

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Lexington County
R. Knox McMahon, Circuit Court Judge

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Opinion No. 4984 (S.C. Ct. App. filed 6/6/2012)

S.C. Supreme Court

09-GS-32-05027

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

PETITIONER.

APPELLATE CASE NO. 2012-213149

APPENDIX

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**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Bennie Golston, Appellant.

Appellate Case No. 2009-127766

Appeal From Lexington County
R. Knox McMahon, Circuit Court Judge

Published Opinion No. 4984
Heard May 13, 2012 – Filed June 6, 2012

AFFIRMED

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Respondent.

FEW, C.J.: Bennie Golston appeals his conviction for criminal domestic violence of a high and aggravated nature (CDVHAN). His primary contention on appeal is

that the trial court erred in declining to charge the jury on criminal domestic violence (CDV) as a lesser-included offense. We affirm.

I. Facts and Procedural History

Golston and the victim lived together "off and on" for approximately five years. On the morning of March 22, 2008, a neighbor found the victim lying on a mattress in her house. Her breathing was shallow and her face was so swollen that she could not open her eyes. The neighbor called 911, and deputies and paramedics came to the victim's house. According to the deputies who responded to the scene, the victim told them Golston attacked her the previous night using his fists, a log, and a hatchet. The victim's adult son also came to her house. Her face was so swollen that he did not recognize her. The son testified:

I went into the house, went to the back, and I saw my momma laying there. That was my momma but that wasn't my momma. I wasn't prepared for that. I worked at Rocket Rescue¹ for about two years, and I've seen wrecks with fatalities. I've never seen anybody's face swollen like that. If she hadn't talked, I wouldn't have known that was my momma.

The paramedics drove the victim to a hospital, where doctors ordered a CAT scan and a blood test for internal trauma. Although the CAT scan revealed no bone fractures and the blood test results were normal, a nurse testified "the doctor documented that she was so swollen he couldn't do the type of exam that he wanted to do to make sure that she could have vision." The victim left the hospital that night with her children. Over the next few days, she continued to have difficulty breathing and could not feed or bathe herself. The swelling continued to prevent her from opening both of her eyes. She was able to open her right eye after four or five days, but she could not open her left eye for about a week and a half. When she finally was able to open her eyes and doctors examined them, she began wearing glasses for the first time.

Golston was indicted and tried for CDVHAN. At trial, the State and Golston presented conflicting accounts of the incident. The victim testified Golston came

¹ It is not clear from the record what the son meant by "Rocket Rescue," but it appears the phrase is a colloquialism for emergency medical services companies.

home between 11:00 p.m. and midnight, smelling of alcohol, and told her he should beat her up for allowing another man inside "our home" earlier that day.² Golston hit her "many, many, many times" in the face with his fists. She managed to get outside to her car, but he pulled her out of the car before she could start it. As she lay on the ground, Golston straddled her and continued beating her in the face. As he hit her, Golston said that she disrespected him by letting another man into the house and that he should kill her. She thought she was going to die. Golston then raised a hatchet over the victim, brought it down slowