24 robbery?

25 A That, that he had, he had advised me---

Chris Brumlow - Direct examination
by Solicitor Gray

1 Q Who -- excuse me, sir.

2 who is he?

3 A That Mr. Robinson had advised me that he was walking on
4 Seminole Drive and two individuals had exited a black
5 Durango, one of which had a handgun, and robbed him of his
6 possessions.

7 Q And Seminole Drive, again, is in Spartanburg County?

8 A Yes, sir, it is.

9 Q And what possessions were alleged to be taken from Mr.
10 Robinson?

11 A If you'll allow me to reference my incident report
12 here. It says his wallet, which contained various forms of
13 identification, and \$40 in U.S. currency as well as a L-9
14 mobile phone.

15 Q Thank you, sir. Please answer any questions Ms. Butler
16 here has.

17 THE COURT: Your witness.

18 MS. BUTLER: Thank you, Your Honor.

19 THE COURT: Yes, ma'am.

20 CROSS-EXAMINATION

21 BY MS. BUTLER:

22 Q Investigator Brumlow, is that correct?

23 A Yes, ma'am.

24 Q Investigator Brumlow, you say that you were called out.
25 You were actually uniform patrol this evening, correct?

Chris Brumlow - Cross-examination
by Ms. Butler

1 A At that particular moment, yes, ma'am.

2 Q And called out and talked to Mr. Robinson?

3 A Yes, ma'am.

4 Q And when you were called out to talk to Mr. Robinson
5 that evening, how long had you been on duty that day?

6 A I would say I'd been on duty for about an hour and 12
7 minutes when I received the call. It had been approximately
8 an hour and 12 minutes.

9 Q All right. And, and, Investigator Brumlow, that was --
10 did you have other cases going on that day or that night?

11 A I can't -- I don't recall.

12 Q So, Investigator Brumlow, since 2009, September
13 21st, certainly you've had other cases gone on from that
14 time until now, is that correct?

15 A Yes, ma'am, that's correct.

16 Q And, and you rely on your, your reports of, as to what
17 happened on that night, is that correct?

18 A Yes, ma'am.

19 Q Because your memory goes -- you go through so many
20 cases it's hard to keep a recollection of that, correct?

21 A Well, I wouldn't say that. The, the specific details
22 of, of a lot of cases, you know, one might have trouble
23 remembering, but I've got a pretty good memory.

24 Q And you rely---

25 A So, I---

Chris Brumlow - Cross-examination
by Ms. Butler

1 Q And you rely on your incident report to, to go back, is
2 that correct?

3 A It's kind of a refresher, yes, ma'am.

4 Q Yes. And, so, the, the way that you remember this case
5 and you go to your report is, is, is how you understand the
6 facts to be, is that correct?

7 A Yes, ma'am.

8 Q And you stated, in your direct examination, that you,
9 on your incident report, you write an exact recitation of
10 the facts, is that correct?

11 A As, as, as it's told to me at that particular moment in
12 time, yes, ma'am.

13 Q So, you write it exactly as it's told to you at that
14 moment?

15 A Yes, ma'am.

16 Q And, Investigator Brumlow, do you have your incident
17 report with you?

18 A Yes, ma'am.

19 Q And can you read to the Court the last statement on
20 that incident report on the first page of it?

21 A Says Mr. Robinson stated that they both appeared to be
22 black males 20 to 30 years old.

23 Q Thank you. That's all the questions I have at this
24 time.

25 THE COURT: Anything on redirect for this witness?

Chris Brumlow - Cross-examination
by Ms. Butler

1 SOLICITOR GRAY: No, sir, Your Honor.

2 THE COURT: All right, sir. You may step down.

3 The State may call its next witness.

4 SOLICITOR CUDE: The State calls Rigoberto Sanchez.

5 THE COURT: Mr. Sanchez, if you'll step around to be

6 sworn. You can come right through here, sir.

7 (WHEREUPON, the interpreter translated the oath to Mr.
8 Sanchez.)

9 INTERPRETER: I promise. I swear. He said I promise.

10 THE COURT: He said affirm?

11 INTERPRETER: I promise.

12 THE COURT: He has to answer that he's either swearing
13 or affirming.

14 INTERPRETER: I swear.

15 THE COURT: Thank you.

16 RIGOBERTO SANCHEZ, having been first duly
17 sworn, testified as follows:

18 THE COURT: Have a seat please.

19 (Witness complies.)

20 THE COURT: State your name please.

21 WITNESS: Rigoberto Sanchez.

22 THE COURT: Mr. Cude, your witness.

23 DIRECT EXAMINATION

24 BY SOLICITOR CUDE:

25 Q Where do you live, Mr. Sanchez?

Rigoberto Sanchez - Direct examination
by Solicitor Cude

1 A Spartanburg, South Carolina.

2 Q What is your address?

3 A [REDACTED].

4 Q Did you report a crime on September 22nd, 2009?

5 A Yes.

6 Q What happened to you?

7 A At night, perhaps like nine o'clock or, yeah, 9:00,
8 9:00 p.m., three men assault me at my home. One pulled a
9 gun on my chest. He was saying to me give me money, give me
10 money. The other subject grabbed one of my cousins. When I
11 give them, when I agree to give them the money, one of them
12 was taking the money and the other one was still pointing at
13 me with the gun.

14 Q Now, you said this happened at your home?

15 A Yes.

16 Q Was it inside your home or outside of your home?

17 A Outside of my home.

18 Q Who else was with you at the time this happened?

19 A One of my cousins.

20 Q What was taken from you?

21 A A key and his wallet only.

22 Q Was any money in your wallet?

23 A He said that he didn't have no money in his wallet.

24 INTERPRETER: I need to clarify. He was talking about
25 his cousin's wallet.

Rigoberto Sanchez - Direct examination
by Solicitor Cude

- 1 Q Okay. All right. How much---
- 2 (WHEREUPON, the interpreter spoke to Mr. Sanchez in
- 3 Spanish.)
- 4 A Yes.
- 5 Q What was taken from you personally?
- 6 A Personally they took away from me my cell phone, my
- 7 wallet, and a, a belt buckle, a belt buckle that I was
- 8 using.
- 9 Q How much money was in your wallet?
- 10 A About \$2,000.
- 11 Q Why did you have so much money in your wallet?
- 12 A Because I go to work far away and that, that time I
- 13 went to work for about one month to Oklahoma. When I came
- 14 back my, my boss paid me all the money and I had it on, with
- 15 me in my wallet.
- 16 Q Did you get injured when this happened?
- 17 A No.
- 18 Q How many guns did you see during this robbery?
- 19 A Only two.
- 20 Q Okay. Could you see these men's faces?
- 21 A No, because he have his face covered, the, the one who
- 22 was pointing the gun at me.
- 23 Q What was it covered with?
- 24 A He had a cape or something to cover from the head to
- 25 the neck to the, to the shoulder.

Rigoberto Sanchez - Direct examination
by Solicitor Cude

1 Q Now, did you call the police right after the robbery?

2 A Not at that moment. It was on the next day.

3 Q Why didn't you call them right after the robbery?

4 A Because they took my cell phone.

5 Q So, so, how long after the robbery did you talk to

6 police?

7 A About the next day about ten o'clock in the morning.

8 Q Okay. Did you ever tell the police that you saw three
9 handguns that night?

10 A Not that I remember.

11 Q Thank you. Please answer any questions Ms. Butler has.

12 MS. BUTLER: May it please the Court?

13 THE COURT: All right. Ms. Butler, your witness.

14 MS. BUTLER: Thank you, Your Honor.

15 CROSS-EXAMINATION

16 BY MS. BUTLER:

17 Q Mr. Sanchez, I just have a couple questions for you.

18 A Okay. That's okay.

19 Q The, the night that you say that you were subject to a
20 crime, but you didn't report this crime at that time, is
21 that correct?

22 A That's correct.

23 Q And you're reporting now that you had \$2,000 in
24 currency, is that correct?

25 A Probably.

Rigoberto Sanchez - Cross-examination
by Ms. Butler

1 Q And you would like to get your \$2,000 from somebody, is
2 that correct?

3 A Probably.

4 Q But, Mr. Sanchez, you don't know who robbed you that
5 night, is that correct?

6 A I couldn't see his face, the person who robbed me.

7 Q So, Mr. Sanchez, you can not make an identification of
8 who robbed you that night, correct?

9 Yes or no?

10 A No.

11 Q Thank you. That's all the questions I have.

12 THE COURT: Redirect?

13 SOLICITOR CUDE: Yes, sir, Your Honor.

14 REDIRECT EXAMINATION

15 BY SOLICITOR CUDE:

16 Q Did you see what vehicle the robbers were using?

17 A Yes, I told the police it was a Durango, but I wasn't
18 sure if it was blue or black.

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

20 MS. BUTLER: Nothing further, Your Honor.

21 THE COURT: All right. You may step down. Thank you,
22 sir.

23 MS. BUTLER: May, may we take a short break, Your
24 Honor?

25 THE COURT: All right. We'll take about a ten to

1 fifteen minute break.

2 Ladies and gentlemen of the jury, I'll ask you to step
3 back to the jury room. As always, I will instruct you not
4 to begin any discussions until I've advised you to do so.
5 You may retire to the jury room.

6 (WHEREUPON, the following takes place outside the
7 presence of the jury.)

8 THE COURT: Court will be in recess for about ten to
9 fifteen minutes.

10 Defendant remains in custody.

11 (WHEREUPON, a short recess was taken at this time.)

12 THE COURT: I don't see the interpreter.

13 SOLICITOR GRAY: Your Honor, may Mr., Investigator
14 Brumlow be excused?

15 THE COURT: Any objection to Officer -- is it Brumlow?

16 SOLICITOR GRAY: Brumlow.

17 THE COURT: Brumlow. I'm sorry.

18 MS. BUTLER: No objection, Your Honor.

19 THE COURT: All right, sir. Yeah, you're free to go.
20 Thank you very much.

21 SOLICITOR GRAY: I'll go look for the interpreter.

22 THE COURT: All right. Thank you.

23 (Pause.)

24 SOLICITOR GRAY: Thank you, Your Honor.

25 THE COURT: All right. Bring the jury in.

1 (WHEREUPON, the following takes place within the
2 presence of the jury.)

3 THE COURT: All right. The record will reflect the
4 jury's returned to the courtroom.

5 The State may call its next witness.

6 SOLICITOR CUDE: Thank you, Your Honor.

7 The State calls Deputy Bobbie Duncan.

8 THE COURT: Come forward, sir, and be sworn, up to my
9 left.

10 BOBBIE DUNCAN, having been first duly
11 sworn, testified as follows:

12 THE COURT: Once you're seated, state your name please.

13 WITNESS: Robert Kevin Duncan.

14 THE COURT: Mr. Cude, your witness.

15 DIRECT EXAMINATION

16 BY SOLICITOR CUDE:

17 Q How are you employed, Deputy Duncan?

18 A With the Spartanburg County Sheriff's Office. I'm
19 currently in, at the time of the report, assigned to uniform
20 patrol.

21 Q And how long have you been employed there?

22 A March will be 12 years.

23 Q What are your duties as a uniform patrol officer?

24 A I respond out to calls where I'm dispatched through
25 9-1-1, answer the calls, write the initial reports if I can

Bobbie Duncan - Direct examination
by Solicitor Cude

1 handle it. Then, if I have all the evidence, I, go ahead,
2 and, you know, take further action. If not, I write the
3 report and send it up to investigations.

4 Q Now, just for the record, were you employed there
5 during the month of September, 2009?

6 A Yes, I was.

7 Q Did you respond to a report on Prince Street, to a call
8 on Prince Street on September 22nd, 2009?

9 A Yes, I was.

10 Q All right. Why were you sent there?

11 A I responded out there in reference to a report of a
12 robbery.

13 Q And what county is this located in?

14 A In Spartanburg County.

15 Q What did you find when you got there?

16 A I found Mr. Sanchez and he reported to me that, that he
17 had been robbed the previous day of, of his money and phones
18 and keys.

19 Q Did you speak to anyone else at that time?

20 A The only other person I spoke with was a friend of his
21 that was translating, helping, helping him translate to me.

22 Q What else did you do at that time?

23 A I did the initial report. I also spoke to Investigator
24 Taylor, who is a violent crime investigator, by phone and
25 did the report.

Bobbie Duncan - Direct examination
by Solicitor Cude

1 Q Thank you. Please answer any questions Ms. Butler may
2 have.

3 THE COURT: Your witness, ma'am.

4 MS. BUTLER: Thank you, Your Honor.

5 CROSS-EXAMINATION

6 BY MS. BUTLER:

7 Q Is it detective, Detective Duncan?

8 A No, not, not currently.

9 Q Okay.

10 A Just Officer Duncan.

11 Q Officer Duncan.

12 A Yes, ma'am.

13 Q Officer Duncan, you responded to a 9-1-1 call you say
14 on the 22nd of September, is that correct?

15 A Yes, ma'am.

16 Q And, Officer Duncan, as a result of that 9-1-1 call,
17 did you make a report?

18 A Yes, ma'am.

19 Q And, Officer Duncan, when you spoke to Mr. Sanchez that
20 evening, did he identify who robbed him?

21 A He did not name any names, no.

22 Q Did he -- he identified the persons -- did he identify
23 the number of people who robbed him?

24 A He told me four black males.

25 Q So, Mr. Sanchez told you that four black males robbed

Bobbie Duncan - Cross-examination
by Ms. Butler

1 him on the evening of the 21st of September?

2 A Yes.

3 Q And that's what you have in your report, correct?

4 A Yes.

5 Q That's all the questions I have. Thank you.

6 THE COURT: Redirect.

7 REDIRECT EXAMINATION

8 BY SOLICITOR CUDE:

9 Q Did he tell you how much money was taken?

10 A He told me \$2,000.

11 Q And, again, just for the record, what date did you
12 respond out there?

13 A I responded out on 9/22/09.

14 Q Okay. And what time of day was it that you responded?

15 A It was about -- well, I responded at 2:20 and I got
16 there at 2:33.

17 Q Thank you.

18 THE COURT: Are you finished, Mr. Cude?

19 SOLICITOR CUDE: Yes, sir, Your Honor.

20 THE COURT: Any other questions, ma'am?

21 MS. BUTLER: No, sir, Your Honor.

22 THE COURT: You may step down.

23 SOLICITOR CUDE: May he be excused, Your Honor?

24 THE COURT: Any objection?

25 MS. BUTLER: No, sir, Your Honor.

Kasey Davis - Direct examination
by Solicitor Cude

1 THE COURT: Sir, you're free to go. Thank you very
2 much.

3 State may call its next witness.

4 SOLICITOR CUDE: State calls Kasey Davis.

5 THE COURT: Come forward, ma'am, and be sworn. Right
6 over here.

7 KASEY DAVIS, having been first duly
8 sworn, testified as follows:

9 THE COURT: Have a seat please. Once seated, ma'am,
10 state your name.

11 WITNESS: I'm Kasey Davis.

12 THE COURT: Mr. Cude, your witness.

13 SOLICITOR CUDE: Thank you, Your Honor.

14 DIRECT EXAMINATION

15 BY SOLICITOR CUDE:

16 Q Good morning, Miss Davis.

17 A Good morning.

18 Q And did you ever live in a home with Bert Wayne Foster
19 and Shannon Varner?

20 A Yes.

21 Q When did you live there?

22 A November/September.

23 Q Of what year?

24 A '09.

25 Q Can you speak up please?

Kasey Davis - Direct examination
by Solicitor Cude

1 A '09.

2 Q Okay. And what months were those?

3 A November and September.

4 Q Okay. Do you see Bert Wayne Foster in the courtroom?

5 A Yes.

6 Q Can you point him out please?

7 A (Witness points.)

8 SOLICITOR CUDE: Let the record reflect Miss Davis
9 indicated the defendant.

10 THE COURT: It will so reflect.

11 You may proceed.

12 Q Now, do you see Shannon Varner in this courtroom?

13 A Yes.

14 Q Can you point her out?

15 A (Witness points.)

16 Q Thank you.

17 Do you see Steven Rogers present in this courtroom?

18 A (Witness nods affirmatively.)

19 Q Can you point Mr. Rogers out?

20 A (Witness points.)

21 Q And can you tell me just what he's wearing right now?

22 Just describe his shirt to us just so we know who
23 you're talking about.

24 A I think it's black and white.

25 Q okay.

Kasey Davis - Direct examination
by Solicitor Cude

1 MS. BUTLER: Your Honor, may we approach?

2 THE COURT: You may..

3 (WHEREUPON, a bench conference was held out of the
4 hearing of the jury at this time.)

5 THE COURT: All right. Ladies and gentlemen of the
6 jury, at this point in time there's a matter I need to take
7 up with the attorneys outside of your hearing. This is one
8 of those occasions I'll ask you to step back to the jury
9 room. Again, don't begin any discussions until I advise you
10 to do so. It shouldn't be a very long break. Thank you
11 very much.

12 (WHEREUPON, the following takes place outside the
13 presence of the jury.)

14 THE COURT: All right. Ms. Butler, if you'll place
15 your motion on the record please.

16 MS. BUTLER: Yes, sir, Your Honor. I -- the defense
17 makes a motion to sequester the witnesses who are the
18 codefendants named in this case. Your Honor, the defense
19 was not aware that the codefendants were still seated in the
20 courtroom during the testimony. But as it stands, they have
21 been here during the previous testimony. There's no
22 objection to that. However, the, the coming testimony is
23 the testimony that has been kind of corroborated by the
24 codefendants throughout this time and the stories that have
25 been---

Kasey Davis - Direct examination
by Solicitor Cude

1 THE COURT: All right. Well, let me see what the
2 State's position would be on sequestration.

3 SOLICITOR GRAY: Your Honor?

4 THE COURT: Name the witnesses specifically that you
5 want to have sequestered.

6 MS. BUTLER: Yes, Your Honor. That would be Shannon
7 Varner, Steven Rogers, and Adam Suchil.

8 THE COURT: Thank you.

9 SOLICITOR GRAY: Your Honor, Mr. Suchil is sequestered.
10 He's a guest of the county right now. We don't believe
11 sequestration is appropriate at the time. You asked defense
12 counsel if there were any further motions at the beginning
13 of the trial. She said no. We addressed part of our
14 motions in limine. We believe motion to, for sequestration
15 is akin, is akin to a contemporaneous objection. She did
16 not make the motion at the appropriate time. We do not
17 believe she's entitled to sequestration at this point in
18 time---

19 THE COURT: Now---

20 SOLICITOR GRAY: ---and---

21 THE COURT: ---the two individuals that are present
22 that have been mentioned would stand for me please. Let me
23 see where they are.

24 (Witnesses stand at this time.)

25 THE COURT: All right. Thank you. I do know that the

Kasey Davis - Direct examination
by Solicitor Cude

1 lady came in just recently. So, they weren't here when the
2 trial started. She wasn't in the courtroom at all until
3 just a little while ago I think. I'm gonna grant the
4 motion.

5 I'm gonna ask that the two witnesses that have been
6 named be, step outside to the lobby. I will caution you
7 that you should not discuss your testimony with each other
8 or with anyone else at this point in time. Once you've
9 completed your testimony it would be improper for you to
10 discuss the testimony that you've already given with anyone.
11 In other words, throughout the duration of this trial, you
12 should not discuss your past, present, or future statements
13 with anyone and should not allow them to discuss any matter
14 concerning with, the trial with you.

15 So, I'm gonna ask you to step outside the courtroom.
16 We'll call you when it is necessary for you to testify. You
17 can have a seat in the lobby.

18 (WHEREUPON, the witnesses leave the courtroom at this
19 time.)

20 THE COURT: All right. Anything further before we
21 proceed, Ms. Butler?

22 MS. BUTLER: No, sir, Your Honor.

23 THE COURT: All right. State ready?

24 SOLICITOR CUDE: Yes, sir, Your Honor.

25 THE COURT: Bring the jury back.

Kasey Davis - Direct examination
by Solicitor Cude

1 (WHEREUPON, the following takes place within the
2 presence of the jury.)

3 THE COURT: All right. Ladies and gentlemen of the
4 jury, I have granted a motion to sequester certain
5 witnesses. What that means is that witnesses that are about
6 to testify have been asked to leave the courtroom, and
7 they'll be allowed to enter only when they're giving their
8 testimony.

9 You may proceed for the State.

10 SOLICITOR CUDE: Thank you, Your Honor.

11 CONTINUED DIRECT EXAMINATION

12 BY SOLICITOR CUDE:

13 Q Miss Davis, where did you live with Mr. Foster and
14 Mrs. Varner?

15 A Evans Trailer Park.

16 Q Okay. And where is that?

17 Do you know what county it's in?

18 A Spartanburg.

19 Q Okay. Who else lives, who else lives with you at that
20 time?

21 A Just me, Shannon, and Bert, and Steven.

22 Q Okay. Now, did you ever ride, did you ever ride in
23 Shannon's automobile?

24 A Yeah.

25 Q What kind of automobile did she have?

Kasey Davis - Direct examination
by Solicitor Cude

- 1 A A Durango.
- 2 Q Okay. Do you know what color it was?
- 3 A Black.
- 4 Q Okay. And can, and can you raise your voice a little
5 bit please just so everybody can hear you?
- 6 All right. When you were ever in that vehicle with
7 her, did you ever see guns displayed by anybody?
- 8 A Yes.
- 9 Q Okay. Tell me about what happened the day that you saw
10 guns brought out in the vehicle.
- 11 A The day I seen them was the day that the robbery
12 happened.
- 13 Q Okay. Just tell me, tell us what happened.
- 14 A I had just got back from being with my boyfriend and
15 his mother, and we put -- they pulled up and we went, we
16 went to Carver Mill.
- 17 Q Let me ask you, when you say, you say you just got
18 back -- well, where did you get to for, for -- you said you
19 just got back with your boyfriend and your mother.
- 20 Where did you, where did you arrive?
- 21 A Arrive at?
- 22 Q When you, you said they pulled up, where were you when
23 they pulled up?
- 24 A I was at the trailer.
- 25 Q Okay. And who pulled up?

Kasey Davis - Direct examination
by Solicitor Cude

- 1 A shannon and them.
- 2 Q shannon and who else?
- 3 A steven, wayne, sooch, and jordan.
- 4 Q Okay. who is sooch?
- 5 A Adam.
- 6 Q what -- do you know his full name?
- 7 A No.
- 8 Q Okay. Is sooch a nickname?
- 9 A Yeah.
- 10 Q Okay. who is the Jordan?
- 11 A Adam's girlfriend.
- 12 Q Okay. And what, what vehicle were they riding in?
- 13 A The Durango.
- 14 Q Okay. what happened after they pulled up?
- 15 A I got in the car with them.
- 16 Q Okay. where did you go?
- 17 A To Carver Mill.
- 18 Q Okay. Let me ask you, after -- do you know how long
- 19 you were at Carver Mill?
- 20 A Maybe ten minutes.
- 21 Q Okay. what happened after you left Carver Mill?
- 22 A We went riding and then we went to the trailer park
- 23 where the guys got out and robbed I guess that man.
- 24 Q Okay. when you say that man, who do you mean?
- 25 Can you point out who you mean?

Kasey Davis - Direct examination
by Solicitor Cude

- 1 A (Witness points.)
- 2 SOLICITOR CUDE: Let the record reflect the witness has
- 3 indicated Mr. Sanchez.
- 4 THE COURT: The record shall so reflect.
- 5 Q Okay. What time of day was it when that happened?
- 6 A It was late at night.
- 7 Q Okay. Was it dark outside?
- 8 A Yeah.
- 9 Q Okay. You say the guys got -- you said the guys got
- 10 out, what guys are you referring to?
- 11 A Steven, Wayne, and Adam.
- 12 Q Okay. And then who do you mean when you say Wayne?
- 13 A Bert.
- 14 Q Okay. What, what's his last name?
- 15 A Foster.
- 16 Q Okay. Can you point him out one more time?
- 17 A (Witness points.)
- 18 SOLICITOR CUDE: Let the record reflect she's again
- 19 indicated the defendant.
- 20 THE COURT: It will so reflect.
- 21 Q Okay. Now, let me ask you, did you see any handguns
- 22 when they got out of the car?
- 23 A (Witness nods affirmatively.)
- 24 Q Okay. How many handguns did you see?
- 25 A Three.

Kasey Davis - Direct examination
by Solicitor Cude

1 Q Okay. who had handguns?

2 A Adam, Bert, and Steven.

3 Q Okay. Let me ask you, did you see what happened when
4 they got out of the car?

5 A (Witness nods negatively.)

6 Q Okay. Do you know how long they were gone from the
7 car?

8 A I'm gonna say ten minutes.

9 Q Okay. Did you, did you get out of the car?

10 A No.

11 Q Okay. All right. What happened when they got back in
12 the car?

13 A They had money and cell phones.

14 Q Okay. When you say they, who, who had what?

15 A Bert had money and a cell phone, and that was the only
16 one I seen.

17 Q Okay. So, you didn't see anything in the hands of the
18 other two, is that---

19 A (Witness nods affirmatively.)

20 Q Is that correct?

21 A (Witness nods affirmatively.)

22 Q Okay. Did Mr. Foster say anything after he got back in
23 the vehicle?

24 A That just that they had the money for rent.

25 Q Okay. Did you see, did you see anyone else outside of

Kasey Davis - Direct examination
by Solicitor Cude

1 the vehicle?

2 A Who got out the car?

3 Q Or did you see anybody -- did you see what was going on
4 at all outside of the vehicle?

5 A No.

6 Q Okay. What happened after that?

7 A They went back to the trailer and I stayed in the car,
8 and then they -- it's like they split the money, and then we
9 got back, they got back in the car.

10 Q Okay. What happened after you got back in the car?

11 A We went to a hotel.

12 Q Okay. Did you get any of the money that was split?

13 A No.

14 Q All right. Did you see, did you see anything else
15 going on that night?

16 A No, not that night.

17 Q Okay. That's all I've got. Please answer any
18 questions Ms. Butler may have.

19 THE COURT: Ms. Butler, your witness.

20 MS. BUTLER: Thank you, Your Honor.

21 THE COURT: Yes, ma'am.

22 CROSS-EXAMINATION

23 BY MS. BUTLER:

24 Q Miss Davis, when, when you're testifying here today,
25 you understand that you're under oath, correct?

Kasey Davis - Cross-examination
by Ms. Butler

1 A Yes.

2 Q And, Miss Davis, when you -- you didn't never report
3 any of this until you heard that the police were looking for
4 you, is that correct?

5 A (Witness nods affirmatively.)

6 Q Yes.

7 And when you reported this it's because you knew that
8 if you tried to convince the police first that you might not
9 be charged, is that correct?

10 A No, actually the detective told me that I could still
11 be charged with it.

12 Q But you, but you reported it thinking that if you were
13 able to---

14 A No, they came.

15 Q Miss Davis, just answer my question, and let me ask the
16 question properly. I'm sorry.

17 THE COURT: I'll instruct the witness if the witness
18 needs instruction.

19 MS. BUTLER: Yes, sir. Thank you.

20 THE COURT: You ask the questions. If there's a
21 problem, address me.

22 MS. BUTLER: Yes, sir. Thank you, Your Honor.

23 THE COURT: Thank you.

24 Q By being the first one to report an alleged crime, did
25 you think that you would have leniency?

Kasey Davis - Cross-examination
by Ms. Butler

1 A No.

2 SOLICITOR CUDE: Judge, I object. She's already
3 answered the question.

4 THE COURT: Not in that form. I'll ask, I'll allow her
5 to ask the question.

6 You may state it again.

7 Q Did you believe that by you being the first to report
8 that you would have leniency?

9 A No.

10 Q Were you, in fact, charged with a crime?

11 A No.

12 Q Have you been charged with a crime to this day?

13 A No.

14 Q You stated, on your direct examination, that Mr. Foster
15 lived with Shannon Varner and with you?

16 A Yes.

17 Q Now, are you saying that Mr. Foster -- I believe you
18 said that he lived with you in, in September and November?

19 A Yes.

20 Q And, Miss Davis, you've, you've discussed this case
21 with people, is that correct?

22 You've discussed this case with the officers that---

23 A Yes.

24 Q ---that have talked to you?

25 You've discussed this case with Shannon Varner, who --

Kasey Davis - Cross-examination
by Ms. Butler

1 are you related to Shannon varner?

2 A No.

3 Q You've lived with Shannon Varner for quite some time,
4 correct?

5 A Like -- I think it was three months, but, yeah.

6 Q And you were the caretaker of her child?

7 A Yes, ma'am.

8 Q And you, you discussed this case with Shannon Varner?

9 A Recently?

10 Q At anytime.

11 A No.

12 Q You've never -- you've lived with Shannon Varner, but
13 you've never discussed the case?

14 A Not since the robbery. I've not lived with her or
15 nothing.

16 Q And you, you're telling us that you've never discussed
17 the case with her since then?

18 A If I did I can't remember.

19 Q And you've discussed the case with Steven Rogers---

20 A No.

21 Q ---is that correct?

22 what about the solicitor, have you discussed the case
23 with him?

24 A Yes.

25 Q When did you last discuss the case with the solicitor?

Kasey Davis - Cross-examination
by Ms. Butler

- 1 A Monday of last week.
- 2 Q Monday of last week.
- 3 A (Witness nods affirmatively.)
- 4 Q Miss Davis, when you say that there was some people
- 5 that got out of the, the car that night, but you don't know
- 6 what happened when people got out of the car, is that
- 7 correct?
- 8 A Yes.
- 9 Q You don't -- you didn't see what happened you stated?
- 10 A Yeah, I stayed in the car.
- 11 Q You don't even know who, who was robbed that night, do
- 12 you?
- 13 A No, I just know it was a Hispanic man.
- 14 Q But it was dark, right?
- 15 A Yeah, but I know.
- 16 Q You didn't get out of the car, is that correct?
- 17 A No, I didn't get out of the car.
- 18 MS. BUTLER: Okay. I beg the Court's indulgence, Your
- 19 Honor.
- 20 THE COURT: Yes, ma'am.
- 21 (Pause.)
- 22 MS. BUTLER: That's all the questions I have for this
- 23 witness at this time, Your Honor.
- 24 THE COURT: Redirect?
- 25 SOLICITOR CUDE: Yes, sir, Your Honor.

Kasey Davis - Redirect examination
by Solicitor Cude

1 THE COURT: Yes, sir.

2 REDIRECT EXAMINATION

3 BY SOLICITOR CUDE:

4 Q Miss Davis, what are the windows like in a Durango?

5 A They're tinted.

6 Q When you say tinted, how -- can you give me, can you
7 give me---

8 A You can't see in them, but you can see out of them.

9 Q Okay. All right. And you said to Ms. Butler that you
10 knew it was a Hispanic man who was robbed.

11 How do you know that?

12 A Because Adam translated for the robbery.

13 Q Okay. Do you, do you know who -- do you know who in
14 the car, whose idea it was to commit the robbery?

15 Did anybody say anything?

16 A No, I can't tell you who specifically, who specifically
17 said. I mean all of them were in for it, for robbing
18 people. But I can't tell you who specifically said it.

19 Q Let me ask you.

20 Did you tell police that you saw any other incidents
21 that night?

22 A Yes.

23 Q Okay. What else did you see that night?

24 MS. BUTLER: Objection, Your Honor.

25 THE COURT: I'll ask the attorneys to approach.

1 (WHEREUPON, a bench conference was held out of the
2 hearing of the jury at this time.)

3 THE COURT: Mr. Cude, you may proceed with your
4 redirect if you'd like.

5 SOLICITOR CUDE: That's all I've got, Your Honor.

6 THE COURT: All right. Any recross?

7 MS. BUTLER: No, sir, Your Honor.

8 THE COURT: All right, ma'am. You may step down.

9 SOLICITOR CUDE: Your Honor, can she be excused?

10 THE COURT: Yes, sir, any objection?

11 SOLICITOR CUDE: No objection, Your Honor.

12 THE COURT: Ma'am, you remain under the sequestration
13 order concerning discussion of your testimony, but you're
14 free to go.

15 I'd ask the attorneys to approach again please.

16 SOLICITOR GRAY: Yes, sir, Your Honor.

17 (WHEREUPON, a bench conference was held out of the
18 hearing of the jury at this time.)

19 THE COURT: All right. Ladies and gentlemen of the
20 jury, we've reached the point where it's about a little
21 after 12:15. Excuse me. We're gonna stop at this point in
22 time and take our lunch break. You'll be leaving the
23 courthouse for that purpose. So, again, my instructions are
24 not to attempt to gather any information on your own from
25 any other source. Don't discuss the case with anyone

1 including among yourselves. Don't allow anyone to discuss
2 the case with you. Should anyone attempt to contact you
3 concerning your service on this jury, I'd ask that you
4 report that back when you return. I'll see that the
5 appropriate investigations are begun should someone attempt
6 to tamper with the jury.

7 we'll take our break until 1:30. Be back in the jury
8 room at that time, 1:30, that's a little over an hour, back
9 in the jury room. Thank you very much.

10 (WHEREUPON, the following takes place outside the
11 presence of the jury.)

12 THE COURT: All right. Court's in recess until 1:30.
13 The defendant remains in custody. Thank you very much.
14 Be sure the jury is clear before you take him out.

15 (WHEREUPON, Court was in recess for the lunch hour.)

16 THE COURT: Okay. State ready to proceed?

17 SOLICITOR GRAY: May we approach, Your Honor?

18 THE COURT: You may.

19 (WHEREUPON, a bench conference was held at this time.)

20 THE COURT: All right. The State appears to be ready.
21 Is the defense ready?

22 MS. BUTLER: Oh, yes, sir, Your Honor.

23 THE COURT: Thank you.

24 Go tell them to bring the jury in.

25 (WHEREUPON, the following takes place within the

1 presence of the jury.)

2 THE COURT: All right. The record will reflect that
3 the jury has returned to the courtroom.

4 When we took our break for lunch the State was in the
5 process of calling its witnesses, and the State may call its
6 next witness.

7 SOLICITOR GRAY: Thank you, Your Honor.

8 The State calls Steven Rogers.

9 THE COURT: Come forward, sir, over here to my left and
10 be sworn.

11 STEVEN ROGERS, having been first duly
12 sworn, testified as follows:

13 THE COURT: Have a seat please.

14 (Witness complies.)

15 THE COURT: State your name please.

16 WITNESS: Steven Rogers.

17 THE COURT: Mr. Gray, your witness.

18 SOLICITOR GRAY: Thank you, Your Honor.

19 DIRECT EXAMINATION

20 BY SOLICITOR GRAY:

21 Q Mr. Rogers, where do you live?

22 A 275 Fuller Road, Cross Anchor, South Carolina.

23 Q Cross Anchor.

24 Have you ever lived in Spartanburg?

25 A Yes, sir.

Steven Rogers - Direct examination
by Solicitor Gray

1 Q when did you live in the City of Spartanburg?

2 A Off and on, the past two or three years.

3 Q where did you live before that, Mr. Rogers?

4 A 104 Lillian Drive.

5 Q You got to slow---

6 A 104---

7 Q ---down for me.

8 A 104 Lillian Drive.

9 Q All right. Now, Mr. Rogers, do you know Mr. Bert Wayne
10 Foster?

11 A Yes, sir.

12 Q Could you point him out for me please?

13 A (Witness points.)

14 Q Is that the gentleman in the blue shirt and the blue
15 tie?

16 A Yes, sir.

17 SOLICITOR GRAY: Let the record reflect this defendant,
18 the victim, excuse me, this person knows the defendant in
19 the case and pointed him out.

20 THE COURT: The record will reflect that he indicated
21 or identified the defendant.

22 You may proceed.

23 SOLICITOR GRAY: Thank you, Your Honor.

24 Q Mr. Rogers, do you call Mr. Foster Bert or Wayne?

25 A wayne.

Steven Rogers - Direct examination
by Solicitor Gray

- 1 Q That's what he goes by?
- 2 A Yes, sir.
- 3 Q Now, do you know Mr. Adam Suchil?
- 4 A Yes, sir.
- 5 Q What does he do?
- 6 A Sooch.
- 7 Q Sooch.
- 8 So, when we're talking about Wayne and Sooch, we're
- 9 talking about Bert Foster and Adam Suchil?
- 10 A Yes, sir.
- 11 Q Do you have a nickname, Mr. Rogers, that---
- 12 A No, sir.
- 13 Q ---everybody calls you?
- 14 A No, sir.
- 15 Q Just Steve or Steven?
- 16 A Yes, sir.
- 17 Q All right. How many months or years have you known
- 18 Mr. Suchil?
- 19 A Maybe a month --
- 20 Q Maybe a month?
- 21 A -- before the incident, yes, sir.
- 22 Q Mr. Foster, how long have you known him?
- 23 A Maybe about two years, three years.
- 24 Q So, you have no problem identifying him?
- 25 A No, sir.

Steven Rogers - Direct examination
by Solicitor Gray

1 Q And I'm guessing you and Mr. Foster use to hang out
2 together?

3 A Yes, sir.

4 Q September 21 of last year, were you and Mr. Foster
5 hanging out together?

6 A Yes, sir.

7 Q Was there anybody else with you during that day?

8 A Yes, sir.

9 Q Who else was with you?

10 A There was a number of people who was there. There was
11 Shannon Varner, Kasey Davis, Adam Suchil, and Adam's
12 girlfriend, Jordan.

13 Q And were you -- what were you doing that day?

14 A Drinking, riding around the city.

15 Q In whose vehicle?

16 A Shannon's.

17 Q And what type of vehicle does Shannon drive?

18 A It was a Dodge Durango.

19 Q What color?

20 A Black.

21 Q A black Durango.

22 Now, did you start off the day with all of these
23 individuals?

24 A That morning, yes, sir.

25 Q And what were you doing in the morning with these

Steven Rogers - Direct examination
by Solicitor Gray

1 people?

2 A Getting up, getting ready for the day, going around. I
3 mean just doing the normal routine to prepare for the day.

4 Q All right. Now, during that day on the 21st of
5 September, did you and these other individuals engage in any
6 illegal activities?

7 A Yes, sir, we went to see a friend of mine who lived
8 down in Wellford, and I was down there checking out the
9 motorcycle. He was selling his bike. He sells a lot of
10 cars and stuff. And while we were down there, me and Wayne
11 were down in the back looking at the motorcycle, looking at
12 the bike and stuff, and then Sooch comes back to the, down
13 to the basement in the back where the park was, where the
14 bike was, and comes down like there, we need to go, we need
15 to go, we need to go.

16 I'm not paying no attention. I ain't really rushing.
17 I've known the guy that we were down there with for a while.
18 So, I'm sitting there chit-chatting. He comes back again,
19 we need to go, we need to go, we need to go, and finally I
20 get in the car and we leave. Somehow or another they had
21 come up with a gun that he had at his house that---

22 Q Okay. Let me stop you for a second.

23 Was it they or one of the, one of these individuals had
24 a weapon?

25 A Wayne had the gun, but come to find out later on it was

Steven Rogers - Direct examination
by Solicitor Gray

1 Adam that had stole it.

2 Q All right. Now, after you leave that residence and you
3 have this, well, one of the two of them has this weapon,
4 either Wayne or Mr. Suchil, what happened next?

5 A We left there. It was still early that day. It was
6 maybe 1:00, 2:00 in the afternoon. We was riding around
7 still continuing to do whatever they done. Shannon had to
8 go take a drug test at D.S.S. or something like that. So,
9 they dropped me off at a buddy of mine's house around the
10 corner from where the trailer on Lillian Drive was. Dropped
11 me off. I sat there for maybe an hour, hour and a half.

12 They come back. They came into some liquor and we was
13 drinking, riding around again, riding around the city.

14 Q Okay. Who -- you say we were -- who was in the car
15 again after you started drinking?

16 A It was the same people before. Me, Adam, Wayne,
17 Shannon, Kasey, and Jordan.

18 Q All right. Now, does day turn into night at this time?

19 A No, sir.

20 Q Is it early evening?

21 A It's getting around 4:30, five o'clock.

22 Q All right. Now, later did some more -- well, did some
23 activity occur with you and Mr. Foster and Mr. Suchil?

24 A Yes, sir. We pulled onto Seminole Drive. It was still
25 daylight by that time. It hadn't gotten dark yet. We were

Steven Rogers - Direct examination
by Solicitor Gray

1 driving down the road. we seen a gentleman walking up and
2 down the road. when he was walking up the road, wayne looks
3 out the window and tells Shannon to stop the truck. she
4 stops the truck. well, is proceeding to stop the truck.

5 Before she gets the truck to a complete stop, Adam's
6 already out the car. So was wayne. They get out of the
7 car, and run back and start to rob the man. She puts the
8 truck in park. I open the door. I stepped out of the
9 truck. when I step out of the truck they're on their way
10 back to the car. Wayne had a bag in his hand. when he got
11 in the truck there was two beers in the bag. He threw a
12 wallet out of the window and a cell phone out of the window.
13 He said there was money in the wallet, but he didn't tell me
14 how much.

15 Q Now, did you see the robbery?

16 A Yes, sir, not, not so much as actually watching them do
17 it. But as far as I heard things. I heard them say, you
18 know what I mean, you know what time this is, you know what
19 time it is, give it up. I don't -- the whole don't be a
20 hero thing, I didn't hear that. And then when they came
21 back, they, he -- wayne and Adam were putting guns up and
22 getting back in the car.

23 Q All right. who had the gun?

24 A Both of them.

25 Q Both of them?

Steven Rogers - Direct examination
by Solicitor Gray

- 1 A Wayne and Adam both, yes, sir.
- 2 Q Did they point it at, at the victim?
- 3 A Yes, sir.
- 4 Q Was the victim Hispanic or African-American?
- 5 A African-American.
- 6 Q Was it this gentleman here?
- 7 A I believe so, yes, sir.
- 8 Q All right. The gentleman, Mr. Robinson?
- 9 A Yes, sir.
- 10 Q Did -- had any of you ever met Mr. Robinson before?
- 11 A No, sir.
- 12 Q Did any of you know Mr. Robinson?
- 13 A No, sir.
- 14 Q Did these two individuals do anything to disguise their
- 15 appearance before the robbery?
- 16 A Yes. Yes, sir, they were both -- Wayne had on some
- 17 shorts, a tank top---
- 18 Q Uh-huh. (Affirmative).
- 19 A ---a hat and a red bandanna around his face. Adam had
- 20 on jeans, sneakers, a hoodie, and a red bandanna around his
- 21 face.
- 22 Q And they pulled these bandannas up before they got out?
- 23 A Yes, sir.
- 24 Q Now, why would these -- why would Mr. Foster rob a
- 25 complete stranger?

Steven Rogers - Direct examination
by Solicitor Gray

- 1 A Down for money, sir. We had -- it was going onward
2 about Shannon's bills, Shannon's bills, but that was the
3 whole gist of it. She had a -- we had portions, but we
4 didn't have all of it, and I'm -- it was basically to get
5 his portion of the bills.
- 6 Q So, it was Mr. Foster's idea?
- 7 A Yes, sir.
- 8 Q You robbed -- they or he or whatever robbed a complete
9 stranger at gunpoint for bill money?
- 10 A Yes, sir.
- 11 Q And, again, what did they take at gunpoint from Mr.
12 Robinson?
- 13 A They got his wallet, two beers in a bag, and a cell
14 phone.
- 15 Q All right. On September 21st, 2009, was that the
16 only gentleman that they robbed?
- 17 A No, sir.
- 18 Q Was there another robbery that evening?
- 19 A Yes, sir, it was later on that night. It had gotten
20 dark already.
- 21 Q Now, where did that occur?
- 22 A Prince Street according to the police reports. I'm not
23 sure entirely where Prince Street is. I couldn't tell you
24 how to get there.
- 25 Q All right. Do you know Seminole Drive?

Steven Rogers - Direct examination
by Solicitor Gray

1 A Yes, sir.

2 Q That's here in Spartanburg County?

3 A Yes, sir.

4 Q Now, Prince Street, were you in the vehicle at that
5 time?

6 A Yes, sir.

7 Q Tell us what happened with that robbery.

8 A We pulled up on Prince Street. We were going down --
9 I'm assuming it's Prince Street. We went down the street.
10 Adam sees the two men standing outside over by some
11 mailboxes in a gravel little drive type thing in front of
12 some trailers that were lined up. We pulled down the
13 street. He notices that they're Mexican or Latin, Latin or
14 whatever, however you want to pronounce it, and tells her to
15 turn around, tells Shannon to turn the truck around and go
16 back and stop there. He was gonna get them. Shannon turns
17 around.

18 Q Who, who said that?

19 A Adam.

20 Q Adam?

21 A Shannon turns back around, pulls in, Adam jumps out the
22 car, starts saying something in Spanish to the dudes. I
23 have no idea what he said. I don't speak any Spanish
24 whatsoever.

25 Q Why does Adam know Spanish?

Steven Rogers - Direct examination
by Solicitor Gray

1 A I'm assuming he's biracial. He's -- I mean that's what
2 I heard between him and his girlfriend that he's biracial.
3 He's half Mexican I believe.

4 Q All right.

5 A And he says something to the guys in Spanish, pulls the
6 gun. All -- Wayne gets out the car and goes over there to
7 him. He puts the gun on the other guy. I was still in the
8 truck at the time. They tell me to get out of the truck,
9 come over there, and pick what they had got from the man up
10 off the ground. I picked it up, got back in the truck, gave
11 it to Wayne, and then we pulled off.

12 Q Now, you do understand that you've made some statements
13 here implicating yourself---

14 A Yes, sir.

15 Q ---here today?

16 Have you been charged with any crimes?

17 A Yes, sir.

18 Q What have you been charged with?

19 A Two counts of armed robbery.

20 Q Are you represented by counsel?

21 A Yes, sir.

22 Q So, you have your own attorney for those charges?

23 A Yes, sir.

24 Q Knowing that, you're still telling the truth here
25 today?

Steven Rogers - Direct examination
by Solicitor Gray

- 1 A Yes, sir.
- 2 Q Mr. Suchil and Mr. Foster pointed guns at two Hispanic
3 gentleman, Mr. Sanchez and another gentleman?
- 4 A Yes, sir.
- 5 Q And told you to come get their items?
- 6 A Yes, sir.
- 7 Q And that's what you did?
- 8 A Yes, sir.
- 9 Q Do you know what of the weapons Mr. Foster had and
10 Mr. Suchil had?
- 11 A Mr. Foster, Wayne, had a .38 revolver. It was a
12 Charter Arms. Adam had a .45 caliber High Point pistol.
- 13 Q And they pointed it at Mr. Sanchez and another
14 individual?
- 15 A Yes, sir.
- 16 Q And robbed them both?
- 17 A Yes, sir.
- 18 Q And, and you witnessed all of this?
- 19 A Yes, sir.
- 20 Q Do you have any problem identifying Mr. Foster as one
21 of the robbers --?
- 22 A No, sir.
- 23 Q -- of Mr. Sanchez?
- 24 A Yes, sir.
- 25 Q Any problem identifying Mr. Suchil as one of the

Steven Rogers - Direct examination
by Solicitor Gray

- 1 robbers ---?
- 2 A No, sir.
- 3 Q -- of Mr. Sanchez?
- 4 A No, sir.
- 5 Q Do you have any problem identifying any of these two,
- 6 Mr. Foster as the robber of Mr. Robinson here?
- 7 A No, sir.
- 8 Q And you were present for both incidents?
- 9 A Yes, sir.
- 10 Q And you're positive that Mr. Foster robbed, with a gun,
- 11 with a weapon, robbed Mr. Robinson and Mr. Sanchez?
- 12 A Yes, sir.
- 13 Q Now, do you know what was taken from Mr. Sanchez?
- 14 A A wallet, a cell phone, some keys, and I believe there
- 15 was another wallet too and another phone. I know there was
- 16 another phone.
- 17 Q What happened to all of these items?
- 18 A It all got throwed away from the car.
- 19 Q They all what?
- 20 A Got thrown out of the window of the car.
- 21 Q The cell phones?
- 22 A Yes, sir.
- 23 Q Cell phone belonging to Mr. Sanchez?
- 24 A Yes, sir.
- 25 Q Cell phone belonging to Mr. Robinson?

Steven Rogers - Direct examination
by Solicitor Gray

1 A Yes, sir.

2 Q The keys or whatever?

3 A Thrown out the window. They threw them out the window
4 just in random, different random places as we were going
5 down the road.

6 Q The wallets?

7 A Yes, sir.

8 Q What about money?

9 A The money was kept.

10 Q And what did they do with the money?

11 A Wayne counted the money. We went back to Shannon's
12 trailer. Wayne counted the money out. There was about 940,
13 \$950. And after he counted the money out, he gave her
14 enough to cover his portion of the bills, \$240.

15 Q Did you get any money?

16 A He handed it to me to give to her. So --.

17 Q Did you get a cut of the money?

18 A No, sir.

19 SOLICITOR GRAY: One moment, Your Honor.

20 THE COURT: Yes, sir.

21 (Pause.)

22 Q Thank you, Mr. Rogers. Please answer any questions Ms.
23 Butler may have for you.

24 A Yes, sir.

25 THE COURT: Ms. Butler, your witness.

Steven Rogers - Direct examination
by Solicitor Gray

1 MS. BUTLER: Thank you, Your Honor.

2 THE COURT: Yes, ma'am.

3 CROSS-EXAMINATION

4 BY MS. BUTLER:

5 Q Mr. Rogers, you testified that you currently live on
6 Fuller Road, is that correct?

7 A Yes, ma'am.

8 Q You live -- are you, are you testifying here today that
9 you lived at Shannon Varner's residence on 9/21/09?

10 A Yes, ma'am, I was staying with them, but it wasn't --
11 it was one of them things where they didn't want people to
12 know that I lived there.

13 Q Okay. But you lived at Shannon Varner's?

14 A Yes, ma'am.

15 Q You, you paid rent at Shannon Varner's?

16 A Yes, ma'am.

17 Q You lived there with Kasey Davis and Shannon Varner,
18 correct?

19 A Yes, ma'am.

20 Q And you had an intimate relationship with Varner
21 actually, is that correct?

22 A Yes, ma'am.

23 Q And that intimate relationship was trying to be hid
24 from the father of Shannon Varner's baby, is that correct?

25 A No, ma'am, at the time she had informed me that she had

Steven Rogers - Cross-examination
by Ms. Butler

1 told him while he was in prison, that he knew.

2 Q But you did have that intimate relationship. You
3 didn't know if she had told or not?

4 A Yes, ma'am.

5 Q You -- on the day of the incident, Mr. Rogers, when you
6 were arrested, do you remember giving a statement to the
7 officers?

8 A Yes, ma'am.

9 Q And do you remember -- Shannon Varner testified that
10 she was high on drugs that night?

11 SOLICITOR GRAY: Objection.

12 MS. BUTLER: I'm sorry.

13 Do you remember if---

14 THE COURT: Just one second.

15 Yes, sir, Mr. Gray.

16 SOLICITOR GRAY: May we approach, Your Honor?

17 THE COURT: You certainly may.

18 (WHEREUPON, a bench conference was held out of the
19 hearing of the jury at this time.)

20 THE COURT: Ladies and gentlemen, the last question
21 that was abandoned by the defense is stricken from the
22 record. When I strike an item from the record that means
23 that you're not to consider that matter at all in reaching
24 your verdict. I'll give you additional information
25 concerning matters that I've stricken from the record during

Steven Rogers - Cross-examination
by Ms. Butler

1 my charge, but that matter has been stricken from the
2 record, and should be disregarded by you in its entirety.

3 You may proceed.

4 MS. BUTLER: Thank you, Your Honor.

5 Q I'm sorry. It was your testimony that y'all were
6 riding around drinking that day, is that correct?

7 A Yes, ma'am.

8 Q Were you also riding around doing drugs that day?

9 A No, ma'am.

10 Q There were no drugs in the car?

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

12 Q Was, to your knowledge, were any of the folks in the
13 car doing drugs that day?

14 A Possibly. Jordan, I know Jordan got a prescription for
15 I think it was Xanaxes of some kind. So, she -- I'm pretty
16 sure she was taking them. She gave Shannon one or two
17 maybe. So, I'm pretty sure she may of taken one.

18 Q So, now there were illegal drugs in the car that day,
19 is that correct?

20 A Not necessarily, ma'am. She had a prescription for
21 them. So, I don't know if you would deem them illegal or
22 not.

23 Q There were, there were drugs in the car, the
24 prescription drugs?

25 A Yes, ma'am.

Steven Rogers - Cross-examination
by Ms. Butler

1 Q Absolutely the prescription drugs?

2 A Yes, ma'am.

3 Q Okay. And you said that you know that it is -- one of
4 the incidents took place on Prince Street, but you don't
5 really know where Prince Street is located?

6 A No, ma'am.

7 Q How do you know that there was an incident that took
8 place on Prince Street?

9 A I've read the police report.

10 Q And you've, you've also talked with the solicitor in
11 this case, is that correct?

12 A Yes, ma'am.

13 Q And the solicitors that are here today prosecuting this
14 case are the same solicitors that are handling your charges,
15 is that correct?

16 A I believe so, yes, ma'am.

17 Q And you've talked with them about your charges?

18 A Not in regards to as far as -- I don't understand the
19 question, ma'am.

20 Q Have you talked with the solicitors about your charges?

21 A Meaning about, talked to them about what?

22 Q Have you talked to the solicitors at all about your
23 charges?

24 A They've informed me, yes, ma'am, what I was charged
25 with. Other than, other than that not really, no, ma'am.

Steven Rogers - Cross-examination
by Ms. Butler

1 Q Have you met -- you and your attorney met with the
2 solicitors, is that correct?

3 A Yes, ma'am.

4 Q The same solicitors that are here today, the same
5 solicitors that are handling your charges?

6 A Yes, ma'am.

7 Q Is it your understanding that they have control over
8 whether your charges stick or disappear?

9 A Ma'am?

10 Q Is it your understanding that the solicitors in this
11 case have control over whether your charges stay against you
12 or are thrown out against you?

13 A Now that you said, yes, ma'am.

14 Q That is your understanding?

15 A Yes, ma'am.

16 MS. BUTLER: I beg the Court's indulgence.

17 THE COURT: Yes, ma'am.

18 (Pause.)

19 Q Very briefly, Mr. Rogers.

20 Your testimony is, is that you, the incident happened
21 at daylight, is that correct?

22 A There are---

23 Q Is that your testimony?

24 A They're two different incidences. Which one are you---

25 Q Was there an incident that you're testifying to that

Steven Rogers - Cross-examination
by Ms. Butler

1 happened at daylight on that day?

2 A Yes, ma'am.

3 Q Thank you.

4 THE COURT: Redirect?

5 SOLICITOR GRAY: Thank you, Your Honor.

6 THE COURT: Yes, sir.

7 REDIRECT EXAMINATION

8 BY SOLICITOR GRAY:

9 Q Do you -- you have, in talking to your attorney and to
10 the solicitor's office, do you have any deal regarding your
11 charges?

12 A No, sir.

13 Q Not at all?

14 A No, sir.

15 Q You're testifying truthfully here today?

16 A Yes, sir.

17 Q Thank you.

18 THE COURT: Recross.

19 MS. BUTLER: Nothing further.

20 THE COURT: You may step down, sir.

21 Do you wish to excuse the witness?

22 SOLICITOR GRAY: Yes, sir.

23 THE COURT: Any objection?

24 MS. BUTLER: No, sir.

25 THE COURT: Sir, I'll caution you that you remained

Steven Rogers - Redirect examination
by Solicitor Gray

1 under the, remain under the sequestration order of the Court
2 until the end of the trial.

3 WITNESS: Yes, sir.

4 THE COURT: You're free to go.

5 The next witness is being brought in from outside?

6 SOLICITOR GRAY: Yes, sir, Your Honor.

7 THE COURT: Thank you.

8 sir, come here, right here to my left and be sworn.

9 ADAM SUCHIL, having been first duly
10 sworn, testified as follows:

11 THE COURT: Have a seat in the witness stand here.
12 Once you're seated, state your name please.

13 WITNESS: Adam Suchil.

14 THE COURT: Adam Suchil?

15 WITNESS: Yes, sir.

16 THE COURT: Your witness, Mr. Cude.

17 SOLICITOR CUDE: Thank you, Your Honor.

18 THE COURT: Yes, sir.

19 DIRECT EXAMINATION

20 BY SOLICITOR CUDE:

21 Q Mr. Suchil, where are you, where are you living right
22 now?

23 A Right at this moment?

24 Q Right?

25 A In the Spartanburg County Detention Center. 950

Adam Suchil - Direct examination
by Solicitor Cude.

1 California Avenue.

2 Q And how, how long have you been there?

3 A A little over fourteen months.

4 Q Okay. On September 21st, 2009, did you commit two
5 armed robberies?

6 A Yes, sir.

7 Q Okay. Was anyone with you at the time of these armed
8 robberies?

9 A Yes, sir.

10 Q Who was with you?

11 A It was a total of four people, Shannon Varner, Steven
12 Rogers, and Bert Wayne, and Shannon's baby.

13 Q Okay. When you say Bert Wayne, who is that?

14 A The guy in the courtroom today.

15 Q Okay. Are you able to raise your hands anymore or---

16 A Just this much.

17 SOLICITOR CUDE: Okay. Let the record reflect he's
18 indicated the defendant, Your Honor.

19 THE COURT: The record will so reflect.

20 You may proceed, Mr. Cude.

21 Q Now, let me ask you some things right off.

22 You've been convicted of crimes before, have you not?

23 A Yes, sir.

24 Q All right. You were convicted of public disorderly
25 conduct in 2003, is that right?

Adam Suchil - Direct examination
by Solicitor Cude

- 1 A Yes, sir.
- 2 Q You're convicted of shoplifting in 2003, is that right?
- 3 A Yes, sir.
- 4 Q Malicious injury to personal property?
- 5 A Yes, sir.
- 6 Q In 2005 you were convicted of assault and battery of a
7 high and aggravated nature, is that right?
- 8 A Yes, sir.
- 9 Q You're convicted in 2006 of two counts of obtaining
10 property under false pretenses, is that right?
- 11 A Yes, sir.
- 12 Q You were convicted of petty larceny, is that right?
- 13 A Yes, sir.
- 14 Q And were you also convicted, at the same time, of
15 burglary?
- 16 A Yes, sir.
- 17 Q Okay. And in 2008 were you convicted of public
18 disorderly conduct?
- 19 A Yes, sir.
- 20 Q And also resisting arrest at that time?
- 21 A Yes, sir.
- 22 Q And let me ask you this, did the State make you an
23 offer in return for your testimony?
- 24 A Yes, sir.
- 25 Q And what is that offer as you understand it?

Adam Suchil - Direct examination
by Solicitor Cude

1 A If I pled guilty to my charges and cooperated with the
2 State, that, before I go to trial, they would drop one of my
3 armed robberies---

4 Q Okay.

5 A ---and just charge me with one. And after I come to
6 trial and gave my testimony, I would get a recommendation of
7 ten years for the next armed robbery.

8 Q Okay. And have you pled guilty to one of those armed
9 robberies?

10 A Yes, I have, sir.

11 Q Okay. And was the sentence, were you sentenced at that
12 time?

13 A No, sir.

14 Q Okay. All right. What happens September 21st, 2010?

15 A Well, it's evening time. It's me, Shane, and Steven,
16 and Wayne. The baby was always with us. We left from
17 Shannon's house over in her, where she was staying in her
18 trailer park. We were driving around in the Arcadia
19 community at this time. We came across the first victim,
20 which was Freddie Robinson I guess. That's what they said
21 his name was.

22 When we seen Freddie Robinson, me, Steven, Wayne jumped
23 out the car. I had a gun at this time. I pulled it on him
24 first. Wayne also had a gun at this time. Steven didn't
25 have one at this time. He had a baseball bat. As I held

Adam Suchil - Direct examination
by Solicitor Cude

- 1 the gun, Steven and Wayne took the guys stuff. I didn't
2 take anything. I just held the gun on him. We left from
3 there. We left -- when we got through from there, we went
4 back to the house cause I had to pick up Kasey. She
5 couldn't get in herself.
- 6 Q Let me ask you something before you go into that.
7 What vehicle were y'all riding in before the first
8 robbery?
- 9 A Shannon's car.
- 10 Q And what kind of car is that?
- 11 A It's a Durango.
- 12 Q All right. What color is that?
- 13 A A black one with---
- 14 Q Okay. And let me ask you, you called -- you said the
15 man you robbed is Freddie Robinson, but you don't know that
16 yourself, do you?
- 17 A No, sir.
- 18 Q Okay. Have you ever met that man before?
- 19 A No, sir.
- 20 Q Do you remember what race he is---
- 21 A Yes, sir.
- 22 Q ---what ethnicity?
23 What ethnicity is that?
- 24 A He was -- he's a black guy, sir.
- 25 Q Okay. Do you see him around here anywhere?

Adam Suchil - Direct examination
by Solicitor Cude

1 A It was dark. I mean I really -- you know, I know it
2 was a black guy.

3 Q All right. Did you say anything to him during the
4 robbery?

5 A I don't remember my exact words, but I do remember
6 saying don't be a hero. But I don't remember no exact
7 details of what I told him. But I'm the one who did talk to
8 him.

9 Q Okay. And did you take anything from him?

10 A No, sir.

11 Q What did you see -- was anything taken from him?

12 A There was a bag I think had some beers in it. I know
13 it did. He had a cell phone and a wallet. But that was it.

14 Q All right. What happened to those items?

15 A We got rid of everything down the road. There was a
16 few dollars in his wallet, but it wasn't even much to get
17 gas with at the time.

18 Q Okay. What happened after -- well, let me ask you one
19 more thing.

20 Was -- were you wearing anything over your face at that
21 time?

22 A I had a hoodie on. I didn't have anything over my
23 face.

24 Q Did anybody else have anything over theirs?

25 A I don't actually recall. I don't think so. But I'm

Adam Suchil - Direct examination
by Solicitor Cude

1 not sure.

2 Q Okay. And do you -- again, I think you mentioned this,
3 do you know what time it was approximately?

4 A I just know it was late. It was at nighttime. I don't
5 know approximately what time it was. It's been so long.

6 Q Okay. What happened after you -- you mentioned then
7 going to get Kasey.

8 what happened after that?

9 A After we went to get Kasey we went to Carver Mill. We
10 got to Carver Mill. We stayed there for probably 30 to 45
11 minutes. Then we left there. All of us but Kasey with us
12 this time.

13 After we left Carver Mill we rode around for a little
14 while, ten to fifteen minutes I guess. I'm not really sure
15 on the times. I'm just guessing. At that time we rode over
16 by the Asheville Highway area where we seen the -- this is
17 where the next armed robbery occurred. We -- there was two
18 guys walking down the road. When we seen them we turned
19 back around and circled. By this time they were at their
20 house. They had got in to where they stay.

21 I, again, jumped out the car. I was out first. I had
22 a gun. This time Wayne didn't have a gun. Steven did. We
23 ran up on the guys. They basically knew what was going on.
24 I don't think they spoke much English. I know a little bit
25 of Spanish, not much, enough to get me in trouble. I told

Adam Suchil - Direct examination
by Solicitor Cude

1 the guys -- they were throwing stuff on the, on the ground,
2 the money. I told them to put the money in Steven's hand
3 and that was basically it. We got the money from them. I
4 didn't take anything again at the time. I held the gun on
5 them though, and Steven held the gun on them. We got in the
6 car and we left.

7 Q All right. Who took the items from them?

8 A Sir?

9 Q Who took the items from them?

10 A Wayne and Steven. But I don't remember in detail
11 really how they took them. You know, it was just -- I know
12 I held the gun on them and I remember some stuff getting
13 thrown on the ground, and it all happened real fast. Then
14 we got in the car and we left.

15 Q How long was that after the first robbery?

16 A Probably an hour, maybe a little longer. Like I said,
17 I'm not too sure on the times, but---

18 Q Okay.

19 A ---what time it was.

20 Q During the second robbery, were you wearing anything
21 over your face then?

22 A I wasn't sir, no.

23 Q Was anybody wearing anything over their face?

24 A I don't know. I don't recall.

25 Q Now, whose idea was it to do these?

Adam Suchil - Direct examination
by Solicitor Cude

1 A well, the whole motive behind it was because of
2 Shannon. She needed her rent paid, and that's where it came
3 from. That was just -- she didn't have money to pay her
4 rent. That was the whole, was the whole ordeal behind the
5 thing.

6 Q Now, what kind of gun did you use during this?

7 A I had a .45. The other one I'm not sure of.

8 SOLICITOR CUDE: Okay. Beg the Court's pardon.

9 THE COURT: Yes, sir.

10 (Pause.)

11 SOLICITOR CUDE: Your Honor, I have nothing further for
12 this witness.

13 THE COURT: All right. Ms. Butler, you may
14 cross-examine.

15 MS. BUTLER: Thank you, Your Honor.

16 THE COURT: Yes, ma'am.

17 CROSS-EXAMINATION

18 BY MS. BUTLER:

19 Q Mr. Suchil, you testified that you've been in jail for
20 14 months now?

21 A Yes, ma'am.

22 Q And in 14 months have you been able to have this
23 discovery packet in the cell with you?

24 A Yes, ma'am.

25 Q And, in fact, the discovery packet is the one thing

Adam Suchil - Cross-examination
by Ms. Butler

1 that the officers can't take from you, is that correct?

2 A Yes, ma'am.

3 Q And the discovery packet includes statements from other
4 persons involved in this crime, is that correct?

5 A Yes, ma'am.

6 Q And the discovery packet includes statements from
7 Shannon Varner and Steven Rogers, is that correct?

8 A Yes, ma'am.

9 Q And in this 14 months time you've had plenty of time to
10 look over those statements of Shannon Rogers, Shannon Varner
11 and Steven Rogers, correct?

12 A Yes, ma'am.

13 Q So, in that time you've had time to get your story
14 together along with Shannon and Steven's story on this case,
15 is that correct?

16 A No, ma'am.

17 Q But you know that if you were -- you knew that Shannon
18 and Steven were plotting and work together against Mr.
19 Foster, correct, in the statements?

20 A No, ma'am.

21 Q Did you read that in the statements?

22 A I read the statements, yes, ma'am.

23 Q Yeah. And, so, in reading, in reading the statements,
24 then you -- when you understand the statements and how
25 they're worded, you, you understood that if you came with

Adam Suchil - Cross-examination
by Ms. Butler

1 Mr. Foster, against Mr. Foster also you might could get out
2 of it, is that correct?

3 A No, ma'am.

4 Q Well, you have gotten out of it though, right?

5 A I admitted my truth in what -- I took responsibility
6 for what I did.

7 Q But you've got one armed robbery dropped?

8 A Yes, ma'am, I have.

9 Q Now, if you had two armed robberies pending you were
10 facing 60 years in prison, correct?

11 A Yes, ma'am.

12 Q And you, you say that you're gonna get ten?

13 A I'm not guaranteed, but I will get a recommendation
14 after this testimony is over.

15 Q A recommendation of ten years---

16 A Yes, ma'am.

17 Q ---as opposed to 60?

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

19 Q Now, that's a pretty good incentive to help the State
20 out, isn't it?

21 A Yes, ma'am.

22 MS. BUTLER: I beg the Court's indulgence, Your Honor.

23 THE COURT: Yes, ma'am.

24 (Pause.)

25 Q Mr. Suchil, you have an extensive criminal history, is

Adam Suchil - Cross-examination
by Ms. Butler

1 that correct?

2 A Yes, ma'am.

3 Q And the solicitor just went over that with you all the
4 way from public disorderly conduct to burglary and, and a
5 few things in-between dating back from -- is that correct?

6 A Yes, ma'am.

7 Q And your offenses date from 2005 to 2008?

8 A Yes, ma'am.

9 Q How old are you?

10 A I'm 25.

11 Q Have you spent some time in prison before?

12 A I been on a youth spread twice.

13 Q In, in the charges that you've had, you become a little
14 familiar with the system, is that correct, Mr., Mr. Suchil?

15 Have you -- have you been before judges before?

16 A Not in this type of environment. Not in this type of
17 matter, no, ma'am.

18 Q Mr. Suchil, when you were charged with burglary, did
19 you have to come before a General Sessions judge?

20 A For guilty -- just to take a guilty plea, yes, ma'am.

21 Q And when you were charged with assault and battery of a
22 high and aggravated nature you had to come before a General
23 Sessions judge?

24 A Yes, ma'am.

25 Q Did you have attorneys in either of those cases?

Adam Suchil - Cross-examination
by Ms. Butler

1 A Just public defenders.

2 Q And public defenders are attorneys?

3 A Yes, ma'am.

4 MS. BUTLER: I beg the Court's indulgence, Your Honor.

5 THE COURT: Yes, ma'am.

6 (Pause.)

7 MS. BUTLER: That's all the questions I have at this
8 time.

9 THE COURT: Redirect.

10 SOLICITOR CUDE: Your Honor, just briefly.

11 REDIRECT EXAMINATION

12 BY SOLICITOR CUDE:

13 Q Do you have an attorney on these charges?

14 A Yes, sir.

15 Q Okay. Is what your - is what you said today the truth?

16 A Yes, sir.

17 SOLICITOR CUDE: That's all I've got, Your Honor.

18 THE COURT: Recross?

19 MS. BUTLER: No, sir.

20 THE COURT: You may step down.

21 State may call its next witness.

22 SOLICITOR GRAY: State calls Investigator Ritchie
23 Foster.

24 THE COURT: Come forward, sir.

25 RITCHIE FOSTER, having been first duly

Ritchie Foster - Direct examination
by Solicitor Cude

1 sworn, testified as follows:

2 THE COURT: Have a seat please, sir. Once you're
3 seated, I'd ask that you state your name.

4 WITNESS: William Foster.

5 THE COURT: Your witness, Mr. Gray.

6 SOLICITOR GRAY: Thank you, Your Honor.

7 DIRECT EXAMINATION

8 BY SOLICITOR GRAY:

9 Q I apologize for calling you Ritchie.

10 A That's what's I go by.

11 Q Thank you.

12 Investigator Foster, how long have you worked for the
13 Sheriff's Office?

14 A Twenty years.

15 Q What have you done in the Sheriff's Department in that
16 time?

17 A I've worked on the road as a road deputy. I've got 16
18 years in the dog handler and been in investigations for
19 three.

20 Q September 21st, 2009, what were you doing?

21 A I was working in investigations.

22 Q Now, you got a report about two armed robberies on that
23 date?

24 A Yes, sir.

25 Q Who came to you with those reports?

Ritchie Foster - Direct examination
by Solicitor Cude

1 A They are generated to us by the supervisor and handed
2 out when they come in.

3 Q Now, did you develop any suspects as a result of these,
4 of your investigation?

5 A Yes, sir, a few days later it came to my attention that
6 the black Durango involved in these belonged to a --
7 Mr. Deal actually was the owner of the vehicle, and it was
8 being driven by Miss Shannon Varner.

9 Q All right. And where was Shannon Varner living?

10 A She was, at that time, I think on Lillian Street,
11 Lillian. I'm sorry. She was on Tenant Street at that time.
12 Number [REDACTED] Tenant Street.

13 Q What color was the vehicle?

14 A It was black.

15 Q What type of vehicle was it?

16 A A Dodge Durango.

17 Q Did you talk to the victims in this case?

18 A I did over the phone, and I -- we have a Hispanic
19 investigator also with us, and through him I talked with
20 Mr. Sanchez.

21 Q And you talked to Mr. Robinson?

22 A Yes, sir.

23 Q And where did his armed robbery occur?

24 A His occurred on Seminole Drive close to Edwards Road in
25 Spartanburg County.

Ritchie Foster - Direct examination
by Solicitor Cude

1 Q Was that on September 21st, 2009?

2 A Yes, sir.

3 Q And where did Mr. Sanchez's armed robbery occur?

4 A His was at [REDACTED], Spartanburg County.

5 Q That was also an armed robbery --

6 A Yes, sir.

7 Q -- involving the black Dodge Durango?

8 A Yes, sir.

9 Q How far apart, to your knowledge, did these two armed
10 robberies occur in time?

11 A From what the reports gathered and, and what the
12 victims were telling me, it was within one or two hours of
13 the same, of the same evening.

14 Q And what was the basic set of facts in each situation?

15 A Both victims were out just minding their own business
16 walking down the street, and a black Dodge Durango comes up,
17 two to three individuals jump out, and accost them with one
18 of two weapons, and take their money, cell phone, and keys.

19 Q And both situations involved Mr. Sanchez and Mr.
20 Robinson?

21 A Yes, sir.

22 Q And did the victims know the individuals in any either
23 case?

24 A No, sir, not -- we didn't have a -- they didn't have a
25 clue who they might be.

Ritchie Foster - Direct examination
by Solicitor Cude

1 Q Total stranger armed robberies?

2 A Did not recognize the voices of any of the individuals
3 that talked to them.

4 Q Does that seem unusual to you?

5 A No, sir, we have -- sometimes the victims will know
6 their, the perpetrators of the crime and sometimes they're
7 total, total strangers.

8 Q And that was the case in this situation?

9 A Yes, sir, total strangers.

10 Q Did you talk to any of the -- strike that.

11 Once you did your investigation, who did you develop as
12 suspects?

13 A Like I say, I obtained Miss Varner as a suspect, and I
14 think it was three days later she and Mr. Rogers were
15 arrested on some traffic offenses and something else, and I
16 went to talk with them in, in jail. They relayed to me that
17 they were indeed the ones that, that did do these crimes.

18 Q well, did you talk with Mr. Suchil about these crimes
19 also?

20 A I did.

21 Q And they, based upon your investigation, do you have
22 any doubt they're the ones who committed the armed robberies
23 on Mr. Robinson and Mr. Sanchez?

24 A Yes, sir.

25 Q No doubt at all?

Ritchie Foster - Direct examination
by Solicitor Cude

1 A NO, sir.

2 Q Did it surprise you that these individuals, Mr.
3 Robinson and Mr. Sanchez, have problems identifying these
4 individuals?

5 A No, sir, I think at that time of year it's dust dark
6 about that time, and they might of had something covering
7 partial, part of their faces, if not all of it, except for
8 their eyes, and sometimes we have witnesses and victims that
9 may even know the suspects and, and not identify them. So,
10 no, sir, it's not that uncommon that they were unable to
11 identify them or recognize them.

12 Q And why would these individuals rob perfect strangers?

13 A Well, the reason I got was they just needed money for
14 rent.

15 Q They committed an armed robbery just for money for
16 rent?

17 A To total strangers, yes, sir.

18 Q Thank you, sir. Nothing further. Please answer any
19 questions from Ms. Butler.

20 THE COURT: Ms. Butler.

21 MS. BUTLER: Thank you, Your Honor.

22 CROSS-EXAMINATION

23 BY MS. BUTLER:

24 Q Detective Foster, Kasey Davis contacted your office, is
25 that correct?

Ritchie Foster - Cross-examination
by Ms. Butler

- 1 A Yes, ma'am.
- 2 Q And you had contact with Kasey Davis?
- 3 A Yes, ma'am.
- 4 Q And Kasey Davis told you numerous stories when you had
5 that contact with her, is that correct?
- 6 She told you about a Firehouse being shot at?
- 7 A Yes, ma'am.
- 8 Q And you couldn't verify that a Firehouse was shot at?
- 9 A No, ma'am, I could not.
- 10 Q She told you that there was a gun stolen on Hampton
11 Road on September 18th, 2009, and you couldn't verify
12 that, correct?
- 13 A No, ma'am, could not.
- 14 Q And she told you that there was a shooting at Quail
15 Points Apartment around that time frame, and you couldn't
16 verify that, is that correct?
- 17 A That's correct.
- 18 Q She also told you there was a black male that these
19 people jumped in the city and that was unfounded, is that
20 correct?
- 21 A Per the city, yes, ma'am.
- 22 Q Yes. Thank you, detective.
- 23 So, Kasey Davis told all sorts, all sorts of stories to
24 you that evening, is that correct?
- 25 A Yes, ma'am.

Ritchie Foster - Cross-examination
by Ms. Butler

1 Q And did you talk to Adam Suchil?

2 A I did.

3 Q And Suchil denied any involvement in the, in the
4 crimes, is that correct?

5 A He just -- he wouldn't talk with me.

6 Q So, Suchil didn't tell you anything?

7 A No, ma'am.

8 Q Did he give you any kind of statement?

9 A No, ma'am.

10 Q Told you -- he, he told you to get out of his face,
11 told you he didn't know anything about it?

12 A Did not want to talk to me.

13 MS. BUTLER: I beg the Court's indulgence, Your Honor.

14 THE COURT: Yes, ma'am.

15 (Pause.)

16 Q And, Investigator Foster, you ordered that there be --
17 I believe it was you that ordered that there be a
18 fingerprint of the vehicles, is that correct?

19 A Yes, ma'am.

20 Q And when that fingerprint report come back, were you
21 able to put Adam Foster, Wayne Foster in that vehicle?

22 A No, ma'am.

23 Q No fingerprints of Wayne Foster?

24 A No, ma'am.

25 Q And there was a camera located in the vehicle, correct?

Ritchie Foster - Cross-examination
by Ms. Butler

1 A Yes, ma'am.

2 Q And were you able to put Wayne Foster in the pictures
3 in the camera?

4 A No, ma'am.

5 Q Thank you, sir. That's all the questions I have.

6 THE COURT: Mr. Gray, your witness.

7 SOLICITOR GRAY: Just briefly.

8 REDIRECT EXAMINATION

9 BY SOLICITOR GRAY:

10 Q Investigator Foster, in that camera, how many pictures
11 did you find?

12 A I believe there were over a hundred pictures in the
13 camera.

14 Q And what were they pictures of?

15 A Miss Varner and her family.

16 Q And that's it?

17 A Yes, sir.

18 Q Her family including her child?

19 A Yes, sir.

20 Q And that's all?

21 A Yes, sir.

22 Q So, it's Miss Varner's camera?

23 A Right.

24 Q Is it common for people committing armed robberies to
25 take pictures of themselves during the armed robbery?

Ritchie Foster - Redirect examination
By Solicitor Gray

1 A Very rarely. But we get lucky some times that they'll
2 do that.

3 Q Thank you, sir. Nothing further.

4 THE COURT: Ms. Butler.

5 MS. BUTLER: Nothing, Your Honor.

6 THE COURT: You may step down.

7 State may call its next witness.

8 SOLICITOR CUDE: Your Honor, we'd like to call Shannon
9 Varner. We'll have to get her. She's outside then.

10 THE COURT: All right. Thank you.

11 (Pause.)

12 THE COURT: Ma'am, if you would, come forward to my
13 left to be sworn in. Right here.

14 SHANNON VARNER, having been first duly
15 sworn, testified as follows:

16 THE COURT: Have a seat in the witness stand, ma'am.
17 When you're seated, state your name please.

18 WITNESS: Shannon Varner.

19 THE COURT: Mr. Cude, your witness.

20 SOLICITOR CUDE: Thank you, Your Honor.

21 DIRECT EXAMINATION

22 BY SOLICITOR CUDE:

23 Q Did you live in the same trailer as Bert Wayne Foster
24 in September---

25 A Yes.

Shannon Varner - Direct examination
by Solicitor Cude

- 1 Q ---of 2009?
- 2 A Yes, sir.
- 3 Q Do you see him here in the courtroom?
- 4 A Yes, sir.
- 5 Q Can you point him out?
- 6 A (Witness points.)
- 7 SOLICITOR CUDE: Please let the record reflect she's
- 8 indicated the defendant.
- 9 THE COURT: It will so reflect.
- 10 You may proceed.
- 11 Q Who else lived in that trailer?
- 12 A Kasey Davis and my daughter.
- 13 Q Okay. And any, anybody else live there at that time?
- 14 A No, sir.
- 15 Q Steve Rogers ever stay there?
- 16 A He stayed there, but he didn't live there.
- 17 Q Okay. Now, what vehicle were you driving in September
- 18 of 2009?
- 19 A A '99 black Dodge Durango.
- 20 Q Okay. Who did that belong to?
- 21 A My fiance.
- 22 Q Okay. What is his name?
- 23 A Daniel Deal.
- 24 Q All right. And let me ask you, did you participate in
- 25 two armed robberies in September of 2009?

Shannon Varner - Direct examination
by Solicitor Cude

- 1 A Repeat the question.
- 2 Q Did you participate in two armed robberies?
- 3 A No, sir. I mean I was, I was driving.
- 4 Q All right. Yeah, I mean were you present during two
- 5 armed robberies?
- 6 A Yes, sir.
- 7 Q All right. What happened?
- 8 A On the first one or the second one?
- 9 Q Just tell me, in order, what happened.
- 10 A Steven and Adam got out of the car, and then the second
- 11 one Steven and Adam and -- no. Wayne and Adam got out on
- 12 the first one, and Steven, Adam, and Wayne all three got out
- 13 of the third, second one.
- 14 Q Okay. Where did, where did these robberies take place?
- 15 A Seminole Drive, Draperline, and one was next to the
- 16 Thunderbird Flea Market.
- 17 Q Okay. What time of day was it?
- 18 A I'm not sure.
- 19 Q Do you know if it was daytime?
- 20 A It was night.
- 21 Q Okay. All right. What happened during the Seminole
- 22 Road robbery?
- 23 A Wayne told me to stop and he, he got out and Adam
- 24 followed.
- 25 Q Okay. What did they do?

Shannon Varner - Direct examination
by Solicitor Cude

- 1 Did you -- could you see what they were doing?
- 2 A No, sir.
- 3 Q Okay. What happened when they got back in the car?
- 4 A Wayne had two beers and a couple of other stuff, and as
- 5 I pulled off he threw them out the window.
- 6 Q And what other stuff did he have?
- 7 A I'm not sure.
- 8 Q Did Wayne say anything to you when he got back in?
- 9 A No, sir.
- 10 Q How about Steven or Adam?
- 11 A No, sir.
- 12 Q Okay. Did you see anyone else after -- did you see who
- 13 they dealt with outside?
- 14 A No, sir.
- 15 Q Okay. All right. What happened next?
- 16 A We continued to Steven Rogers' cousin's house.
- 17 Q Okay. Who is that?
- 18 A Caitlin. I don't know her last name.
- 19 Q Okay. How long did you stay there?
- 20 A About an hour, hour and a half.
- 21 Q All right. What did you do after that?
- 22 A We went to McDonald's and got something to eat.
- 23 Q Okay. After that?
- 24 A Wayne said he wanted to borrow some money for some
- 25 people he knew. So, gave me the directions to somewhere

Shannon Varner - Direct examination
by Solicitor Cude

1 near the Thunderbird Flea Market, and he told me to stop
2 where the house was.

3 Q Okay. What did you -- what did you see when you
4 stopped?

5 A I saw a couple people standing outside.

6 Q What were they standing outside of?

7 A A trailer.

8 Q And did you know these, these people?

9 A No, sir.

10 Q Were they male or female?

11 A I'm not sure.

12 Q Okay. Do you -- and, again, was it -- how long was
13 this after the first incident?

14 A Within an hour and a half to two hours I guess.

15 Q Okay. Was it daytime or nighttime by then?

16 A Nighttime.

17 Q Okay. What happened after Wayne and others got out of
18 the car?

19 A They got back in and we went to my, to my house.

20 Q Okay. Did you see anything happen between Wayne and
21 the others?

22 A Yes, I seen them trade off some money, and Wayne, Wayne
23 handed me a \$2 bill for my daughter.

24 Q Okay. You saw, you saw who trade off money?

25 A I seen Wayne splitting up money between Steven and

Shannon Varner - Direct examination
by Solicitor Cude

1 Adam.

2 Q All right. Let me back up.

3 when you stopped near the Thunderbird Flea Market, what
4 did you -- did you see anything happen after Wayne got out
5 of the vehicle?

6 A No, sir.

7 Q Okay. What -- did Wayne say anything to you when you
8 got back in the vehicle?

9 A No, sir.

10 Q Okay. Did Wayne have anything in his possession?

11 A Not that I seen.

12 Q Okay. How about anybody else?

13 A Hu huh. (Negative).

14 Not that I seen.

15 Q Okay. What happened when you got back home?

16 A Wayne handed me a \$2 bill. We just went to the house
17 and started listening to music like we always do.

18 Q Okay. Why did he hand you a \$2 bill?

19 A For my daughter. I don't know. He just handed me one.
20 They're rare.

21 Q Where did the \$2 bill come from?

22 A Out of his pocket.

23 Q Okay. Were you late on your rent that month?

24 A Yes, sir.

25 SOLICITOR CUDE: Okay. I think that's all I have, Your

Shannon Varner - Direct examination
by Solicitor Cude

1 Honor.

2 THE COURT: Ms. Butler, your witness.

3 MS. BUTLER: Thank you, Your Honor.

4 THE COURT: Yes, ma'am.

5 CROSS-EXAMINATION

6 BY MS. BUTLER:

7 Q Miss Varner, where do you currently reside?

8 A Here in Spartanburg, South Carolina.

9 Q On 9/21/09 you say you lived together, you, Kasey, your
10 child, and Steven, and Wayne, is that correct?

11 A No, Steven didn't live there.

12 Q Steven and -- Steven now -- Steven didn't live at your
13 house?

14 A No, he didn't have clothes there. He would stay a
15 night or two, but he didn't live there.

16 Q Steven and you had an intimate relationship, is that
17 correct?

18 A Yes, ma'am.

19 Q And that intimate relationship was an ongoing
20 relationship?

21 A No, ma'am.

22 Q You had a baby. You testified that you had a fiance.
23 You were in his vehicle that time, right?

24 A Uh-huh. (Affirmative).

25 Q Steven Rogers was not your fiance, correct?

Shannon Varner - Cross-examination
by Ms. Butler

1 A No. No, ma'am.

2 Q So, is it your testimony that you had a relationship
3 going on with Steven Rogers, but you also had a fiance and
4 you were driving his vehicle?

5 A Yes, ma'am.

6 Q And did you have a baby with your fiance?

7 A Yes, ma'am.

8 Q And where was your fiance at the time?

9 A He was in jail.

10 Q He was in prison?

11 A Yes, ma'am.

12 Q And you didn't want your fiance to know about Steven
13 Rogers, is that correct?

14 A I told him about him the first time.

15 Q Uh-huh. (Affirmative).

16 You tried to hide that from Steven Rogers, from your
17 fiance, is that correct?

18 A No, ma'am, Steven Rogers knew about Daniel from the
19 first day he met me, and the first time me and Steven had
20 sexual intercourse I told my fiance.

21 Q So, you're, you're saying that Daniel knew that you and
22 Steven were in a relationship?

23 SOLICITOR GRAY: Objection, Your Honor.

24 A We were in---

25 SOLICITOR GRAY: Relevance.

Shannon Varner - Cross-examination
by Ms. Butler

1 THE COURT: Relevance?

2 MS. BUTLER: Yes, Your Honor. Motive, the motive to
3 fabricate the story.

4 May -- would you like for us to approach, Your Honor?

5 THE COURT: No, I'm gonna ask that the jury step back
6 to the jury room, and, again, don't begin any discussions
7 until I advise you to do so.

8 (WHEREUPON, the following takes place outside the
9 presence of the jury.)

10 THE COURT: All right. You're gonna have to help me
11 with all the players here so I'm sure I understand who is
12 who.

13 SOLICITOR GRAY: Yes, sir, Your Honor.

14 THE COURT: I don't have a program. So, it's hard to
15 figure out.

16 SOLICITOR GRAY: Mr. Deal was her fiance at the time he
17 was incarcerated.

18 THE COURT: He was throughout -- he was, he was not
19 around when this happened?

20 SOLICITOR GRAY: No, sir, she was driving his black
21 Durango.

22 THE COURT: It belonged to him?

23 SOLICITOR GRAY: Yes, sir, that's how officers figured
24 out it was, she was driving it during these incidents.

25 THE COURT: Uh-huh. (Affirmative).

Shannon Varner - Cross-examination
by Ms. Butler

1 SOLICITOR GRAY: Mr. Rogers was the tall
2 African-American gentleman who testified earlier, Steven.

3 THE COURT: Who was involved in it?

4 SOLICITOR GRAY: With her. With -- involved with the
5 incident, and allegedly with her also. Now, I don't, I
6 don't understand the relevance of whether she was involved
7 or not with Mr. Rogers, and whether or not she told an
8 incarcerated felon what she was doing.

9 THE COURT: Ms. Butler, maybe you can help me with
10 this.

11 MS. BUTLER: Yes, sir, Your Honor. The -- Miss
12 Varner -- it's the defendant's position that Miss Varner
13 fabricated this story with Mr. Rogers in order to keep her
14 incarcerated fiance from knowing that Mr. Rogers was around.
15 He knew that Mr. Foster was around because Mr. Foster is his
16 cousin, and Mr. Deal, the fiance, did not have a problem
17 with Mr. Foster being around, but did not know about
18 Mr. Rogers being around. So, that's where Miss Varner came
19 and put Mr. Foster in the middle of everything to try to
20 keep her fiance from knowing about the relationship.

21 THE COURT: How, how would that keep him from knowing
22 since your client is related to Mr. Deal, is that right?

23 MS. BUTLER: That's correct, Your Honor.

24 THE COURT: And she could communicate with him and tell
25 him everything?

Shannon Varner - Cross-examination
by Ms. Butler

1 MS. BUTLER: That's correct, Your Honor, but she --
2 they were banking on my client not, and, and she was not.
3 gonna tell.

4 THE COURT: Is there any evidence of this other than
5 your client's belief?

6 MS. BUTLER: Well, I believe that Steven Rogers
7 testified that it was not to be known, that they were not
8 hiding -- they were not putting their relationship out forth
9 I guess.

10 THE COURT: Well, I'm, I'm still at a loss as to what
11 purpose it would serve for her to fabricate a story, and how
12 that would keep him from knowing. I don't understand how
13 that connects. I -- those dots don't connect for me.

14 MS. BUTLER: To keep Mr. Deal -- well, it's my client's
15 position that it was to keep Mr. Deal from -- that
16 Mr. Foster was even brought into the, was even brought into
17 the story to keep Mr. Deal from knowing about Mr. Rogers,
18 but I understand you---

19 THE COURT: But wouldn't, wouldn't that give your
20 client an incentive to call Mr. Deal or write him a letter
21 and tell him?

22 MS. BUTLER: Yes, Your Honor. I understand Your
23 Honor's position.

24 THE COURT: I mean I don't see how that connects, how,
25 how making up that story would prevent someone in prison

Shannon Varner - Cross-examination
by Ms. Butler

1 from learning of this relationship. I don't understand how
2 that works.

3 MS. BUTLER: I, I understand where you're, where you're
4 going with you, Your Honor.

5 THE COURT: Okay. I'm gonna sustain the objection. I
6 don't see any relevance at all. I just don't see how that
7 connects.

8 MS. BUTLER: Yes, sir.

9 THE COURT: Unless there's some evidence.

10 MS. BUTLER: The only evidence---

11 THE COURT: There's a, there's a letter or a email or
12 something that would, would establish that motive somehow.

13 MS. BUTLER: Yes, sir, Your Honor. There's, there's
14 nothing that would establish the --.

15 THE COURT: And I'll allow you to make a proffer with
16 this witness while the jury is out if you want to explore
17 that further, but not in front of the -- we're not going
18 into a fishing expedition in front of the jury unless
19 somehow it connects.

20 MS. BUTLER: I don't. I'm sorry, Your Honor. I don't
21 have any material evidence to put forth, and I don't believe
22 the defendant's gonna testify as to such. So, I'll withdraw
23 the line of questioning.

24 THE COURT: All right. I'm gonna sustain the objection
25 then.

Shannon Varner - Cross-examination
by Ms. Butler

1 Bring the jury back.

2 (WHEREUPON, the following takes place within the
3 presence of the jury.)

4 THE COURT: All right. The jury's returned to the
5 courtroom. I have sustained the State's objection as to
6 relevancy.

7 You may proceed with your cross-examination, Ms.
8 Butler.

9 MS. BUTLER: Thank you, Your Honor.

10 CONTINUED CROSS-EXAMINATION

11 BY MS. BUTLER:

12 Q Miss Varner, Kasey Davis and your baby are cousins, is
13 that correct?

14 A I think so, yes, ma'am.

15 Q And, Miss Varner, do you remember giving statements to
16 the officers on September 25th and on October 1st?

17 A Yes, ma'am.

18 Q And do you remember telling the officers that you were
19 messed up on drugs?

20 A Yes, ma'am.

21 Q Totem poles I believe?

22 A Yes, ma'am.

23 Q And you were, in fact, messed up on drugs that day, is
24 that correct?

25 A I had took a totem pole, yes, ma'am.

Shannon Varner - Cross-examination
by Ms. Butler

1 Q And you, Miss Varner, you were so messed up that you
2 didn't realize that there was a second robbery that occurred
3 on that, on that first statement, is that correct?

4 A Well, that first statement has nothing to do with
5 neither one of these.

6 Q The first statement that you gave to the officers you
7 didn't allege any second robbery though, is that correct?

8 A That first statement isn't about a robbery. I thought
9 I was getting robbed.

10 MS. BUTLER: I beg the Court's indulgence.

11 THE COURT: Yes, ma'am.

12 (Pause.)

13 Q Miss Varner, the first statement that I'm referring to
14 is dated September 25th, 2009.

15 A Yes, ma'am.

16 Q And the second statement that I'm referring to is dated
17 October 1st, 2009, correct?

18 A Uh-huh. (Affirmative).

19 Q And you remember talking with the officer on those two
20 dates about---

21 A Uh-huh. (Affirmative).

22 Q ---about robberies, is that correct?

23 A Yes, ma'am.

24 Q Okay. And do you remember having Officer Horton write
25 that second statement for you?

Shannon Varner - Cross-examination
by Ms. Butler

1 A Yes, ma'am.

2 Q Okay. Miss Varner, there were actually no clothes or
3 anything of Wayne Foster's at your house, is that correct?

4 A Yes, there was.

5 Q Wayne Foster, Wayne Foster had his clothes at your
6 house, is that your testimony?

7 A Yes, ma'am.

8 Q And your testimony is that he actually lived at your
9 house?

10 A Yes, ma'am.

11 Q He paid rent at your house?

12 A Yes, ma'am.

13 Q And, Miss Varner, the solicitors that are here
14 prosecuting this case today, are they the same solicitors
15 who are handling your charges?

16 A Yes, ma'am.

17 Q And have you talked with them about your charges?

18 A Yes, ma'am.

19 Q Did you meet with them with your attorney about your
20 charges?

21 A Yes, ma'am.

22 Q And are you expecting the State to be lenient on you
23 for testifying about these charges?

24 A No, ma'am.

25 Q When you met with the State, was it your understanding

Shannon Varner - Cross-examination
by Ms. Butler

1 that they have complete control over your charges, that they
2 can throw them out or they can leave them?

3 A Yes.

4 MS. BUTLER: I beg the Court's indulgence, Your Honor.

5 THE COURT: Yes, ma'am.

6 (Pause.)

7 MS. BUTLER: That's all the questions I have at this
8 time.

9 THE COURT: You may redirect.

10 REDIRECT EXAMINATION

11 BY SOLICITOR CUDE:

12 Q Miss Varner, Ms. Butler asked about your charges.

13 Were you charged with two counts of armed robbery?

14 A Yes, ma'am. Oh, yes, sir.

15 Q Were you promised anything in return for your
16 testimony?

17 A No, sir.

18 Q Thank you.

19 That's all I have, Your Honor.

20 THE COURT: Any other questions?

21 MS. BUTLER: No, sir, Your Honor.

22 THE COURT: Ma'am, you may step down.

23 WITNESS: Thank you.

24 THE COURT: You wish to have this witness excused?

25 SOLICITOR GRAY: Yes, sir, Your Honor.

1 THE COURT: Any objection?

2 MS. BUTLER: No, sir.

3 THE COURT: Ma'am, you remain under the sequestration
4 order, but you're excused. Thank you.

5 WITNESS: Okay.

6 THE COURT: The State may call its next witness.

7 SOLICITOR GRAY: The State has no further witnesses at
8 this time, Your Honor.

9 THE COURT: All right. Ladies and gentlemen, that
10 concludes the presentation of evidence by the State. At
11 this stage of the trial it's my responsibility to go over
12 some matters with the attorneys. It will be a good time for
13 us to take a break as well. So, the bailiffs will assist
14 you if you'd like anything during your break.

15 As always, I'll instruct you not to discuss anything
16 about this case until I've advised you to begin your
17 deliberations.

18 You may retire to the jury room.

19 (WHEREUPON, the following takes place outside the
20 presence of the jury.)

21 THE COURT: All right. Any motions?

22 MS. BUTLER: No, sir, Your Honor.

23 THE COURT: All right. Ma'am, I want to inquire of
24 your client as to whether or not he wishes to testify in the
25 case.

1 Sir, if you'll please stand.

2 (Defendant complies.)

3 THE COURT: Madam Clerk, please swear the defendant.

4 (WHEREUPON, the defendant was placed under oath at this
5 time.)

6 THE COURT: All right, sir. You can be seated.

7 (Defendant complies.)

8 THE COURT: Your name is Bert Wayne Foster, and, Mr.
9 Foster, at this time I'm going to explain to you certain of
10 your Constitutional rights. If you do not understand what I
11 tell you at this time or if you wish for me to offer
12 additional explanation, I will give you an opportunity, when
13 I finish discussing this matter with you, to request
14 additional information.

15 You understand what we're doing, sir?

16 DEFENDANT: Yes, sir.

17 THE COURT: All right. We've reached the stage of the
18 trial where you have the right to present your defense. You
19 have the right also to claim the protections which are given
20 to you under the Fifth Amendment to the United States
21 Constitution. That amendment reads, in part, that no person
22 shall be compelled, in any criminal case, to be a witness
23 against himself.

24 What that means is that you do not -- you can not be
25 required to testify during this trial. You certainly have

1 the right to testify if you wish to. You also have the
2 right to remain silent. The right to remain silent is a
3 personal right. No one can give up the right to remain
4 silent but yourself.

5 I will advise you that if you make the decision to
6 testify that you will be subject to the same rules that
7 govern the testimony of every other witness who will testify
8 in this case. What that means is that you would be examined
9 by your lawyer and then you would be cross-examined by the
10 State's lawyer.

11 In addition to that cross-examination, should you have
12 any convictions involving dishonesty or false statements or
13 convictions for crimes which were punishable by imprisonment
14 for more than one year, and this Court then makes the
15 determination that the probative value of admitting this
16 evidence outweighs its prejudicial effect, the solicitor, in
17 that case, would be able to introduce that record for the
18 purpose of attacking your credibility.

19 Now, the decision to testify is, again, a decision that
20 you must make freely, voluntarily, and intelligently. That
21 means it's something that you've decided to do, and that you
22 have knowledge of the protections which are given to you
23 under the Fifth Amendment, and also knowledge of the
24 consequences of your decision to testify.

25 I will tell you, if you decide not to testify, that I

1 am required to and I will instruct the jury that your
2 silence could not be used against you in any fashion
3 whatsoever, and that there's to be absolutely no prejudice
4 to you or your case in, in the event that you don't testify.
5 In fact, I will instruct the jury that that issue can not
6 even be discussed by them in their deliberations.

7 Now, you have the right to discuss this discussion with
8 anyone. Your lawyer, family, friends, anybody. But the
9 final decision is yours.

10 Now, do you understand what I have explained to you?

11 DEFENDANT: Yes, sir, I do.

12 THE COURT: Do you have any questions about the rights
13 I have explained to you?

14 DEFENDANT: No, sir, I understand what you're saying.

15 THE COURT: Have you had an opportunity to discuss this
16 issue with your lawyer?

17 DEFENDANT: Yes, sir, I have.

18 THE COURT: And with others?

19 DEFENDANT: I only talked to my lawyer.

20 THE COURT: All right. Now, do you wish to talk to
21 anyone further at this time?

22 DEFENDANT: No, sir.

23 THE COURT: Do you wish to testify in this case?

24 DEFENDANT: No, I do not.

25 THE COURT: All right. Now, Ms. Butler, you had listed

1 one additional witness.

2 Do you intend to call that witness?

3 MS. BUTLER: I do, Your Honor.

4 THE COURT: All right. We'll take about a ten to
5 fifteen minute break at this time.

6 The defendant remains in custody.

7 Court's in brief recess. Thank you.

8 (WHEREUPON, a short recess was taken at this time.)

9 THE COURT: All right. Is the State ready to proceed?

10 SOLICITOR GRAY: Yes, sir, Your Honor.

11 THE COURT: Defense ready to proceed?

12 MS. BUTLER: Yes, sir, Your Honor.

13 THE COURT: Bring the jury in.

14 (WHEREUPON, the following takes place within the
15 presence of the jury.)

16 THE COURT: All right. The record will reflect that
17 the jury has returned to the courtroom.

18 And when we broke a few minutes ago, the State had
19 completed presenting the evidence that it wished to present.
20 At this time the defense has the right to call its
21 witnesses.

22 Ms. Butler, do you wish to call your first witness?

23 MS. BUTLER: Yes, sir, Your Honor.

24 Call Cassie Cardoza to the stand.

25 THE COURT: Come forward please over here to my left,

Cassie Cardoza - Direct examination
by Ms. Butler

1 ma'am, to be sworn.

2 CASSIE CARDOZA, having been first duly
3 sworn, testified as follows:

4 THE COURT: Have a seat please.

5 (Witness complies.)

6 THE COURT: State your name.

7 WITNESS: Cassie Cardoza.

8 THE COURT: Your witness, Ms. Butler.

9 MS. BUTLER: Thank you, Your Honor.

10 DIRECT EXAMINATION

11 BY MS. BUTLER:

12 Q Miss Cardoza, how old are you?

13 A Eighteen.

14 Q And where do you currently live?

15 A 1010 Harrelson Road.

16 Q Where's that?

17 A It's in Pauline, South Carolina.

18 Q And how long have you lived there?

19 A We've lived there pretty much all of our lives. Just
20 like we just got a different house, moved there. But we
21 lived there all our lives pretty much.

22 Q We who?

23 A Me, and my mom, and my step-dad, and my brother, and my
24 sister.

25 Q And at one point did Wayne Foster live there with you?

Cassie Cardoza - Direct examination
by Ms. Butler

1 A Yes, ma'am.

2 Q And when was that?

3 A That was -- it was last year, September.

4 Q The -- would that be September of 2009?

5 A Yes, ma'am.

6 Q And he was living with you?

7 A Yes, ma'am.

8 Q And how do you know it was September that he was living
9 with you?

10 A Cause it was September. He got in all that trouble and
11 turned his self in, self in in October, and right before he
12 turned his self in he was living with us.

13 Q And was he paying rent there?

14 A No, ma'am.

15 Q Now, you don't know for sure -- do you know for sure if
16 Mr. Foster was, was at your house on the 21st of
17 September?

18 A I mean I'm not positive. I couldn't say that he was.
19 But he was living with us at the time.

20 Q Thank you.

21 That's all the questions I have.

22 THE COURT: Mr. Gray, your witness.

23 SOLICITOR GRAY: Yes, sir, Your Honor.

24 CROSS-EXAMINATION

25 BY SOLICITOR GRAY:

Cassie Cardoza - Cross-examination
by Solicitor Gray

1 Q So, you were 17 when Mr. Foster was living in your
2 house?

3 A Yes, sir.

4 Q With who, your mom and your dad and your brother?

5 A My step-dad and, which is his brother. My step-dad's
6 his brother, and my brother, and my little sister, and my
7 mom.

8 Q Are they here today?

9 A My sister and my mom is.

10 Q Okay. Your step-dad?

11 A No, he's not here today.

12 Q Okay. Beside your testimony, what other proof do you
13 have that he lived there?

14 A I mean we don't have any proof cause he didn't pay any
15 bills. You know, that's family. Just that I -- my mom and
16 my sister's here and they could say that he was living with
17 us at that time as well.

18 Q I mean but he didn't pay any bills there?

19 A No, sir.

20 Q He had no financial responsibilities in the house
21 whatsoever?

22 A No, that's family.

23 Q I'm, I'm -- how is that living there if he didn't have
24 to pay any bills?

25 He just ate there occasionally?

Cassie Cardoza - Cross-examination
by Solicitor Gray

1 Did he have clothes there?

2 A He ate there. He slept there. He showered there.

3 Q But not every night?

4 A Not every night. Mostly every night.

5 Q Okay. So, how many nights was he away?

6 A Maybe once or twice out of the week.

7 Q So, five days out of the week he sort of lived there,
8 two days out of the week he was gone?

9 A I mean not every week. I'm not say gonna say he was
10 gone twice a week every week, but he left, he left our house
11 maybe twice a week.

12 Q And where did he go for two days at a time?

13 A He was hanging out with Such, Adam Suchil for a little
14 while. I mean I didn't go with him a lot. So, I don't know
15 where he went.

16 Q Do you know if he was hanging out with Shannon Varner
17 too?

18 A Well, she came to my house and dropped him off one day.
19 So --.

20 Q Okay. And Mr. Rogers, was he staying out with Steven
21 Rogers too?

22 A I never met him, no, sir.

23 Q But you did meet Adam Suchil and Shannon Varner?

24 A Yes. Yes, sir.

25 Q And she even dropped them off at the house

Cassie Cardoza - Cross-examination
by Solicitor Gray

1 occasionally?

2 A She dropped him off one time.

3 Q One time?

4 A That I know of. I was there.

5 Q And how long did he allegedly stay with you?

6 A He did stay with us.

7 Q How long?

8 How many months?

9 A Not long. Maybe two months maybe. It was all
10 September and like the beginning of November. It wasn't
11 long at all. It was no long period of time, but --.

12 Q So, this -- he, he just happened to stay with you
13 September, not October, and then again in November?

14 A He turned his self in in October.

15 Q okay. So, he was in jail in all of October?

16 A Yes, sir, he turned his self in October 16th.

17 Q okay.

18 A He stayed---

19 Q So, he stayed with you some of October too or not?

20 A No.

21 Q okay. Beginning of October to October 16th where was
22 he?

23 A I'm not, I'm not sure.

24 Q All right. Thanks.

25 No further questions, Your Honor.

Cassie Carodoza - Redirect examination
by MS. Butler

1 THE COURT: Anything further, Ms. Butler?

2 MS. BUTLER: Just, just to clarify.

3 REDIRECT EXAMINATION

4 BY MS. BUTLER:

5 Q Miss Cardoza, I think -- was Mr. Foster actually living
6 with you in November?

7 A No, I didn't, I didn't mean to say that.

8 Q Right. Okay.

9 A I was thinking November came before October. I'm
10 tripping.

11 Q So, it's not -- you misstated -- did you misstate that
12 he lived with you in November?

13 A Yes, ma'am.

14 Q Okay. Did he live with you any in October?

15 A No, ma'am. Well, like at the beginning of October, of
16 October cause he turned his self in October 16th. I
17 mean -- and I said he lived with us at the beginning of
18 November. I meant the beginning of October.

19 Q Okay. Thank you.

20 THE COURT: Anything further, Mr. Gray?

21 SOLICITOR GRAY: No, sir, Your Honor.

22 THE COURT: You may step down.

23 The defense may call its next witness.

24 MS. BUTLER: Your Honor, the defense rests at this
25 time.

1 THE COURT: Does the State wish to call any witnesses
2 in reply or rebuttable?

3 MS. BUTLER: No, sir, Your Honor.

4 THE COURT: All right. Ladies and gentlemen of the
5 jury, that concludes the presentation of evidence in this
6 matter. At this time I told you that we would allow the
7 attorneys to make a closing or a final argument.

8 Anything before we begin final arguments from the
9 State?

10 SOLICITOR GRAY: No, sir.

11 THE COURT: Anything from the defense before we begin
12 final arguments?

13 MS. BUTLER: No, sir.

14 THE COURT: All right. The defense has presented
15 evidence in this case. So, the defense will be going first.

16 You may proceed, Ms. Butler.

17 MS. BUTLER: Thank you, Your Honor.

18 Ladies and gentlemen of the jury, thank you very much
19 for your patience throughout the trial. Thank you for your
20 attention. You've been very attentive and we appreciate
21 that. You've been able to listen to the testimony that was
22 presented today, and, and make a just verdict.

23 I'm not gonna recap everything that you've heard today.
24 I know it's been a long day for us, but I do want to go over
25 a few of the witnesses that testified.

1 Specifically I want to go over and start with the two
2 victims that, that testified, Mr. Robinson and Mr. Sanchez,
3 who both stated to you that they have no idea who robbed
4 them on this evening, and they can not tell you who robbed
5 them on this evening, and, and they were the only ones that
6 were present at the scene that could tell you that, that, on
7 that evening they didn't have any interest in this. I'll,
8 I'll get to the other ones in a few minutes.

9 You heard the officers. The officer, all he's been
10 able to go on is what he was able to put together from the
11 statements from folks like Kasey Davis, and you've heard him
12 testify that Kasey Davis told him a whole host of, of things
13 that were not verified, could not be verified that day, that
14 he tried to verify, but he could not.

15 And you heard the codefendants testify. They were the
16 only ones present at the scene who can put Mr. Foster at the
17 scene that day. And they're the ones with an interest in
18 the outcome in this matter. They're the ones that have been
19 offered -- well, they're the ones that have an expectation
20 that they might get something in return for their testimony.

21 You heard them testify that the State is in complete
22 control of their charges, whether the state keeps those
23 charges on them or whether the state dismisses those charges
24 on them. You heard the one guy testify that he was facing
25 60 years and now he's facing ten years is his expectation

1 after his testimony.

2 Those three witnesses that have placed Mr. Foster at
3 the scene are the witnesses who have an interest in the
4 outcome of this case and who have an interest to make things
5 seem the way that they want them to be in order for you to
6 be able to convict Mr. Foster. Had the witness -- had those
7 people not testified here today, they would be facing the
8 same fate that Mr. Foster was facing, and that is the trial
9 before the jury and determining their fate.

10 There was some inconsistencies in the testimony today,
11 and I know that you observed them even better than I did.
12 I've been writing the whole time. So, I would just ask
13 that, as you deliberate, that you go back through the
14 inconsistencies especially in Kasey Davis, and the, the
15 three codefendants that testified, Rogers, Varner, and Adam
16 Suchil. If you'll go through and, and just go back and
17 forth with each other and see through those inconsistencies
18 that are there, Kasey Davis, she testified that you
19 couldn't -- there was one incident that day. There was,
20 there was no testimony of any other incidents although in
21 other testimony you've heard another incident.

22 So, I'm just asking you to consider what you've heard.
23 You've took it all in today, as you deliberate and go back
24 and forth with each other, and, and actually have that
25 conversation with each other as you think through the guilt

1 or the innocence here.

2 Thank you.

3 THE COURT: Mr. Gray, are you doing the closing
4 statement?

5 SOLICITOR GRAY: Yes, sir, Your Honor.

6 THE COURT: You may proceed.

7 SOLICITOR GRAY: May it please the Court, Your Honor.

8 THE COURT: Yes, sir.

9 SOLICITOR GRAY: Opposing counsel.

10 Ladies and gentlemen, that man and that man have an
11 interest in the outcome. They have guns pointed at them.
12 Don't be a hero, give it up.

13 Strangers robbing strangers for a reason. A very
14 simple reason. I can't, can't identify you. I don't know
15 you.

16 Now, I understand Ms. Butler's argument that these
17 people have talked to my office, talked to Mr. Cude. Yet,
18 they got up here and told you the truth. Not what we wanted
19 them to say. Trust me, the testimony would of been a lot
20 different if it's what we wanted them to say. They told you
21 the truth.

22 Mr. Foster needed money for rent. He was living with
23 Miss Varner. With all due respect to his cousin or
24 whatever, there's no proof he lived there. He allegedly was
25 gone two days a week. He stayed with Miss Varner because

1 even, even from his attorney, he's related to the baby's
2 father in some way out of whatever.

3 Mr. Foster committed these armed robberies. That --
4 that's the point here, ladies and gentlemen. Spartanburg
5 County, in this State, armed robbery, you can't take out a
6 gun and put it to somebody's chest and put it to somebody's
7 head and say give me the money, take your money, that's
8 armed robbery. Simply.

9 I don't know you. I don't have to like you. I don't
10 have to have a beef against you. I don't have to dislike
11 your favorite television show. I don't need a motive to
12 commit a crime, but he did. He needed money for rent, and
13 he figured out how to do it. He stole a gun and he and his
14 buddies went driving around, found two people in less than
15 three hours.

16 And this is what, four or five miles apart?

17 They're in Una and they go up Asheville Highway right
18 past the circle, Thunderbird.

19 How dangerous is that?

20 These -- Mr. Sanchez was at home just walking on his
21 front sidewalk. He just walked an old relative home. Not
22 doing anything wrong. walking down the street. And these
23 guys are like something out of a movie. A black Dodge
24 Durango pull up, jump out, give me your stuff. They stole
25 beers, money, and cell phones, tossed the cell phones.

1 Can't trace them with the cell phones, cell phones gone.
2 They kept the money, divided up the money, gave it to Miss
3 Varner for her portion of the rent. That's it.

4 And she wants to talk about inconsistencies, fine.
5 Here are the consistencies. Bert Foster did it. Bert
6 Foster had a gun. Mr. Suchil said I did it. I admit to
7 what I did before the burglaries and now. Never had a jury
8 trial. He manned up.

9 Miss Varner told you he lived with him. Mr. Rogers
10 didn't live with him. He stayed there sometimes. He told
11 you all the truth.

12 Who's the man they robbed first?

13 Mr. Robinson.

14 Who's the man they robbed second?

15 Mr. Sanchez.

16 From Mr. Suchil, to Mr. Rogers, Miss Varner, and Kasey.
17 Let's talk about Kasey and her inconsistencies. She didn't
18 tell you about the one thing that she told the police that
19 followed up and worked out, which would be why we're here
20 today, and the officers got wind of her statements and what
21 she wanted to say, everything verified through Investigator
22 Ritchie, Investigator Foster, when, and they arrested some
23 people.

24 They said it. That's what happened. Mr. Suchil got up
25 on the stand today and said that's what happened. We had a

1 gun. We pointed it at Mr. Robinson. We pointed it at
2 Mr. Sanchez, and we robbed them. That's armed robbery,
3 ladies and gentlemen of the jury. Plain and simple.

4 They have no deals except for admittedly Mr. Suchil.
5 And if you think ten years of your life is a deal, good on
6 you.

7 Ten years in prison is a deal?

8 More power to you.

9 He got over here and he admitted in front of a judge
10 and you what I did and what he did. There's no problem with
11 identification. There's no need for a motive, but which we
12 do have anyway, and you know what happened because of his
13 interest and his interest.

14 Don't lose sight of the fact these are the victims. He
15 may be on trial, but these two men, who did nothing wrong,
16 got robbed that day, and Mr. Foster was part of that, both
17 armed robberies.

18 Thank you.

19 THE COURT: Ladies and gentlemen, that completes the
20 closing statements or arguments by counsel, and I told you
21 that when we reached this stage of the trial it would be my
22 responsibility to charge you concerning the law to be
23 applied in this case.

24 When we started this trial earlier I went over the
25 indictments in the case with you. I'm going to do that

1 again at this time.

2 The indictments in this case are in Case Number
3 2010-GS-42-1308. That indictment is for the offense of
4 armed robbery. The indictment states that Bert Wayne Foster
5 did, in Spartanburg County, on or about September 21 of
6 2009, while armed with a pistol or other deadly weapon, or
7 while alleging, either by actions or words, he was armed
8 while using a representation of a deadly weapon or any
9 object which a person present during the commission of the
10 robbery reasonably believed to be a deadly weapon,
11 feloniously take from the person or presence of Rigoberto
12 Sanchez, by means of force, violence, and/or intimidation,
13 goods or monies of Rigoberto Sanchez. Such goods or monies
14 being described as follows: Keys, cell phone, and U.S.
15 currency with the intent to deprive the owner permanently of
16 such property in violation of Section 16-11-30(a) of the
17 code of Laws of South Carolina, 1976, as amended, against
18 the peace and dignity of the State, and contrary to the
19 statute in such case made and provided. That's the first
20 indictment in this case.

21 The second indictment is in Case 2010-GS-42-1309. That
22 indictment is also for armed robbery. The indictment states
23 that Bert Wayne Foster, did, in Spartanburg County, on or
24 about September 21 of 2009, while armed with a pistol or
25 other deadly weapon, or while alleging, either by action or

1 words, he was armed while using a representation of a deadly
2 weapon or any object which a person present during the
3 commission of the robbery reasonably believed to be a deadly
4 weapon feloniously take from the person or presence of
5 Freddie Robinson, Junior, by means of force, violence and/or
6 intimidation, goods or monies of Freddie Robinson, Junior.
7 Such goods or monies being described as follows: beer, keys,
8 cell phone, and U.S. Currency with the intent to deprive the
9 owner permanently of such property in violation of section
10 16-11-330(a) of the Code of Laws of South Carolina, 1976 as
11 amended, against the peace and dignity of the State, and
12 contrary to such statutes in such case made and provided.

13 Now, ladies and gentlemen, those are the indictments,
14 and I remind you the fact that a defendant has been
15 arrested, charged, and indicted is not evidence in the case.
16 The indictment, the indictment is not evidence of guilt in
17 the case, and it can not be considered by you as evidence of
18 guilt nor does it create any inference or presumption of
19 guilt. Those are the documents and they're simply the
20 documents that bring the case before the Court and inform us
21 of the charges lodged against the defendant and the charges
22 to be tried by this Court.

23 I told you at the beginning of the trial the defendant
24 has pled not guilty to those indictments. That plea places
25 the burden upon the State to prove the defendant guilty. I

1 tell you that a person charged with the commission of a
2 crime in South Carolina is never required to prove himself
3 innocent. I charge you that it's an important rule of law
4 that a defendant, in a criminal trial, no matter what the
5 seriousness of the charges might be, is always presumed to
6 be innocent of the crime for which the indictment has been
7 issued unless and until guilt has been shown or proven to
8 you beyond a reasonable doubt.

9 The presumption of innocence doesn't end when you begin
10 your deliberations. It accompanies the defendant throughout
11 the trial and into your deliberations. Some people describe
12 the presumption of innocence like the robe that I wear into
13 the courtroom. It remains about the defendant's shoulders
14 throughout the trial and into your deliberations until such
15 time as it might be stripped from him by evidence that
16 satisfies by, satisfies you of the guilt of the defendant
17 beyond a reasonable doubt.

18 The presumption of innocence is not just a legal
19 phrase. It's not just a legal theory. It's a substantial
20 right that every defendant is entitled to until you, the
21 jury, are satisfied from the evidence of the defendant's
22 guilt beyond a reasonable doubt.

23 Now, I've already used that phrase reasonable doubt
24 about three or four times in my charge, and you may be
25 asking yourself just what is meant by a reasonable doubt or

1 what is a reasonable doubt. A reasonable doubt is that kind
2 of doubt which would cause a reasonable person to hesitate
3 to act. The State has the burden of proving the defendant's
4 guilty.

5 Now, some of you may of been involved in or
6 participated in trials that were civil in nature. Now,
7 civil trials are where someone's seeking monetary damages.
8 In those cases the standard of proof is by the greater
9 weight or the preponderance of the evidence. In criminal
10 trial, the -- and that's the scales of justice tilting ever
11 so slightly one way or the other.

12 In a criminal trial the standard of proof is more
13 powerful than that. It's proof beyond a reasonable doubt.
14 I'll tell you, proof beyond a reasonable doubt is that kind
15 of proof which leaves you firmly convinced of the
16 defendant's guilt.

17 Now, there's very few things that go on in our lives
18 that can be proved beyond any doubt whatsoever, and the
19 State's not put to that burden of proof. That's not the
20 standard the State has to meet because there are very few
21 things that you can prove beyond any doubt. The State is
22 not required to provide proof that overcomes, overcomes
23 every possible doubt.

24 I will tell you that if, based on your consideration of
25 the evidence, you're firmly convinced that the defendant is

1 guilty beyond a reasonable doubt, you must find the
2 defendant guilty. However, on the other hand, if you think
3 there's a real possibility that the defendant is not guilty,
4 then you must give the defendant the benefit of your doubt
5 and find him not guilty.

6 During the trial I've told you we've had different jobs
7 and duties to perform. It's been my job to rule on
8 evidence, the admissibility of evidence. During the trial I
9 struck a matter from the record, and I will you tell, again,
10 that anything that I have stricken from the record can not
11 be considered by you in any fashion in reaching a verdict.
12 You should disregard that information in its entirety.
13 You're to consider only the competent evidence before you
14 that's in the record of the case of this, of this trial.

15 In addition, I have the duty of charging you concerning
16 the law in this case, and I have told you I'm the sole judge
17 of the law in this case, and it's your duty, under your
18 oath, to take the law as I give it to you, apply it to the
19 facts as you find them to be. Now, if you, again, have any
20 idea as to what the law is or what it ought to be, leave
21 those notions outside of the jury room and take only the law
22 as I give it to you to apply to the facts as you find them
23 to be because you are the sole judges of the facts. You're
24 the sole and exclusive judges of the facts, and you should
25 take nothing from what I've done or what I say to indicate

1 to you that I have an opinion one way or the other as to how
2 you determine the facts. Again, I'm not allowed an opinion
3 on the subject, and I don't have an opinion as to how you
4 determine the facts in this case.

5 Now, it will be your duty, ladies and gentlemen, in a
6 few minutes to determine and weigh the evidence that you've
7 heard, to determine the effect of the evidence you've heard,
8 and the truth of the evidence presented to you during the
9 trial.

10 Now, there's two types of evidence that you have a
11 right to consider in the case. That is direct evidence and
12 circumstantial evidence. Direct evidence is testimony from
13 a witness who claims to have actual knowledge of the facts
14 about which the person testifies. Circumstantial evidence,
15 on the other hand, is proof of a chain of facts or
16 circumstances from which someone might reasonably infer the
17 existence of another fact. Sometimes, in describing
18 circumstantial evidence, we call it proof of collateral
19 facts from which a main fact might be reasonably inferred.

20 Now, let me explain to you, I give a simple example of
21 proof of a fact by inference. Let's say last time, when you
22 went to bed at home, you looked outside the window, and your
23 lawn was dry, the stars were shining, and you went to bed,
24 slept well all night, didn't wake up at all. The next
25 morning you look out that same window when you wake up, and

1 the sun's shining, but there's water dripping from all the
2 trees, the grass is wet. There's large puddles in the road
3 or the driveway out in front of your home.

4 Now, you didn't see it rain. You didn't hear it rain
5 because you slept all night. But from the facts you know to
6 exist, the collateral facts, you could reasonably infer that
7 at some time during the night it did rain. That's what's
8 meant by proof of a fact by inference or by a chain of facts
9 leading to the inference of another fact.

10 Now, circumstantial evidence, excuse me, the law makes
11 no distinction between the weight or value that you can give
12 to either direct or circumstantial evidence. You're the
13 sole judges of the facts. You have the right to give both
14 kinds of evidence the weight you think it ought to receive.
15 You should weigh all of the evidence in the case, both
16 direct and circumstantial. I will tell you, after you've
17 weighed all the evidence in the case, if you're firmly
18 convinced of the defendant's guilt beyond a reasonable
19 doubt, you must find the defendant guilty. However, if you
20 think there's a real possibility that the defendant is not
21 guilty and his guilt has not been proven beyond a reasonable
22 doubt, then you must find the defendant not guilty.

23 Again, I will remind you you're the sole judges of the
24 credibility and the believability of the witnesses who
25 testified during this trial. It's your duty, as jurors, to

1 analyze and evaluate the evidence and determine which
2 evidence convinces you of its truth.

3 In determining believability of witnesses who testified
4 in the case, again, you can believe one witness against all
5 the others, all the others against one. You can believe all
6 of, part of, or none of what a witness has told you during
7 the trial. You may consider whether the witness has
8 exhibited to you any interest, bias, or prejudice, or other
9 motive in testifying. You can also consider the appearance
10 and the manner in which the witness testified while on the
11 witness stand.

12 Now, I'm going to instruct you and I'm going to
13 emphasize to you that the fact that the defendant did not
14 testify in this trial is not a factor to be considered by
15 you in your deliberations and your consideration of the
16 question of guilt or innocence in this matter. It must not
17 be considered by you in any manner whatsoever.

18 All defendants have a Constitutional right to remain
19 silent, and the assertion of the defendant of a
20 Constitutional right should not be considered by you at all
21 in your deliberations. I repeat, under your oath as jurors,
22 you're to draw no conclusion whatsoever from the fact that
23 the defendant did not testify in this case. In fact, the
24 fact that the defendant did not testify in this case should
25 not even be discussed by you or mentioned by you in your

1 deliberations in this matter because the burden of proof in
2 this case is always upon the State. It is upon the State
3 throughout the trial. The defendant has no burden of proof
4 in this case.

5 Also, during this trial, a person testified who has a
6 prior criminal record. I will tell you that someone who has
7 a prior criminal record is competent to testify during a
8 trial. A past criminal record of a witness does not affect
9 the ability of the witness to testify. The past record of a
10 witness can only be considered by you, the jury, if at all,
11 in determining the credibility or believability of that
12 witness. Remember, again, you're the sole judges of the
13 facts in this case, and the believability of the witnesses,
14 and that includes all witnesses on all subjects that they
15 testify to.

16 Now, I'm going to charge you, in South Carolina, if a
17 crime is committed by two or more people who are acting
18 together in committing a crime, the act of one is considered
19 the act of all. A person who joins with another to commit
20 an unlawful act is criminally responsible for everything
21 that is done by the other person which happens as a probable
22 or a natural consequence of the act done in carrying out the
23 common plan and purpose. For example, and this doesn't
24 apply directly to this case, it's being used simply as an
25 example, two people can be guilty of killing another person

1 when only one of the persons, people had a gun and there was
2 only one bullet fired and only one of the two fired the shot
3 that caused the death. Because if two or more people are
4 together, acting together, assisting each other in the
5 commission of an offense, again, the act of one is the act
6 of all or as it is sometimes said commonly, the hand of one
7 is the hand of all.

8 Prior knowledge that a crime is going to be committed
9 without more is not sufficient to make a person guilty of
10 the crime. Mere knowledge that another person is going to
11 commit a crime, even if the defendant were present at that
12 time when the crime is committed, is not sufficient to
13 convict the defendant as a principal. Guilt as a principal
14 is shown by actual or constructive presence at the scene as
15 a result of prior arrangement.

16 Therefore, a finding of a prior arrangement or plan or
17 common scheme is necessary for a finding of, of guilt as a
18 principal. The State must prove, beyond a reasonable doubt
19 by competent evidence, the theory of the hand of one is the
20 hand of all. A principal in crime is one who either
21 actually commits the crime or who is also present aiding,
22 abetting, or assisting in the commission of the crime. When
23 a person does an act in the presence of and with the
24 assistance of another, the act is done by both. There
25 are -- where there, where there are two, two or more acting

1 with a common plan or intent and are present at the
2 commission of the crime, it does not matter who actually
3 committed the crime. All are guilty. Again, the hand of
4 one is the hand of all. Presence at the commission of a
5 crime means to be sufficiently near to aid, abet, and assist
6 in the commission of the crime.

7 However, excuse me, mere presence at the scene of the
8 crime is not sufficient to convict one as a principal on the
9 theory of aiding and abetting. Intent is also a necessary
10 element for there must have been a common design or intent
11 to commit the crime, and the crime must have been committed
12 pursuant thereto with the other person aiding and abetting
13 by some overt act.

14 Intent means intending the result which actually
15 occurs. Not accidentally or involuntarily. Intent can be
16 shown by acts and conduct of a defendant and other
17 circumstances, in other words, by other circumstantial
18 evidence, from which you may naturally and reasonably infer
19 intent. The State must prove these elements, again, beyond
20 a reasonable doubt.

21 Now, you have heard from the testimony in this case the
22 penalty that a person can serve for the crime alleged in the
23 indictments. In determining guilt or innocence of the
24 defendant, I will instruct the jury that you can not
25 consider any possible penalty for a particular crime in

1 reaching your verdict. The punishment for the crimes is a
2 matter for me, the judge, to determine, and you should never
3 be concerned or considered, in any way, the penalty that may
4 be involved in this case in arriving at a fair and impartial
5 verdict as to guilt or innocence of the defendant in this
6 matter.

7 Now, the defendant is charged with the crime of armed
8 robbery, and that, that statute is Code Section 16-11-330.
9 In order to prove this offense, the state must prove, first
10 prove, beyond a reasonable doubt, that the defendant took
11 personal property from the person or the presence of another
12 person. Now, property is in the presence of a person if
13 it's within the person's reach, inspection, observation, or
14 control so that the person could, if not overcome by the
15 violence, prevent it, or prevented by fear, they could of
16 kept possession of that property. The state must also
17 prove, beyond a reasonable doubt, that the defendant carried
18 the property away intending to permanently deprive the owner
19 of the property, and to keep the property for the
20 defendant's own use.

21 Now, the slightest movement of the property or complete
22 possession of the property, even if for an instant, would be
23 sufficient to show a carrying away of the property. The
24 taking and carrying away of the property must have been done
25 by violence or by putting an owner of the property in fear

1 of violence.

2 Finally, the State must prove, beyond a reasonable
3 doubt, that the defendant was armed with a deadly weapon
4 during the robbery. Now, a deadly weapon is any article or
5 instrument or substance which is likely to cause death or
6 great bodily harm. Whether an instrument has been used as a
7 deadly weapon depends on the facts and circumstances in each
8 case.

9 I will tell you the following items are examples of
10 instruments which may be considered as a deadly weapon. A
11 pistol, a shotgun, rifle, a dagger, a knife, a slingshot,
12 metal knuckles, razors, gasoline, fire bombs, Molotov
13 cocktails, and/or lighter fluid. Those are items which, in
14 the past, have been considered to be deadly weapons. A gun
15 may be a deadly weapon even if it is not operated.

16 Now, Mr. Charles Turner, raise your hand please, sir.

17 (Juror complies.)

18 THE COURT: You're gonna be the foreperson of the jury.
19 That means you will be the person who is responsible to
20 conduct the deliberations of the jury.

21 If, during the deliberations, the jury has a question,
22 I'll ask that you get the jury to agree on the form of the
23 question, write it on a piece of paper, knock on the door
24 and hand it to the bailiff. The bailiff will deliver that
25 question to me. I will determine the appropriate response

1 to the question.

2 I will advise you that there are certain things that I
3 can't get involved in as far as you're concerned. I can't
4 get involved in your decisions on the facts and things that
5 relate to those decisions. I can answer questions
6 concerning the procedures that we followed, the law that
7 I've charged you, and in some cases certain parts of the
8 evidence that you've heard. However, I'm not asking you to
9 edit any question. Whatever the question is that the jury
10 comes, has, or wishes to have asked, write it on a piece of
11 paper, pass it to me, I'll decide the appropriate response.

12 Also, it would be your responsibility to fill out the
13 verdict form that will be in use in this case. I have it
14 here, and in a few minutes I'll give that to you and go over
15 it with you. But as I've told the remainder of the jury,
16 the jury must -- the verdict must be unanimous. Each of you
17 must agree upon the verdict before it become the verdict of
18 the jury. Therefore, the foreperson has no greater say in
19 the outcome than any other person on the jury, but it must
20 require -- it does require all of you to agree before it
21 becomes the verdict of the jury, and the foreperson then has
22 the right to record that verdict and submit it to the court.

23 I've gone over a good bit with you, and what I'm going
24 to do at this time, I'm going to ask you to step back to the
25 jury room one more time. Don't begin any discussions. I'm

1 going to go over some matters with the attorneys briefly.
2 It won't be but a few minutes. I'll bring you back in for
3 final instructions, and then I'll send you out for your
4 deliberations.

5 You may retire to the jury room.

6 (WHEREUPON, the following takes place outside the
7 presence of the jury.)

8 THE COURT: Any objections to the charge from the
9 State?

10 SOLICITOR GRAY: No, sir, Your Honor.

11 THE COURT: Any from the defense?

12 MS. BUTLER: No, sir, Your Honor.

13 THE COURT: All right. I don't believe there was any
14 evidence placed into the record, is that right?

15 SOLICITOR GRAY: That's correct, Your Honor.

16 THE COURT: I'll ask counsel to approach, look over the
17 verdict form, and see if there's any objection to the
18 verdict form I've prepared.

19 (Pause.)

20 THE COURT: Any objections?

21 MS. BUTLER: No, sir.

22 THE COURT: Any objections?

23 SOLICITOR CUDE: No, sir.

24 THE COURT: All right. There are no objections to the
25 verdict that's proposed.

1 Mr. Humphries, bring the jury back in.

2 (WHEREUPON, the following takes place within the
3 presence of the jury.)

4 THE COURT: All right. Mr. Turner, I'm going to pass,
5 by the bailiff, the verdict form to you and ask you to take
6 a look at that please, sir. At the top you'll see there's
7 the State of South Carolina, County of Spartanburg, and the
8 Court in which we're located is at the top, and below that
9 is the caption, State of South Carolina versus Bert Wayne
10 Foster. Over to the right it indicates it's a verdict form
11 for the two indictment numbers and the Court. Below that
12 the form, the actual verdict itself.

13 Question number one is as to Indictment 10-GS-42-1308
14 for armed robbery, and it stays that you, the jury,
15 unanimously find the defendant, Bert Wayne Foster, two
16 choices, not guilty or guilty. Once a verdict has been
17 reached unanimously, simply check or put an X in the blank
18 next to the appropriate verdict, and, of course, I'll tell
19 the jury that the fact that I've placed these verdict
20 choices in any order does not indicate a preference. I will
21 tell you that every criminal case I've ever tried has those
22 verdicts in the same order. So, it does not indicate a
23 preference on my part. That's the order in which I placed
24 them on the verdict form.

25 Now, I will tell you that the first indictment that you

1 must make a decision on is the robbery of Rigoberto Sanchez.
2 That's the gentleman who was robbed in that first question.
3 The second question is to the other indictment, and that has
4 to do with the robbery, the alleged robbery of Freddie
5 Robinson, Junior. So, that's the two indictments you must
6 decide. You must write a verdict separately for each
7 indictment.

8 Again, the first indictment is the alleged robbery of
9 Rigoberto Sanchez. The second indictment is the alleged
10 robbery of Freddie Robinson.

11 Once both verdicts has, have been reached, then, sir,
12 you would sign it where the foreperson line is at the
13 bottom. Of course, the date is December 15th. You'll
14 need to put the date on that.

15 All right. At this time I'm going to ask that the jury
16 itself, not the alternate, ma'am, you remain seated. I'll
17 ask that the jury retire, begin your deliberations.

18 Thank you very much.

19 (WHEREUPON, the alternate juror was dismissed at this
20 time.)

21 THE COURT: All right. Any objections to my final
22 instructions from the State?

23 SOLICITOR GRAY: No, sir, Your Honor.

24 THE COURT: Any from the defense?

25 MS. BUTLER: No, sir.

1 THE COURT: All right. Court will be in recess until
2 such time as a verdict has been reached.

3 The defendant remains in custody.

4 (WHEREUPON, the jury began deliberations at 3:36 and
5 returned with a question at 4:15.)

6 THE COURT: I've received a question from the jury.
7 The question is does the defendant have to have a weapon in
8 his hand to be considered guilty of armed robbery.

9 Now, during the regular charge I charged the theory of
10 hand of one, hand of all. I would propose to answer that
11 question by recharging that as well as the law on armed
12 robbery. If there are other portions of the charge you
13 would think I should repeat, I'll be more than happy to
14 consider that or I will consider recharging the jury
15 altogether.

16 State wish for me to proceed by charging hand of one
17 hand of all and armed robbery?

18 SOLICITOR GRAY: Yes, sir, Your Honor.

19 THE COURT: Defense have any additions to that?

20 MS. BUTLER: Your Honor, the defense would like to ask
21 if the State, if the Court is gonna recharge on the hand of
22 one, hand of all, would the Court also recharge on mere
23 presence at the scene?

24 THE COURT: That's included in the hand of one, hand of
25 all charge---

1 MS. BUTLER: Yes.

2 THE COURT: ---is the mere presence at the scene does
3 not make one guilty. They have to do some overt act.

4 MS. BUTLER: Okay.

5 THE COURT: So, I think it will be included in that.
6 when I finish, if you don't think I properly covered that,
7 then I'll allow you to make a motion at that time.

8 MS. BUTLER: Thank you, sir.

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

10 (WHEREUPON, the following takes place within the
11 presence of the jury.)

12 THE COURT: All right. I've received a question from
13 the jury, and the question is does the defendant have to
14 have a weapon in hand to be considered guilty of armed
15 robbery. I'm going to go over a couple of sections in the
16 charge on the law that I gave you. I believe that the
17 answer to your question is covered by the charge, and I'll
18 go back over this.

19 Mr. Foreman, when I finish, if you feel that I have not
20 properly responded to the question, I'll ask you about that
21 at that time.

22 The first part that I'm going to charge to you is under
23 the theory of hand of one hand of all. If a crime is
24 committed by two or more people who are acting together in
25 committing a crime, the act of one is the act of all. A

1 person who joins with another to commit an unlawful act is
2 criminally responsible for everything done by the other
3 person which happens as a probable or natural consequence of
4 the acts done in carrying out the common plan and purpose.

5 Now, I gave an example to you during that charge that
6 applies not specifically to this case, but, for example, two
7 people can be guilty of killing another person when only one
8 of the two had a gun, and there was only one bullet fired,
9 and only one of the two fired the shot that caused the
10 death. If two or more people are acting together, are
11 together, acting together, and assisting each other in
12 committing the offense, the act of one is the act of all or
13 as is sometimes said, the hand of one is the hand of all.

14 Now, prior knowledge that a crime is going to be
15 committed without more is not sufficient to make a person
16 guilty. Mere knowledge that another person is going to
17 commit a crime, even if the defendant was present when the
18 crime is committed, is not sufficient to convict a defendant
19 as a principal. Guilt as a principal is shown by actual or
20 constructive presence at the scene as a result of some prior
21 arrangement. Therefore, the finding of a prior
22 arrangement or a common scheme is necessary for a finding of
23 guilt as a principal. The State must prove, beyond a
24 reasonable doubt by competent evidence, that the theory of
25 the hand of one is the hand of all.

1 A principal in a crime is one who either actually
2 commits the crime or is, who is present aiding, abetting, or
3 assisting in the commission of the crime. When a person
4 does an act in the presence of or with the assistance of
5 another, the act is done by both. Where two or more, acting
6 with a common plan or scheme, are present at the commission
7 of a crime, it doesn't matter who actually commits the
8 crime. All are guilty. The hand of one is the hand of all.

9 The presence at the commission of the crime means to be
10 sufficiently near to so as to aid, abet, and assist in the
11 commission of the crime. Now, mere presence at the scene
12 where a crime is committed is not sufficient to convict one
13 as a principal on the theory of aiding and abetting. Intent
14 is also a necessary element or there must have been a common
15 design or intent to commit the crime, and the crime must
16 have been committed pursuant thereto with the person aiding
17 or abetting by some overt act.

18 Now, intending means intending the result which
19 actually occurs. Not some accident or involuntary action.
20 Intent may be shown by acts and conduct of the defendant and
21 other circumstances from which you might naturally and
22 reasonably infer intent. Now, the State must prove those
23 elements of the hand of one hand of all beyond a reasonable
24 doubt.

25 Now, I'm also going to charge you concerning the

1 offense of armed robbery so that we'll just be sure that
2 we've covered that. The defendant is charged in this case
3 with the commission of armed robbery. In order to prove
4 this offense, the State must prove first, prove beyond a
5 reasonable doubt, that the defendant took personal property
6 from the person or presence of another person. Property is
7 in the presence of a person if it's within that person's
8 reach, inspection, observation, or control so that the
9 person could not, if not, could, excuse me, could, if not
10 overcome with violence or fear, keep possession of his
11 property.

12 The State must prove, beyond a reasonable doubt, that
13 the defendant carried away property intending to permanently
14 deprive the owner of the property and to keep the property
15 for the defendant's own use. The slightest removal of the
16 property or the complete possession of the property, if even
17 for an instant by the defendant, is sufficient, sufficient
18 to show a taking and carrying away of the property. Taking
19 and carrying away of the property must be done by violence
20 or by putting the owner of the property in fear of violence.

21 Finally, the State must prove, beyond a reasonable
22 doubt, that the defendant was armed with a deadly weapon
23 during the commission of the robbery. A deadly weapon is
24 any article or instrument or substance which is likely to
25 cause death or great bodily harm. whether an instrument has

1 been used as a deadly weapon depends upon the facts and
2 circumstances of each case.

3 The following are examples of instruments which may be
4 deadly weapons. Such things as a pistol, a rifle, a dirk, a
5 dagger, a knife, a slingshot, metal knuckles, razors,
6 gasoline, fire bombs, Molotov cocktails, and lighter fluid.
7 A gun can be a deadly weapon even if it is not operating.

8 Now, you must take those charges together. In other
9 words, that all goes together, the hand of one the hand of
10 all as well as the charge on armed robbery.

11 Now, does that sufficiently respond to the question
12 that you had?

13 FOREMAN: The hand of one is the hand of all?

14 THE COURT: Well, sir, again, if the State has proven
15 those things that I said they had to prove in order to
16 establish that particular theory.

17 FOREMAN: Okay.

18 THE COURT: That is the law in this state.

19 FOREMAN: Okay.

20 THE COURT: Does that respond to the question?

21 FOREMAN: Yes, sir.

22 THE COURT: All right. You may retire and continue
23 deliberations.

24 (WHEREUPON, the following takes place outside the
25 presence of the jury.)

1 THE COURT: Any objection to my recharge from the
2 State?

3 SOLICITOR GRAY: No, sir, Your Honor.

4 THE COURT: Any from the defense?

5 MS. BUTLER: No, sir, Your Honor.

6 THE COURT: All right. The question that was asked
7 will be made an exhibit and part of the record.

8 (WHEREUPON, the note from the jury was marked as
9 Court's Exhibit No. 1 and received into evidence at this
10 time.)

11 THE COURT: We'll remain in recess until such time as a
12 verdict is reached.

13 (WHEREUPON, the jury began deliberations again at 4:20,
14 and returned with a verdict at 4:27.)

15 THE COURT: All right. I've been informed now by the
16 bailiff that a verdict has been reached.

17 Is the State ready to receive the verdict?

18 SOLICITOR GRAY: Yes, sir, Your Honor.

19 THE COURT: Is the defense ready?

20 MS. BUTLER: Yes, sir, Your Honor.

21 THE COURT: Bring the jury in.

22 (WHEREUPON, the following takes place within the
23 presence of the jury.)

24 THE COURT: Mr. Foreman, the bailiff has informed me
25 that a verdict has been reached.

1 Is that true?

2 FOREMAN: Yes, sir.

3 THE COURT: Pass the form to the bailiff please.

4 (Foreman complies.)

5 THE COURT: Madam Clerk, you may publish the verdict.

6 CLERK: In the State of South Carolina, the County of
7 Spartanburg, in the Court of General Sessions, as to
8 Indictment Number 2010-GS-42-1308 for armed robbery, we, the
9 jury, unanimously find the defendant, Bert Wayne Foster,
10 guilty.

11 As to Indictment Number 2010-GS-42-1309 for armed
12 robbery, we, the jury, unanimously find the defendant, Bert
13 Wayne Foster, guilty. Signed by the foreperson the 15th day
14 of December, 2010.

15 Ladies and gentlemen of the jury, is this your verdict
16 and still your verdict, if so, please raise your right hand.

17 (WHEREUPON, all jurors raise their right hands at this
18 time.)

19 CLERK: So say you-all.

20 THE COURT: Thank you.

21 Anything further from the State before I release the
22 jury?

23 SOLICITOR GRAY: No, sir, Your Honor.

24 THE COURT: Anything further from the defense before I
25 release the jury?

1 MS. BUTLER: Your Honor, we would ask the Court to poll
2 the jury please.

3 THE COURT: Madam Clerk, poll the jury please.

4 (WHEREUPON, all jurors were asked if this was and is
5 still their verdict and all jurors responded in the
6 affirmative.)

7 THE COURT: Thank you, Madam Clerk.

8 Anything further before I release the jury panel?

9 MS. BUTLER: No, sir, Your Honor.

10 THE COURT: All right.

11 (WHEREUPON, the jury was dismissed at this time.)

12 THE COURT: All right. I'll ask you to approach the
13 bar please. Defendant in front of the microphone please.

14 (Parties comply.)

15 THE COURT: All right. Mr. Bert Wayne Foster, you
16 are -- you have been found guilty by a jury of your peers of
17 the offenses of armed robbery in two cases. At this time
18 I'll be happy to hear from your attorney concerning
19 sentencing.

20 MS. BUTLER: Thank you, Your Honor.

21 THE COURT: Yes, ma'am.

22 MS. BUTLER: I, I do -- he does have two relatives that
23 would like to speak on his behalf at the appropriate time.

24 THE COURT: All right. I'll be happy to hear from
25 them.

1 MS. BUTLER: Thank you, Your Honor.

2 Would you like to hear from them now?

3 THE COURT: I'd rather hear from you first and then
4 I'll hear from them.

5 MS. BUTLER: Yes, sir, we would, we would ask Your
6 Honor consider the, the proximity and date and time of the
7 crimes, consider them as being so close together. Also
8 consider the, Mr. Foster's age of 21 years old at the time
9 that the, time that the crimes were committed and that Mr.
10 Foster has much room for growth and overcome in this matter,
11 and we would request that the court consider running his
12 sentences concurrent to each other.

13 THE COURT: All right. Anything you'd like to say,
14 Mr. Foster?

15 DEFENDANT: (Nods negatively.)

16 THE COURT: All right. The family members, one at a, a
17 time, may come forward. whoever wishes to speak on his
18 behalf, come forward please.

19 Your name is?

20 MS. PARKER: Norma Parker.

21 THE COURT: And your relationship?

22 MS. PARKER: I am Wayne's paternal aunt.

23 THE COURT: All right. I'll be happy to hear from you,
24 ma'am.

25 MS. PARKER: Well, in my presence with Wayne, he has

1 always been very very nice, very polite, kind. I don't know
2 him any other way. So, what has been charged here today I'm
3 not happy with. But also I'm rather surprised.

4 Also, I would like to request leniency from the Court.
5 Wayne's very young. I hate to see his life destroyed due to
6 incarceration. He has a son four years old that he needs to
7 help raise so that we can stop any forms of obedience to the
8 law in our family.

9 I would like to also state that Wayne is ADD and also
10 bipolar, and from what I understand was not on his
11 medication during the past two years. So, it is something
12 that he does need to keep this mood swings in check.

13 I'm also very sorry for anyone who he has been harmed
14 in any way emotionally or whatever, and I would like to ask
15 them pray for the forgiveness of this disobedience, and I'm
16 so sorry, and I hate to see his life destroyed. If there's
17 some way I could correct it I would without him having to be
18 incarcerated in any way, and any way that I can assist I
19 will according to the law.

20 I am actually a retired correctional officer. So, this
21 is not something that is ever happened actually in our
22 family. Again, I want to request a leniency of him. I love
23 him very much, and I want to thank you, Your Honor.

24 THE COURT: Thank you, ma'am.

25 Another family member wish to speak?

1 Your name is?

2 MS. CROCKER: I am Barbara Crocker. I am his aunt.
3 His -- my brother is his father.

4 THE COURT: All right. I'll, I'll be happy to hear
5 from you, ma'am.

6 MS. CROCKER: I just want to say that -- I guess I can
7 express my opinion. I'm not happy with what happened here
8 today either. But we love Wayne. We've always loved him.
9 I use to keep him when he was a little boy. He was always
10 good. He was always smart. He did very good in school. He
11 was in ROTC, volunteer fire department. He went to church,
12 as the old expression, every time the doors was opened.
13 Yes, ma'am, no, ma'am.

14 I hate to see this at his age of 23. There's nothing I
15 can say to change anybody's mind about anything because I
16 mean that's already been done. I wasn't asked to do it.
17 But I would like for the court to show some leniency on him.
18 I don't think 23 years -- I don't understand the law even
19 though I was in corrections 18 years, like I said. My
20 husband was captain of security 25 years.

21 I have seen and heard a lot you better believe me, and
22 I -- some of the guys that come in there, based on what they
23 tell you, well then you have access to their background, and
24 you're wondering, you mean you got 50 years for this, who
25 was mad at you, you know. That was the story.

1 I really hate to see this to happen to him, and I'm
2 sorry to have to say this in front of the whole court. But
3 I don't think that he was given a fair trial. I tried to
4 speak to Mr. Gray and he, before the -- and I admit this.
5 If I did anything to make you angry, Mr. Gray, is he in
6 here. I can't see. I have matricular degeneration.

7 THE COURT: Ma'am, you need to speak with me, ma'am.
8 Don't address him.

9 MS. CROCKER: I tried to speak with Mr. Gray, and if I
10 have any influence on the outcome of this I apologize. I
11 left him a message to call me, and maybe I should of not
12 done that. But I wanted him to hear from us. But he
13 absolutely refused. He -- it's like from day one he's never
14 made Wayne an offer. He made up his mind that Wayne was
15 guilty based on a mug shot I understand, and he, he told Ms.
16 Butler, have you seen this mug shot because this is a
17 hardened criminal.

18 Have you talked to him, Mr. Gray?

19 No.

20 So, I, I don't understand the outcome of this. But --
21 and I'm very upset about the legal system because it's more
22 politics than it is legal. I apologize, sir. But I had to
23 say what I had to say, and maybe we can file an appeal. I
24 don't know if we do. I just think there were deals made
25 under the table because Mr. Gray had it in for him and

1 that's my honest opinion.

2 But please have mercy on him. Don't take anything I
3 say to get even with him because that's how I see the law.
4 I was, I was in it many many years and I saw it everyday.
5 If my husband could hear he would come up here and say
6 something. He has 30 years experience in law enforcement
7 and, and -- but he can't hear the questions.

8 So, thank you for listening to me, and I apologize to
9 the Court if I was out of order in any way. But I did speak
10 the truth.

11 THE COURT: Thank you, ma'am.

12 MS. CROCKER: Yes, sir.

13 THE COURT: Anything further from the defense?

14 MS. BUTLER: No, sir, Your Honor.

15 THE COURT: The State.

16 SOLICITOR GRAY: Thank you, Your Honor.

17 Speaking on behalf of the state in sentencing, Mr.
18 Robinson and Mr. Sanchez do not wish to address the Court.
19 But I will, Your Honor.

20 THE COURT: Yes, sir.

21 SOLICITOR GRAY: There's no remorse from this young
22 man. And I say young man, Your Honor, he started his
23 criminal career at 18.

24 2006, in an eerily similar fashion, there was a car
25 full of people, went to 165 Walden Circle, broke into a

1 house, cops arrived, cops chased him, he sped away, and only
2 because of that officers quick thinking, stopped the car,
3 got everybody out, and this young man, at 18, was charged
4 with burglary second degree and petty larceny. He was given
5 a break. Another solicitor, on that charge, allowed him to
6 plead to a burglary third. He got a Y.O.A. And after that,
7 he got a Y.O.A. revocation, and after the Y.O.A. revocation
8 he committed shoplifting in 2009.

9 I don't know this man. I'm reading his record. I'm
10 reading the facts. I'm reading the incident report. He
11 robbed two strangers at gunpoint to pay rent. That's scary
12 plain and simple. I don't care, Mexican, white black, if
13 he's standing next to me, anybody that does that is a scary
14 individual. After being through the system, not once, not
15 twice, three times, and still feels the law does not apply
16 to him, and I still have four more pending charges on this
17 young man.

18 It's time to stop, Your Honor. I don't know how else
19 to do this. This is the job and the oath that Mr. Cude and
20 I have taken. It needs to stop before the next time. They
21 won't be taking a gun to an individual, they will be taking
22 a bullet from an individual. Plain and simple.

23 THE COURT: Thank you, Mr. Gray. I will not consider
24 any pending charges mentioned in making my decision in the
25 matter.

1 How much time has he served?

2 MS. BUTLER: Fourteen months, Your Honor. He's been in
3 since October 14th of '09.

4 THE COURT: Does the State agree with the 14 months?

5 SOLICITOR GRAY: Yes, sir, Your Honor.

6 THE COURT: Mr. Foster, I have considered the facts
7 that the jury has found in your case. I've also considered
8 the nature of these offenses. I've also considered the past
9 record that you exhibit in this matter. Apparently there --
10 it involves at least two convictions, three convictions
11 actually, but there was a Y.O.A. and then a shoplifting
12 charge.

13 That resulted in a conviction?

14 SOLICITOR GRAY: Yes, sir.

15 THE COURT: Prior to this time. And this is all before
16 you were the age of 23. Actually you've been in jail for 14
17 months. So, we're looking at 22, which is not a very
18 promising record and the decision making that you're making
19 is a danger to our community. People who face guns on the
20 street, quite often those situations result in violence and
21 quite often deadly violence. So, all of those factors have
22 been considered in reaching the sentence that I have reached
23 in this case.

24 The Sentence in each case is 12 years and I have run
25 them consecutive to each other. I've given you credit for

1 14 months service.

2 I wish you luck, sir.

3 MS. BUTLER: Thank you, Your Honor.

4 SOLICITOR GRAY: Thank you, Your Honor.

5

6 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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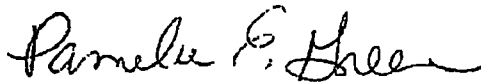
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the Seventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for Spartanburg County, South Carolina, on the 15th day of December, 2010.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

February 22nd, 2011



PAMELA E. GREEN, Court Reporter

FORM 5

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Spartanburg)Bert Wayne Foster #325398)
Full name and prison number (if any) of Applicant.)**2013-CP-42-3201**

v.)

APPLICATION FOR

State of South Carolina)

POST-CONVICTION RELIEF)

INSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay 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 Lee Correctional Inst. 490 W. Sackville Hwy. Bishopville, SC 29010
2. Name and location of Court which imposed sentence Spartanburg, SC - General Sessions.
3. Name(s) of co-defendant(s) (if any) Adam N. Suchel, Shannon A. Varner, Steven T. Rogers, et al.
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 - (a) 2010-GS-42-1308 - Armed Robbery - SC Code: 16-11-330(A), COR Code: 139
 - (b) 2010-GS-42-1309 - Armed Robbery - SC Code: 16-11-330(A), COR Code: 139
 - (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 - (a) 12/15/10 - 12 years consecutive to sentence on 12/15/10.
 - (b) 12/15/10 - 12 years consecutive to sentence on 12/15/10.

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- (c) _____
6. Check whether a finding of guilty was made:
- (a) after a plea of guilty _____
- ✓ (b) after a plea of not guilty jury returned with a verdict of guilty on both counts.
- (c) after a plea of nolo contendere _____
7. Did you appeal from the judgment of conviction or the imposition of sentence?
yes.
8. If you answered "yes" to (7), list:
- (a) the name of each Court to which you appealed:
- i. South Carolina Court of Appeals. (Direct Appeal)
- ii. _____
- iii. _____
- (b) the result in each such Court to which you appealed:
- i. Dismissed
- ii. _____
- iii. _____
- (c) the date of each such result:
- i. August 20, 2011
- ii. _____
- iii. _____
- (d) if known, citations of any written opinion or orders entered pursuant to such results:
- i. _____
- ii. _____
- iii. _____
9. If you answered "no" to (7), state your reasons for not so appealing:
- (a) _____
- (b) NA
- (c) _____
10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) ineffective assistance of Trial Counsel
 (b) after acquired evidence
 (c) ineffective assistance of Appellate Counsel
11. State concisely and in the same order the facts which support each of the grounds set out in (10):
 (a) failure to make proper objections at trial; failure to investigate, prepare and ^{cont.}
 (b) Witness were offered a deal for testimony and lied about it.
 (c) Failure to raise all meritorious issue on appeal.
12. Prior to this application have you filed with respect to this conviction:
 (a) any petition in a State Court under South Carolina Law? NO
 (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. _____ NA
 iii. _____
 iv. _____
 (b) the name and location of the Court in which each was filed:
 i. _____
 ii. _____ NA
 iii. _____
 iv. _____
 (c) the disposition thereof:
 i. _____
 ii. _____ NA
 iii. _____

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 M. HOPE BLACKLEY

iv. _____

(d) the date of each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:

i. _____

ii. _____

iii. _____

iv. _____

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?

15. If you answered "yes" to (14) identify:

(a) which grounds have been presented:

i. _____

ii. _____

iii. _____

(b) the proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:

(a) Post Conviction Relief is the proper forum for such allegations

(b) _____

(c) _____

17. Were you represented by an attorney at any time during the course of:

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STATE OF SOUTH CAROLINA)

County of)

Spartanburg)

VERIFICATION

I, BF, 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.

Burt Foster

SWORN to and subscribed before me this 17th
day of July, 2013.

Melinda Cantelero (L.S.)
Notary Public

My Commission Expires: 01-11-15

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M. HOPE BLACKLEY

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

Bert Foster

I, Bert Foster, 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.

Bert Foster
Applicant

SWORN or affirmed to and subscribed before me this

17th day of July, 2013.

Melinda Placoley
Notary Public

My Commission Expires: 01-11-15

2013 AUG -6 PM 2:47
M. HOPE PLACOLEY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
	)	2013-CP-42-3201
Bert Wayne Foster, #325398,	)	
	)	
Applicant,	)	
	)	
v.	)	RETURN
	)	
State of South Carolina,	)	
	)	
Respondent.	)	
	)	

Respondent, making its Return to the application for post-conviction relief (PCR) filed August 6, 2013, would respectfully show this Court:

I.

The Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. He was indicted at the February 2010 term of the Spartanburg County Grand Jury for two counts of armed robbery (2010-GS-42-1308, -1309). The Applicant was represented by Melinda Butler, Esquire. On December 15, 2010, the Applicant proceeded to trial and was convicted as indicted on both charges. The Honorable Robert L. Couch sentenced Applicant to two consecutive sentences of twelve years.

A timely Notice of Appeal was filed on Applicant's behalf. The South Carolina Court of Appeals affirmed the Applicant's conviction and sentence. State v. Foster, Op. No. 2012-UP-485 (filed August 8, 2012). The Remittitur was returned on August 24, 2012.

Attached herewith and incorporated herein are the records of the Spartanburg County Clerk of Court regarding the subject conviction, the Applicant's records from the South Carolina

Department of Corrections, the trial transcript, and Applicant's appellate records. The Respondent reserves the right to amend this Return upon receipt of any relevant materials.

II.

In his current Application, the Applicant alleges that he is being held in custody unlawfully for the following reasons:

- a. Ineffective assistance of trial, in that;
 - i. Trial counsel failed to make proper objections,
 - ii. Trial counsel failed to investigate,
- b. Ineffective assistance of appellate counsel, in that;
 - i. Appellate counsel failed to "raise all meritorus (sic) issue (sic) on appeal."
- c. After discovered evidence, in that;
 - i. "Witness (sic) were offered a deal for testimony and lied about it."

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 the 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.

The allegation that appellate counsel was ineffective is without merit. Respondent contends that the Applicant's appellate counsel rendered adequate assistance and provided representation within the range of competence required by appellate attorneys. A defendant is constitutionally entitled to the effective assistance of appellate counsel. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830 (1985). Where ineffective assistance of appellate counsel is alleged, the Applicant must show that appellate counsel's performance was (1) deficient; and (2) that there was prejudice from the appellate counsel's deficiency. Southerland v. State, 337 S.C. 610, 524 S.E.2d 833 (1999). To be effective, appellate counsel must give assistance of such quality as to make appellate proceedings fair. Id. Appellate counsel must provide effective assistance but need not raise every non-frivolous issue presented by the record. Id. Appellate counsel has a professional duty to choose among potential

issues according to their merit. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983). Where the strategic decision to exclude certain issues on appeal is based on reasonable professional judgment, the failure to appeal all trial errors is not ineffective assistance of counsel. Griffin v. Aiken, 775 F.2d 1226 (4th Cir. 1985).

When a claim of ineffective assistance of appellate counsel is based upon failure to raise viable issues, the court must examine the record to determine "whether appellate counsel failed to present significant and obvious issues on appeal." Gray v. Greer, 800 F.2d 644, 646 (7th Cir. 1986).

Generally, the presumption of effective assistance of counsel will be overcome only when the alleged ignored issues are clearly stronger than those actually raised on appeal. Id.

The Respondent submits that the Applicant cannot satisfy either requirement of the Strickland test with regard to the ineffectiveness claims against appellate counsel. However, the allegation of ineffective assistance of appellate counsel probably raises questions of fact that cannot be conclusively refuted by the record. The Respondent requests an evidentiary hearing to fully resolve this issue. Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

V.

The Applicant's also alleges that newly discovered or after discovered evidence exists. The newly discovered evidence alleged to be present by the Applicant is, "Witness (sic) were offered a deal for testimony and lied about it."

This contention is vague and general in its terms. A defendant requesting a new trial based on after discovered evidence must show that the evidence:

- (1) Is such as would probably change the result if a new trial was had; (2) Has been discovered since the trial; (3) Could not by the exercise of due diligence have been discovered before the trial; (4) Is material to the issue of guilt or innocence; and (5) Is not merely cumulative or impeaching. Hayden v. State, 278 S.C. 610, 611-12, 299 S.E.2d 854, 855 (1983).

The Applicant has not shown that the alleged evidence meets *any* of the requirements for after-discovered evidence. Most importantly, the "new evidence" offered by the Applicant is not "material to the issue of guilt or innocence," and probably would not "change the result if a new trial was had." Hayden, Id. The Court should summarily dismiss this allegation.

VI.

Each and every allegation contained within the application not hereinbefore expressly admitted, qualified or explained is hereby denied.

VII.

WHEREFORE, having made its Return, the State requests that an evidentiary hearing be held solely on the claims of ineffective assistance of trial and appellate counsel.

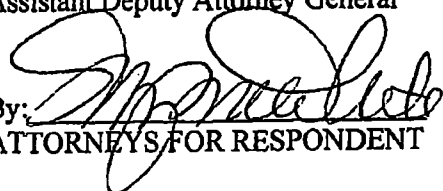
Respectfully submitted,

ALAN WILSON
Attorney General

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August 14, 2014.

STATE OF SOUTH CAROLINA)

COUNTY OF SPARTANBURG)

BERT WAYNE FORSTER, #325398)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent.)

IN THE COURT OF COMMON PLEAS

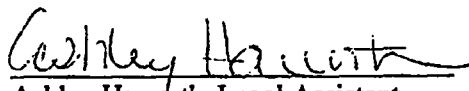
2013-CP-42-3201

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the Return on the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Mr. Christopher Brough
The Brough Law Firm
175 Magnolia St., Ste. 202
Spartanburg, SC 29306

DATED this 14TH day of August, 2014.


 Ashley Haworth, Legal Assistant
 For Respondent

State of South Carolina)
) Court of Common Pleas
 County of Spartanburg)
 Post Conviction Relief

2013-CP-42-3201

Bert Wayne Foster)
) vs. Transcript of Record
)
)
 State of South Carolina)
 Defendant)

November 10, 2015
 Spartanburg, South Carolina

B E F O R E:

Honorable Larry B. Hyman, Judge

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

Alicia A. Olive, Assistant Attorney General
 Attorney for the State

Christopher D. Brough, Esq.
 Attorney for the Applicant

Joy E. Holston
 Official Court Reporter

INDEX OF WITNESSES

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EXHIBITS

(There were no exhibits introduced.)

1 THE COURT: Ms. Olive.

2 MS. OLIVE: Thank you, Your Honor. This is Bert
3 Wayne Foster v. State. It is 2013-CP-42-3201. Mr. Foster
4 filed this application for PCR on August 13th of '13. He
5 was indicted in February of 2010 for two counts of armed
6 robbery. Ms. Melinda Butler represented him on those
7 charges. On December 15th, 2010 he went to trial and was
8 convicted as indicted on both charges. Judge Couch
9 sentenced him to two consecutive sentences of 12 years on
10 each count, well, sentenced him to two consecutive
11 sentences of 12 years on the armed robbery charges. He
12 did file an appeal. The South Carolina Court of Appeals
13 affirmed his conviction and sentence. And I will turn it
14 over to Mr. Brough.

15 THE COURT: Mr. Brough.

16 MR. BROUGH: Brough, Your Honor.

17 THE COURT: Have we met, Mr. Brough?

18 MR. BROUGH: I don't believe we have, Judge, I think
19 this might be my first time.

20 THE COURT: Well, it is good to see you, Mr. Brough.

21 MR. BROUGH: Your Honor, I ask the Court to go
22 through the admonitions to Mr. Foster, if you don't mind.

23 THE COURT: Mr. Foster, I just want you to know that
24 nothing I do here today, rather I rule in your favor or
25 not, is going to result in a dismissal of your charges.

1 At the very best that I could possibly do would be remand
2 for a new trial. Okay. And you would be facing exactly
3 the same charges that you were facing initially. And I
4 don't know what they were. Was it just two counts of
5 armed robbery?

6 MS. OLIVE: That is my understanding, Your Honor.

7 THE COURT: Okay. And in that regard the trial
8 Judge, if you were convicted on those charges, would not
9 be bound by Judge Couch's sentence. That is, he could
10 give you, is it 30 or 25?

11 MR. BROUGH: 10 to 30 on each, Judge.

12 THE COURT: 30 years on each one, up to 30 years. Do
13 you understand that?

14 MR. FOSTER: Yes, sir.

15 THE COURT: And you should know that before you
16 decide whether you want to go forward with this matter.
17 Do you wish to go forward understanding that you might get
18 a, if I grant your relief, you still might get a more
19 severe sentence.

20 MR. FOSTER: Yes, I understand.

21 THE COURT: You want to go forward?

22 MR. FOSTER: Yes, sir.

23 THE COURT: Okay, Mr. Brough.

24 MR. BROUGH: Thank you, Your Honor. Your Honor, we
25 call Mr. Foster to the stand, please.

1 BERT WAYNE FOSTER, being
2 first duly sworn, testified as follows:

3 DIRECT EXAMINATION

4 By Mr. Brough:

5 Q Please state your name for the record, sir.

6 A Bert Foster.

7 Q And, Mr. Foster, you filed an application for post
8 conviction relief in this proceeding alleging ineffective
9 assistance of counsel as to your trial lawyer, Ms. Butler,
10 is that correct?

11 A That's correct, sir.

12 Q Now, in terms of your trial counsel, how did you
13 first come to have Ms. Butler represent you, sir?

14 A My mother and my aunt pretty much paid for her and
15 she came to see me and was appointed as my attorney.

16 Q And you are charged out of two different incidences
17 which both occurred on the night of September 21st of
18 2009. Is that correct?

19 A That's correct.

20 Q And one is the robbery of a Rigoberto Sanchez under
21 indictment 1308 and under 1309 a Freddie Robinson. Is
22 that correct?

23 A Yes sir, that is correct.

24 Q Okay. Now, when you first came to meet Ms. Butler,
25 did you go over the discovery in your case with her, sir?

1 A At first I didn't have my whole motion of discovery.

2 Q Okay.

3 A And afterwards she give me more that I didn't have
4 because I was in a pod with my codefendant, it seemed like
5 there was more. Like I say, I informed her and she did
6 bring me more.

7 Q And ultimately in this case you went to trial,
8 correct?

9 A Correct.

10 Q Did you ever consider pursuing anything plea-wise or
11 anything of that nature?

12 A The day of my trial I was offered a 30-year plea.

13 Q And is that the only offer that was made in your
14 case?

15 A That's correct. It wasn't for the two charges that I
16 was going to trial for. It was for six charges that I was
17 being detained for. I was refused a plea for the two
18 charges that I was going to trial for that day.

19 THE COURT: Counsel, let me ask you. Were those
20 charges null posed as a result of this conviction?

21 MR. BROUGH: He is serving additional sentences in
22 the Department of Corrections, Your Honor.

23 THE COURT: All right.

24 Q Mr. Foster, now prior to trial how many times did you
25 meet with Ms. Butler?

1 A Twice.

2 Q And did you discuss what your defense was going to
3 be?

4 A Pretty much the fact that I withdrew from the prior
5 and she made charges for the jury that she did not present
6 at the time of my trial.

7 Q Okay. And was that for withdrawal of the criminal
8 conspiracy?

9 A Yes, sir.

10 Q And was there a mere presence charge as well?

11 A She asked the Judge for mere presence instruction and
12 he said that would be included in the hands of one, hands
13 of all. And that was the only charge to the jury.

14 Q Now, at trial would it be fair to say that all of
15 your codefendants testified against you?

16 A That's true.

17 Q Okay. And did you have advance notice that that was
18 going to take place?

19 A I pretty much found out the day of the trial.

20 Q Okay. So you did not know that was going to occur?

21 A Not exactly, no.

22 Q Now, the two victims in the case though, they could
23 not identify the people who robbed them, is that accurate?

24 A That's correct.

25 Q And that is Mr. Robinson and Mr. Sanchez, correct?

1 A Yes, sir.

2 Q But during the trial and essentially the allegations
3 is that y'all were riding around in a vehicle, in a Dodge
4 Durango and you were robbing people, is that correct?

5 A That's correct.

6 Q Now, at the time of the trial though, the
7 codefendants who testified against you, would it be fair
8 to say they all testified that you explicitly took part in
9 each crime?

10 A That's correct. They pretty much located me as the
11 mastermind. Their testimony was that they committed the
12 crime but I was there too.

13 Q And was that accurate?

14 A One of the crimes was accurate.

15 Q So you admit that you committed one of the crimes but
16 not the other?

17 A Yes sir, that's correct.

18 THE COURT: Can you tell me or identify which one by
19 indictment?

20 MR. BROUGH: Yes, sir.

21 Q And, sir, the crime that you are indicating that you
22 did not commit was the robbery of Freddie Robinson and
23 that was indictment 2010-GS-42-1309. Is that accurate?

24 A That's correct.

25 Q Okay. Tell me what happened as to Mr. Robinson?

1 A Mr. Robinson was the first crime that took place that
2 night. We was really on our way, going to rob Rigoberto
3 Sanchez, I didn't know his name but we knew where he lived
4 at. We was pretty much, our plan was to go and rob him.
5 On the way to rob him we were coming around the corner and
6 there was a black guy which comes out to be Freddie
7 Robinson walking down the road. My codefendant who is in
8 the backseat, he taps the seat, he tells the driver to
9 stop the car. I can see by the way that the man has a six
10 pack of beer and clothes on him and stuff, he is not
11 worthy of being robbed. He looked like a crack head to be
12 honest. So I tell them no, no, no. By this time they
13 jump out of the car and robbed him and I did not even come
14 around the car, come around out or participate in anything
15 to do with this crime. I mean, I didn't call the cops and
16 try to stop them but I verbally tried to stop them and
17 telling them, no, he is not worthy of being robbed.

18 Q And when you say he is not worthy of being robbed,
19 why do you say that?

20 A It is his appearance, period, he is walking down the
21 road with dirty clothes on.

22 Q What is the point of you robbing someone?

23 A To get money.

24 Q And when you looked at this gentleman would it be
25 your position that he would not be someone that would have

1 any money?

2 A He didn't, he didn't look like any type of person
3 that should be robbed. Like I said, I tried to stop them
4 because of this situation.

5 Q Now, Mr. Robinson was unable to make any sort of
6 eyewitness identification. Is that correct?

7 A That's correct. And, in fact, the testimony in the
8 trial transcript, page 58, I think it is the
9 cross-examination by the Solicitor, he states that two
10 people robbed him. A tall light skinned male and a
11 short--

12 Q I am actually going to direct your attention to the
13 transcript, page 57. If you could for me, beginning on
14 line 3 through line 18. If you could read that for me.

15 A It starts with a question on line 3.

16 Now, are you sure you can tell if they were black or
17 white?

18 Mostly.

19 Or light skinned?

20 The one holding the gun, the light skinned guy and
21 the tall black guy was slim. He came out from the other
22 side.

23 Was he dark skinned or light skinned?

24 The tall one was dark skinned but the one that pulled
25 the gun was light skinned, was real light.

1 The one that pulled the gun was light skinned?

2 Right.

3 So you couldn't really make--

4 I couldn't.

5 He interrupts, he says positive identification of
6 anybody?

7 I couldn't make it because they was covered up.

8 Q So he indicates he couldn't make a positive ID?

9 A He pretty much said that it was a light skinned,
10 black guy.

11 Q And how many people were riding in the car that
12 night?

13 A Four, a female driver; a tall African American in the
14 front; me and a mixed race Mexican guy in the back.

15 Q Now, at trial though your codefendants indicated that
16 you took part in this robbery, correct?

17 A That's correct.

18 Q Did you take the stand to deny it?

19 A No, sir. I did not. I was advised to plead the
20 fifth, to exercise my Fifth Amendment right.

21 Q Now, was there a specific reason that you did not
22 take the stand?

23 A Other than the fact that my attorney, a paid
24 attorney, I felt like I needed to do what she said. She
25 just advised me, for a couple of reasons, she said I

1 seemed real nervous. I had a nervous smile that the jury
2 might not believe what I am saying. And I just went with
3 what she said. My intention was that I am guilty of one
4 of these armed robberies. I need to clear myself on this
5 armed robbery and clarify the fact that I did not commit
6 one of the armed robberies. But once again, I was advised
7 to plead the Fifth, to keep my mouth shut.

8 Q Would I be accurate if I were to say that during the
9 trial, essentially you had some police officers testify.
10 You had the two victims, Mr. Sanchez and Mr. Robinson
11 testify. And then you had the codefendants to testify.
12 Would that be a good summary of the case pretty much?

13 A That's correct, sir.

14 Q From the State's standpoint. Now, would I be correct
15 in asserting that neither of the victims could identify
16 any of the people?

17 A Their testimony, each victim's testimony states they
18 could not identify any assailant.

19 Q But they both testified they were robbed?

20 A Yes sir, that's correct.

21 Q And so the identification as to who did what came
22 from the codefendants, correct?

23 A Yes sir, that's correct.

24 Q And so the codefendants were the people riding around
25 in the vehicle, the Dodge Durango?

1 A That's correct.

2 Q And so everybody in that Dodge Durango, with the
3 exception of you, testified. Is that accurate?

4 A That's correct.

5 Q So at trial, what you are telling me is, your lawyer
6 involved you being the only person who could deny it that
7 was in that vehicle to not testify. Is that your
8 testimony?

9 A That's correct.

10 Q Now, your lawyer also called one witness on your
11 defense, a Cassie Cardoza?

12 A That is my niece.

13 Q That is your niece. And did y'all have any
14 conversations about, from a trial strategy point, you know
15 what I mean when I say rights of the last argument?

16 A As far as the defense, gets a percent of witnesses
17 last, correct?

18 Q Well, the defense, in other words, were you ever
19 advised that the defense gets to argue last and then you
20 don't put up the case. In closing arguments you get to
21 close last if you don't put up a case for the defense. Do
22 you understand that?

23 A I think the Judge instructed on that.

24 Q Okay. But in your case they did put up a witness,
25 just one?

1 A Yes, sir.

2 Q Your niece. And she indicated that she wasn't sure
3 where you were on September the 21st of 2009. That was
4 her testimony, was it not?

5 A That's correct.

6 Q But then you did not testify?

7 A No sir, I didn't.

8 Q So your lawyer gave up the right to last argument to
9 call a witness that had no idea where you were when the
10 crime was committed, correct?

11 A That's correct. She had no idea. Honestly, my
12 sister was suppose to testify and my sister did not show
13 up, my sister was suppose to testify the fact that I live
14 with her. The State was trying to prove that I live with
15 these people, I was going to have my sister to testify
16 that I lived with her. At this point and time I had just
17 got out of prison, I was back and forth between my
18 brothers and my sister. And so really my attorney was
19 like, well, we need someone to say something in your
20 behalf. So she went out, when we was in the courtroom she
21 went out and was like, your sister is not here, who can
22 help you. I was like, me and my family that I live with
23 and so it was her idea, she came back and said, my niece
24 should testify that I live with her. But as far as, we
25 never discussed that until pretty much right then and

1 there, the day of the trial.

2 THE COURT: The purpose of putting the niece up was
3 to testify that you lived with her?

4 A Yes, sir.

5 Q During the testimony wasn't it true that she did end
6 up stating that she didn't know where you were living in
7 September or October?

8 A She told the Court she didn't know nothing about it,
9 she didn't know where I was.

10 Q Okay. But they chose not to call you, you were
11 advised not to testify, being the only person that could
12 give any testimony that would support that you were merely
13 present from the robbery of Freddie Robinson, correct?

14 A Correct.

15 Q Is there anything else that we haven't gone over that
16 you felt like your lawyer did that was inappropriate as
17 the result of your prejudice in your case?

18 A I would like to elaborate on the fact that she did
19 not present, the proposed instructions that she had typed
20 out in my motion in discovery. We had discussed about
21 withdrawing from the scheme of the crime, mere presence at
22 the scene, the scheme of the crime. A lessor included
23 offense, very simple fact that I did not participate on
24 one of these crimes but she did not present these
25 instructions to the jury. But they are in my Rule 5 and I

1 do have these pieces of paper right here where she has
2 them typed up.

3 Q Yes, sir.

4 MS. OLIVE: Your Honor, I would object to him to
5 strike that last testimony because it is not in the
6 application.

7 MR. BROUGH: He alleges ineffective assistance of
8 counsel.

9 THE COURT: Failure to, something about the
10 instructions. I don't see anything, Mr. Brough, do you?

11 MR. BROUGH: Judge, I think that, nothing
12 specifically alleged that in his complaint. I think that
13 really the crux of the testimony though is that, the
14 evidence was failed on a general ineffective assistance of
15 counsel but for would have supported those charges from
16 our standpoint. I think even if she were to present those
17 charges based on the testimony--

18 THE COURT: The charges is supported by the evidence
19 in the trial.

20 MR. BROUGH: Right.

21 THE COURT: Nobody testified that, there was mere
22 presence.

23 MR. BROUGH: Again, I agree. Please answer any of
24 Ms. Olive's questions. Okay.

25 THE COURT: Ms. Olive.

1 MS. OLIVE: Thank you, Your Honor.

2 THE COURT: I am going to overrule your objection, on
3 the last objection. Go ahead.

4 MS. OLIVE: Thank you.

5 CROSS-EXAMINATION

6 By Ms. Olive:

7 Q Mr. Foster, you do admit to robbing at least one of
8 the victim's, correct?

9 A Yes ma'am, Rigoberto Sanchez.

10 Q And but you were in the car at least when Mr.
11 Robinson was robbed?

12 A Yes ma'am, I was.

13 Q And the Judge asked you on the record at your trial
14 if you wanted to testify, did he not?

15 A Yes ma'am, he did.

16 Q Thank you, that is all the questions that I have.

17 MR. BROUGH: Nothing further, Judge. We rest at this
18 point, Your Honor.

19 THE COURT: You may step down. Ms. Olive.

20 MS. OLIVE: Your Honor, the State calls Melinda
21 Butler.

22 MELINDA BUTLER, being
23 first duly sworn, testified as follows:

24 DIRECT EXAMINATION

25 By Ms. Olive:

1 Q Ms. Butler, were you appointed or retained in this
2 case?

3 A I was retained.

4 Q And do you recall at what point you were retained to
5 represent Mr. Foster?

6 A December of 2009, as I recall.

7 Q And do you recall how many times you met with Mr.
8 Foster overall?

9 A Yes, I do. Actually I keep pretty good notes. I met
10 with him eight times at the jail and two times at court.
11 We had, I was actually representing him and I requested a
12 preliminary hearing in the beginning. So we had one
13 preliminary hearing that we went to, from what I remember,
14 my notes reflect that he was transported there. We had
15 another preliminary hearing and he was transported there.
16 So we met both of those times and then we had eight visits
17 where I actually went to the jail and took notes of my
18 visits. And in addition to those eight times I met with
19 his family members which is his mother and his aunt,
20 twelve or thirteen times, in addition to the times that I
21 met with him.

22 Q And about how long did the meetings with him last?

23 A Always more than an hour because I would drive 45 to
24 50 minutes just to make the visit with him. So I would
25 always make sure that we were discussing plenty while we

1 were there.

2 Q And what specific items did you discuss during your
3 meetings?

4 A Well, once we got the discovery, like I said, I
5 represented him through the preliminary and once that was
6 submitted to the Grand Jury and we got the discovery, of
7 course, we went through it. Mr. Foster's case was my
8 biggest case at this time. And so once I got discovery we
9 went, we went through the discovery. It actually took us
10 about three visits just to talk through discovery, three
11 separate visits. And we went detail by detail.

12 Q And did you, during that discovery did you explain
13 the elements of the charges that he was facing and what
14 the State was required to prove?

15 A Yes, absolutely. And as we went through the
16 discovery we realized together that there was a 911 call
17 and we actually, I actually submitted a request to 911 and
18 had that tape submitted to us. In addition to that, there
19 was some discovery that was submitted to us that was not
20 legible. Like it was, where it was copies you just
21 couldn't see it, you can see there was writing but you
22 couldn't make out what it said. So, I went back to the
23 Solicitor and made sure that he gave us some legible
24 copies of that which he did and which probably goes to
25 what Mr. Foster was saying, he got some pages in discovery

1 later which were legible copies.

2 Q And you went over those items with him as well?

3 A Yes, that was very early on too that we got
4 discovery. So we actually, you know, had discovery for a
5 good many months.

6 Q And in reviewing the discovery, speaking with Mr.
7 Foster, what did you tell him concerning the State's case
8 concerning their burden of proving the elements of the
9 charges?

10 A Well, the State's case was pretty compelling and we
11 knew that going in, they wouldn't give him any good offer.
12 He was facing, my recollection was, they gave him an offer
13 of 20, he testified they gave him an offer of 30. But
14 they wouldn't go down on the offer at all. And so, you
15 know, we discussed that but the case had a, it was a
16 compelling case. And he decided, you know, after all the
17 discussions that he wanted to go to trial and I supported
18 his decision.

19 Q And did he, so he discussed with you his version of
20 the facts and what happened?

21 A Yes. And with the mere presence, the jury, it
22 actually was kind of what we hung our hat on because
23 everybody, we knew all the codefendants were saying that
24 they were there, that they were all present so we hung our
25 hat on the fact that Mr. Foster was just merely present.

1 And the Judge did end up charging mere presence at my
2 request. I did not request a withdrawal because the facts
3 did not support that request.

4 Q Did you, as far as any other defenses that were
5 available, did you cover any possible defenses to the
6 charges with him?

7 A Well, we went through, you know, all the aspects that
8 we could of anything that would support. I mean, the fact
9 that the victims couldn't identify any of the folks, we
10 knew that all the way through. And so we discussed that,
11 we also discussed that the codefendants were getting some
12 relief and actually cross-examined the codefendants on the
13 relief that they were getting. One was facing 60 years,
14 the same as Mr. Foster and testified on the stand that he
15 was only going to get 10 years. So, you know, we went
16 through all of that and he understood that. At trial I
17 submitted written request for voir dire, written request
18 to charge the jury, written motions in limine that we went
19 through piece by piece.

20 Q Did you cross-examine all of the codefendants
21 regarding his involvement, his alleged involvement?

22 A Yes. And as to the biased that they were facing were
23 getting a much less sentence by them coming forward to
24 testify.

25 Q And regarding the issue of identification, both of

1 the victims testified in the trial?

2 A They did.

3 Q And did you cross-examine both of them regarding
4 their, the issues of identification?

5 A I did. And the testimony that Mr. Foster read from
6 was my cross-examination, to show that the victim really
7 didn't have a good, didn't know who it was.

8 Q And you cross-examined them regarding, have they
9 given any statements to police prior, during the
10 investigation?

11 A Both of the victims.

12 Q And did you cross-examine them involving the
13 statements?

14 A Yes.

15 Q Why did you call Mr. Foster's niece?

16 A So Mr. Foster is right, his sister was suppose to
17 testify. The State's motive, the State put forth a motive
18 to the jury of Mr. Foster robbed these people because he
19 needed money to pay his rent to Shannon Martin whom he was
20 living with. Well, his sister was going to testify that
21 he was not living with Shannon Martin, that he was living
22 with them. Well, his sister didn't show up to testify and
23 he is right, so Cassie, she was here and she knew and she
24 could testify the exact same thing the sister was, that he
25 was living with them at that time. And that was the

1 reason, was to show that he wasn't needing money for rent,
2 he was living with his family.

3 Q And did she testify to that?

4 A She did, she testified that he was living with his
5 family, with them at this particular time. She testified
6 that he might be gone a day or two and she didn't know
7 exactly where he was on the day of the incident but that
8 he did live with them.

9 Q No further questions.

10 THE COURT: What was his criminal record?

11 A He did have some impeachable record. If I recall
12 correctly it was a prior burglary. At the beginning of
13 the case one of my motions in limine was to determine
14 what, if any, charges, previous convictions that would be
15 used against him if he were to be called as a witness.

16 THE COURT: Mr. Brough.

17 CROSS-EXAMINATION

18 By Mr. Brough:

19 Q Ms. Butler, you said you hung your hat on the mere
20 presence, that being your theory. I am a little confused
21 about something so maybe you can help me out. Cassie
22 Cardoza, you just testified you called her to attack the
23 credibility of the State's case to show that he had motive
24 to rob these people, correct?

25 A Yes.

1 Q But if you are going to mere presence you are going
2 to admit he was in the vehicle with them while they were
3 robbing other folks, correct?

4 A The motive of the robbery, Mr. Foster is saying that
5 he didn't take part in that robbery of Mr. Robinson.

6 Q Ms. Cardozo backed up on you on the stand too about
7 where he was living, didn't she?

8 A She possibly did.

9 Q Do you have a copy of the transcript in front of you?

10 A I don't.

11 Q Let me show you your redirect examination beginning
12 on page 166, line 5.

13 A Ms. Cardozo, I think, was Mr. Foster actually living
14 with you in November?

15 No, I didn't mean to say that.

16 Right. Okay.

17 I was thinking November came from October. I am
18 tripping.

19 Q So she backed up pretty substantially?

20 A No, actually the reason that I redirected her was
21 because I knew that she didn't mean to say that he was
22 with her there in November because he actually went to
23 jail in October. And so that is what she is saying, I
24 didn't mean October. And that is what we thought she was
25 going to say.

1 Q Mr. Foster, he was merely present there, everybody in
2 the vehicle testified in court at trial that he actively
3 participated in both of these robberies, correct?

4 A Yes.

5 Q So, if you are going to argue he was merely present
6 there, you have got the two victims who testified that
7 they were robbed, you have got the four people in the car
8 saying that Mr. Foster was actively participating in the
9 robbery. And essentially you have no evidence at all that
10 he was just merely there, correct?

11 A No, that is not correct. The two victims couldn't
12 identify Mr. Foster. And the three codefendants that
13 testified had reason to testify, were biased witnesses in
14 their testimony because of the sentence--

15 Q -- would it be a more fair and accurate statement
16 actually be that the two victims couldn't identify anyone
17 who robbed them. Wasn't that their testimony at trial?

18 A Yes.

19 Q So, they had no idea who robbed them at all but they
20 know that they were robbed. The testimony about the
21 identification came from the codefendants who all put him
22 as being actively participating in both of these
23 robberies, which he was convicted of both.

24 A I don't recall that all the testimony put him
25 actively there. I do recall that all the codefendants

1 were questioned as to their biased of putting him actively
2 there. They had reason.

3 Q So what you are telling me is you had some
4 inconsistencies that you cross-examined the codefendants on
5 but you didn't have anyone to just say, that he wasn't
6 involved, he was just there. None of them said that,
7 correct?

8 A That's correct.

9 Q And not only testimony, testimony could only have
10 come from Mr. Foster, am I right? The only testimony that
11 could have said, since he was the only other person in the
12 car and like he testified here today, that he was merely
13 there during the Freddie Robinson robbery, did not take
14 any participation, did not act. In fact, actually said
15 not to rob Mr. Robinson. The only thing that would have
16 ever come into evidence is by you calling him?

17 A That is true. Mr. Foster and I discussed me calling
18 him and after giving him all of the risks and the benefits
19 Mr. Foster decided to not testify.

20 Q The risk being that he had a burglary third and petty
21 larceny conviction that was going to come out, is that the
22 risk?

23 A Not just that risk but the risk of his inconsistent
24 stories that would be there. The risk of him coming on
25 the stand and admitting to one robbery when he places

1 himself in the car with these people right before they
2 commit another robbery and he is going to admit to the one
3 but not the other. That is the huge inconsistency.

4 Q So instead it is better for him to have no testimony
5 of merely present, just for one and, than getting
6 convicted of both?

7 A Understanding that Mr. Foster had a case against him
8 that was, he really didn't get a good offer. I mean, it
9 just comes down to that and he had to take a jury trial.
10 And thank God the Judge just gave him 24 years instead of
11 60.

12 Q He didn't get a good offer so he took a jury trial
13 without putting forth any evidence to show that he wasn't
14 going to be at, at least one of the two offenses.

15 A He put forth the best evidence that he could have
16 possibly under the circumstances.

17 Q No further questions.

18 THE COURT: Ms. Olive.

19 MS. OLIVE: Just briefly, Your Honor.

20 REDIRECT EXAMINATION

21 By Ms. Olive:

22 Q Whose decision was it not to testify?

23 A That was Mr. Foster's decision. I can't make that
24 decision for him.

25 Q Thank you. No further questions.

1 MS. OLIVE: The State would rest, Your Honor.

2 THE COURT: Anything further?

3 MR. BROUGH: Nothing further, Your Honor.

4 THE COURT: You may step down, thank you.

5 MS. OLIVE: Your Honor, may Ms. Butler be excused?

6 MR. BROUGH: No objection.

7 THE COURT: She is excused. All right, Counsel, let
8 me hear from you.

9 MR. BROUGH: Thank you, Your Honor. Your Honor, it
10 would be our position that we have shown that Ms. Butler
11 was ineffective, she failed to report the only evidence
12 that Mr. Foster was, in fact, innocent of the robbery of
13 Freddie Robinson. By failing to go forward with that
14 evidence, there was essentially nothing that the jury
15 could have reasonably relied on in order to have him
16 acquitted. Her main reason for going to trial is that she
17 didn't like the offer and while that may be a reason for
18 trying the case, certainly at that trial you have to do
19 what you can to protect your client's best interest. And
20 in this case I feel that she was deficient in doing so in
21 light of the fact that other than cross-examining, the
22 minor inconsistencies between the codefendants there was
23 essentially no overt effort made at all to present any
24 evidence that would actually help Mr. Foster to achieve an
25 acquittal in at least one of these cases going towards the

1 Freddie Robinson robbery under indictment 2010-GS-42-1309.
2 And we would ask for a new trial based on that.

3 THE COURT: We have both heard Mr., the petitioner,
4 Mr. Foster's testimony here a moment ago. And if you were
5 his trial counsel would you want him to take the stand and
6 said, yep, we went out to rob people. We just robbed one
7 and we were riding around looking for another one and I
8 saw this one and my compadres jumped out and robbed him.
9 And I said, he doesn't look worth robbing. And, but I
10 didn't do anything about it and we went on looking for
11 someone else. Would you want that in your case, do you
12 thing that would establish a defense?

13 MR. BROUGH: As to one offense, yes. And the reason
14 I say that is because as much as it is not going to cause
15 a jury to like it, I want to suggest that they are going
16 to hate him when he says that. And I fully understand
17 that. However, having said that, I think his reasoning
18 about the targeting aspect of the crime, as unpopular as
19 it may be makes a lot of sense. When you look at it from
20 that standpoint, I am not going to rob that person because
21 the objective of me robbing someone is to obtain money.
22 This person has nothing so why would I do that. Now, does
23 that make him a popular guy, no.

24 THE COURT: It makes him reprehensible if he is there
25 with people and they are intending to rob folks, he just

1 doesn't have to agree with them on this one particular
2 one. But he does nothing about it.

3 MR. BROUGH: I don't think it makes him reprehensible
4 because he specifically testified that he told them not to
5 do it.

6 THE COURT: You believe there is a reasonable
7 argument otherwise?

8 MR. BROUGH: I think there is an argument otherwise
9 but I think the testimony as stated would support a more
10 practical defense. And what I would suggest further that
11 it would be better off if his counsel worked the case out
12 before ever going to trial. Sometimes I understand that
13 is not possible. However, having said that and having
14 your, if you are in any trial situation you need to
15 present the evidence whether popular or not that can
16 reasonably be expected to potentially acquit your client
17 and not just stand back and rely on some minor
18 inconsistencies dealing, that you were in any trial
19 situation you need to present the evidence, popular or
20 not, that can reasonably be expected to potentially acquit
21 your client knowing full well the outcome.

22 THE COURT: Well, what would she do when the Judge
23 instructed her client as to his rights to testify or not
24 to testify and he said, tell the Court I am not going to
25 testify. What is her position and what can she do.

1 MR. BROUGH: I think the reason he indicated that, as
2 he testified, is that was her advice.

3 THE COURT: Let me hear from you, Ms. Olive.

4 MS. OLIVE: Your Honor, it is the State's position
5 that Mr. Foster failed to show that counsel was
6 ineffective and also failed to show prejudice. Your
7 Honor, Ms. Butler testified that she, she testified she
8 was very prepared for this case. She met with Mr. Foster
9 ten times, I mean in person at least eight times. They
10 went over the discovery ad nauseam, went over defenses
11 that he might have. She testified that, and it is
12 apparent in the record that she cross-examined all of the
13 codefendants, she cross-examined who testified against
14 him, she cross-examined the victims regarding their
15 inability to identify the assailant. Essentially, as I
16 understand the argument, the only thing that could have
17 been done differently would be to put Mr. Foster on the
18 stand to testify. And counsel, Ms. Butler indicated that
19 that would not have been in his favor, she chose, she
20 advised him of his right to testify. The Judge advised of
21 his right to testify. Ms. Butler testified that
22 ultimately it was his decision. And, Your Honor, I don't
23 think, that being said there is no reasonable probability
24 that the outcome would have been different in this case.
25 There is overwhelming evidence. I mean, regardless of

1 whether he had testified, you have got the testimony of
2 all of these codefendants, they did make inconsistent
3 statements. She cross-examined them on that. I don't
4 think there--

5 THE COURT: I am not sure that even if he testified
6 that it would have established a defense after what I hear
7 today. What do you say about that.

8 MS. OLIVE: I am sorry, can you repeat the question,
9 Your Honor.

10 THE COURT: What he said he would have said in court,
11 what his position was, about what they were doing and what
12 they did do. I am not even sure he would have been able
13 to establish a defense.

14 MS. OLIVE: Yes, Your Honor, I agree with that. I
15 think he would have incriminated himself on the armed
16 robbery.

17 THE COURT: On one and maybe two.

18 MS. OLIVE: I mean, he put himself there.

19 THE COURT: Well, I think the only thing that
20 possibly would indicate a deficit in Ms. Butler's defense
21 was not advising him to take the stand. Now, I don't know
22 whether she advised him to take the stand or not. But
23 there was certainly good reasons for her to advise him not
24 to. First of all, his prior record. She explored that.
25 He did have a burglary charge, I think that is what I

1 heard that would have been used to impeach him. And
2 secondly, the story that he had told here today, I am not
3 so sure he, it would be more incriminating than it would
4 than anything else. I don't think that there is any
5 reasonable way that it would have changed the outcome and
6 primarily I don't find that it is, shows any deficiency on
7 her part. And I am going to deny relief. Thank you.

8 MS. OLIVE: Thank you, Your Honor.

9 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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1 CERTIFICATE OF REPORTER

2
3
4 State of South Carolina)
5 County of Newberry)
6
7

8 I, Joy E. Holston, Official Court Reporter for the
9 Eighth Judicial Circuit of the State of South Carolina, do
10 hereby certify that the foregoing is a true, accurate and
11 complete transcript of record of the proceedings had and
12 evidence introduced in the trial of the captioned case,
13 relative to appeal, in the County of Spartanburg, South
14 Carolina on the 10th day of November, 2015.

15 I do further certify that I am neither of kin,
16 counsel nor interest to any party hereto.
17

18 October 19, 2016
19

20 *Joy E. Holston*
21

22 Joy E. Holston, Court Reporter

23 My Commission expires: May 2, 2026
24
25

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE SEVENTH JUDICIAL CIRCUIT
COUNTY OF SPARTANBURG	)	
Bert Wayne Foster, #325398,	)	Case No. 2013-CP-42-3201
Applicant,	)	
v.	)	ORDER OF DISMISSAL
State of South Carolina,	)	
Respondent.	)	

This matter comes before the Court by way of an Application for Post-Conviction Relief filed August 6, 2013. Respondent made a Return on or about August 14, 2014. The Court convened an evidentiary hearing into the matter on November 10, 2015, at the Spartanburg County Courthouse. Applicant was present at the hearing and represented by Christopher Brough, Esquire. Alicia A. Olive, Esquire, of the South Carolina Attorney General's Office, represented Respondent.

Applicant testified on his own behalf at the evidentiary hearing. Applicant's trial counsel, Melinda Butler, Esquire, also testified. The Court had before it a copy of the trial transcript, the records of the Spartanburg County Clerk of Court regarding the subject convictions, Applicant's records from the South Carolina Department of Corrections, the application, and the return. The Court finds as follows:

I. PROCEDURAL HISTORY

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Spartanburg County Clerk of Court. In February 2010, the Spartanburg County Grand Jury indicted Applicant for two counts of armed robbery (2010-GS-42-1308, and -1309). Melinda Butler, Esquire, represented Applicant. On December 15, 2010,

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CLERK

Applicant proceeded to trial before the Honorable Roger L. Couch and a jury. The jury found Applicant guilty as indicted on both charges. Judge Couch sentenced Applicant to imprisonment for consecutive terms of 12 years for each count of armed robbery.

Applicant filed a timely notice of appeal. Katherine H. Hudgins, Esquire, of the Office of Appellate Defense perfected the appeal. The South Carolina Court of Appeals affirmed Applicant's conviction. State v. Foster, Op. No. 2012-UP-485 (S.C. Ct. App. filed August 8, 2012). The Remittitur was returned to the circuit court on August 24, 2012.

II. ALLEGATIONS

In his application, Applicant alleged he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of trial counsel, in that;
 - a. Trial counsel failed to make proper objections,
 - b. Trial counsel failed to investigate,
2. Ineffective Assistance of Appellate Counsel, in that;
 - a. Appellate counsel failed to raise all meritorious issues on appeal;
3. After discovered evidence, in that;
 - a. Witnesses were offered a deal for testimony and lied about it.

At the evidentiary hearing, Applicant proceeded on only the allegations of ineffective assistance of trial counsel for failure to investigate and for advising Applicant not to testify.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court has reviewed the record in its entirety and has heard the testimony and arguments presented at the evidentiary hearing. The Court has further had the opportunity to observe each witness who testified at the hearing, and to closely pass upon their credibility. The Court has weighed the testimony accordingly. Set forth below are the relevant findings of fact and conclusions of law as required by S.C. Code Ann. § 17-27-80.

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 HOPKINS
 BLACKLEY

A. Summary of Testimony

Applicant was charged with two armed robberies that took place on the same night. Applicant testified that he committed one armed robbery, but not the other. He denied involvement with the robbery of the first victim, Freddie Robinson. He stated that he and his co-defendants went to rob the second victim, Rigoberto Sanchez, and on the way, they saw Robinson and his co-defendants decided to rob him. Applicant stated that he was not involved because based on Robinson's appearance, he was not worthy of being robbed. However, Applicant admitted he was in the car when Robinson was robbed. Applicant testified that he and Counsel did not discuss his niece, Cassie Cordoza, testifying until the day of trial because his sister did not show up. Counsel asked him who could testify about where he lived and he told her that Cordoza could.

Melinda Butler ("Counsel") testified that she was retained in December of 2009 and that she met with Applicant at least ten times prior to trial and that those meetings were always longer than an hour. She testified she received full discovery and that she went over discovery with him in three separate visits. She stated at the time she represented Applicant she was able to devote a substantial amount of time to preparing his case. She testified that she discussed with Applicant the elements of the offenses and what the State would be required to prove at trial. She discussed with him his version of the facts and the legal concept of "the hand-of-one is the hand-of-all" and the defense of mere presence. She testified she and Applicant discussed all aspects of the defense, including the identification issues and the fact that Applicant's co-defendants were getting deals in exchange for their testimony. Counsel requested a mere presence instruction at the trial. Both victims and all of Applicant's co-defendants testified against him. Trial counsel cross-examined both victims about their inability to positively identify Applicant as an assailant.

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STATE OF TEXAS
CLERK OF COURT
COUNTY CLERK
J. H. P. E. B. A. C. K. E. Y.

Counsel also cross-examined Officer Bobbie Duncan regarding a 9-1-1 call in which victim Sanchez reported he had been robbed by four black males, though Applicant is a white male. Counsel testified she called Applicant's niece at trial because Counsel expected his sister to testify, but she did not appear. She testified the State's theory was that Applicant participated in the robberies because he needed rent money. Counsel testified she needed the niece's testimony to show lack of motive because she could testify that Applicant was living with them and did not need money for rent.

Applicant's co-defendants testified that he actively participated in the robberies. The victims testified that the assailants were in a dark-colored Dodge Durango. Applicant testified he was riding around with the co-defendants in a Dodge Durango that night. Furthermore he did not deny that he was involved in the robbery of Sanchez. Counsel characterized the State's case against Applicant as "compelling." She testified it was his decision to go to trial. She testified she thought the most viable defense was mere presence and that the judge did charge the jury on the concept of mere presence. Counsel stated she did not think Applicant should testify at trial because he had a criminal record that the State intended to impeach him with. She testified she discussed with Applicant the risks and benefits of testifying, and it was ultimately his decision not to testify.

B. Ineffective Assistance of Trial Counsel

In this post-conviction relief action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 442, 334 S.E.2d 813, 814 (1985) (citing Griffin v. Martin, 278 S.C. 620, 300 S.E.2d 482 (1983)). Where the application alleges ineffective assistance of counsel as a ground for relief, the applicant must prove counsel's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon

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 COURT REPORTER

as having produced a just result." Id. at 442, 334 S.E.2d at 814 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

The proper measure of performance is whether counsel provided representation within the range of competence required in criminal cases. Id. (citing Strickland, 466 U.S. at 687; Turner v. Bass, 753 F.2d 342 (4th Cir. 1985); Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977)). The Court presumes counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption in order to receive relief. Cherry v. State, 300 S.C. 115, 118, 386 S.E.2d 624, 625 (1989).

The Court uses a two-pronged test in evaluating allegations of ineffective assistance of counsel. Id. at 117, 386 S.E.2d at 625. First, Applicant must prove counsel's performance was deficient. Id. Under this prong, the Court measures counsel's performance by its "reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688). Second, any deficient performance must have prejudiced Applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 117-18, 386 S.E.2d at 625.

Failure to Investigate

Applicant alleged that Counsel failed to adequately investigate or prepare for trial. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation[.]" Edwards v. State, 392 S.C. 449, 456, 710 S.E.2d 60, 64 (2011). This Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" Strickland, 466 U.S. at 689. This Court finds Applicant has failed to satisfy his burden of proving either deficiency or prejudice as to this allegation.

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M. HOSE BLACKLEY

Here, Counsel reviewed all the evidence in the case. She met with Applicant at least ten times for at least an hour each visit. In these meetings, she reviewed all discovery with Applicant, *ad nauseam*, and fully discussed any possible defenses with him. Such an investigation was reasonable under the circumstances, particularly where Applicant never denied that he was in the vehicle with the co-defendants during both robberies. *See Edwards*, 392 S.C. at 457, 710 S.E.2d at 65 (citing *Daniels v. State*, 676 S.E.2d 13 (Ga. 2009)). To the extent there were inconsistencies with the victims' and co-defendants' testimony at trial, Counsel challenged those witnesses on those inconsistencies in cross-examination. *See Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (*per curiam*) ("[T]he Confrontation Clause guarantees an opportunity for effective cross examination, not cross examination that is effective in whatever way, and to whatever extent, the defense might wish" (emphasis in original)). She testified the only viable defense was mere presence. Applicant has failed to produce any testimony or evidence of any other available defenses. *See Palacio v. State*, 333 S.C. 506, 514, 511 S.E.2d 62, 67 (1999) (no deficiency where "it would have been futile for Attorney to have made such arguments"). This Court finds Counsel conducted a proper investigation, adequately conferred with Applicant, and was thoroughly competent in her representation. Applicant has failed to show any deficiency in Counsel's performance.

This Court further finds Counsel provided competent representation in light of the overwhelming evidence against Applicant, and Applicant has failed to show that but for the alleged error of Counsel, he would not have been convicted. *See Harris v. State*, 377 S.C. 66, 79, 659 S.E.2d 140, 147 (2008) (holding applicant cannot prove prejudice where there is overwhelming evidence of guilt). Counsel testified the State's case was compelling and this Court likewise finds there was overwhelming evidence of Applicant's guilt. Both victims and all

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M. HOPE BRADLEY
CLERK OF COURT

co-defendants testified against Applicant. Both of the victims testified that the assailants were in a dark-colored Dodge Durango and that one of the assailants had his face covered. Counsel adequately cross-examined both the victims and the co-defendants. Applicant has failed to produce evidence of what information Counsel failed to uncover, or how any such information would have assisted in the defense. See Jackson v. State, 329 S.C. 345, 353-54, 495 S.E.2d 768, 772 (1998) ("Respondent failed to present any evidence of what counsel could have discovered or what other defenses respondent would have requested counsel pursue had counsel more fully prepared for the trial."). Accordingly, this Court finds Applicant has failed to show that but for the alleged error, he would not have been convicted. Applicant has failed to show either deficiency or prejudice with regard to this allegation and it is therefore denied and dismissed.

Advice Not to Testify

Counsel stated she advised Applicant not to testify because she did not think it was in his best interest. She made a pretrial motion to settle the record as to Applicant's prior convictions, and the State indicated it intended to impeach him on a 2007 conviction for third-degree burglary. The trial judge also advised Applicant that if he chose to testify, any convictions he had involving dishonesty or false statements or convictions for crimes which were punishable by imprisonment for more than one year, could be used against him and that the judge would make the determination of the admissibility of that record. Counsel testified the only viable defense was mere presence. The only evidence of mere presence would have been Applicant's testimony; however, Counsel testified she did not believe it was in his best interest to testify. See Stokes v. State, 308 S.C. 546, 548, 419 S.E.2d 778, 779 (1992) ("Where, as here, counsel articulates a valid reason for employing certain strategy, such conduct will not be deemed ineffective assistance of counsel." (citing Whitehead v. State, 308 S.C. 119, 417 S.E.2d 529 (1992))). This

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Court finds that Applicant has failed to show Counsel's conduct in advising him not to testify was unreasonable under prevailing professional norms. Therefore, Applicant has failed to satisfy his burden of proving deficiency as to this allegation.

This Court also finds Applicant has failed to show that this alleged deficiency prejudiced him. Based on Applicant's testimony at the PCR hearing and in light of the overwhelming evidence against him, this Court is not convinced his testimony would have assisted him in his defense. See Harris, 377 S.C. at 79, 659 S.E.2d at 147 (holding applicant cannot prove prejudice where there is overwhelming evidence of guilt). Applicant only denied that he participated in one of the robberies and did not deny that he was in the vehicle during both. Therefore, this Court finds that Applicant has failed to show there is a reasonable probability that but for Counsel's advice not to testify, he would not have been convicted. Accordingly, this Court finds Applicant has failed to show any deficiency in Counsel's performance or resulting prejudice. Therefore, this allegation is denied and dismissed.

C. All Other Allegations

As to any and all allegations that were raised in the application or at the hearing in this matter and not specifically addressed in this order, the Court finds Applicant failed to present any evidence regarding such allegations. Accordingly, the Court finds Applicant has abandoned any such allegations.

IV. CONCLUSION

Based on the foregoing, the Court finds and concludes Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

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M. HOPE BLACKLEY
CLERK

The Court notes Applicant must file and serve a notice of appeal within thirty (30) days from PCR counsel's receipt of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to Austin v. State, 305 S.C. 453, 409 S.E.2d 395 (1991), Applicant has a right to appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if Applicant wishes to seek appellate review, PCR counsel must serve and file a notice of appeal on Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

IT IS THEREFORE ORDERED THAT:

1. The Application for Post-Conviction Relief is **denied and dismissed with prejudice**; and
2. Applicant must be remanded to the custody of the Department of Corrections to complete service of his sentence.

AND IT IS SO ORDERED this 15 day of July, 2016.



THE HONORABLE LARRY B. HYMAN, JR.
Presiding Judge
Seventh Judicial Circuit

Coway, South Carolina

2016 JUL 22 AM 9:28
M. HOPE BLACHLEY

WITNESSES

Spartanburg County Sheriff's Office

1. SENTENCE MADE ☒

2. REPORT ENDED ☒

3. CARD PULLED ☒

4. INDEXED ☒

5. CHECKED WARRANT NUMBER ☒

6. CHECKED SIGNATURE ☒

7. ASSESSMENT AND FINE CARD MADE ☒

M116556

8. TRAFFIC VIOLATION COPY ☒

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 2/18/10

VERDICT

Guilty

Foreperson of Petit Jury

Date:

DOCKET NO

10-GS-42-1308

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

FEB 22 2010

TERM

THE STATE
VS.

Bert Wayne Foster

Indictment for

ARMED ROBBERY

SC Code: 16-11-330 (A)

CDR Code: 139

Class FEL/A

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2010 MAR -4 AM 11:38

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Computer

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF SPARTANBURG)

At a Court of General Sessions, convened on FEB 18 2010, the Grand Jurors of Spartanburg County present upon their oath:

ARMED ROBBERY

That Bert Wayne Foster did in Spartanburg County on or about September 21, 2009, while armed with a pistol, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, feloniously take from the person or presence of Rigoberto Sanchez, by means of force, violence, and/or intimidation, goods or monies of Rigoberto Sanchez, such goods or monies being described as follows: keys, cell phone and US currency, with intent to deprive the owner permanently of such property, in violation of §16-11-330 (A), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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


ASSISTANT SOLICITOR

WITNESSES

Spartanburg County Sheriff's Office

1. SENTENCE MADE ☒

2. REPORT ENDED

3. CARD PULLED ☒

4. INDEXED ☒

ARREST WARRANT NUMBER

5. CHECKED WARRANTS ☒

6. CHECKED SIGNATURE ☒

7. ASSESSMENT AND
M116542 FINE CARD MADE

8. TRAFFIC VIOLATION COPY ☒

ACTION OF GRAND JURY

Foreperson of Grand Jury

Date: 2/18/10

VERDICT

Foreperson of Petit Jury

Date:

DOCKET NO.

10-GS-42-1309

The State of South Carolina

County of Spartanburg

Trey Gowdy, Solicitor

COURT OF GENERAL SESSIONS

FEB 22 2010

TERM

THE STATE
vs.

Bert Wayne Foster

Indictment for

ARMED ROBBERY

SC Code: 16-11-330 (A)

CDR Code: 139

Class FEL/A

FILED
CLERK OF COURT
SPARTANBURG COUNTY

2010 MAR -4 AM 11:38

STATE OF SOUTH CAROLINA)

INDICTMENT

COUNTY OF SPARTANBURG)

FEB 18 2010

At a Court of General Sessions, convened on _____ the Grand

Jurors of Spartanburg County present upon their oath:

ARMED ROBBERY

That Bert Wayne Foster did in Spartanburg County on or about September 21, 2009, while armed with a pistol, or other deadly weapon, or while alleging, either by action or words, he was armed while using a representation of a deadly weapon or any object which a person present during the commission of the robbery reasonably believed to be a deadly weapon, feloniously take from the person or presence of Freddie Robinson, Jr., by means of force, violence, and/or intimidation, goods or monies of Freddie Robinson, Jr., such goods or monies being described as follows: beer, keys, cell phone and US currency, with intent to deprive the owner permanently of such property, in violation of §16-11-330 (A), *THE CODE OF LAWS OF SOUTH CAROLINA*, (1976), as amended.

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


ASSISTANT SOLICITOR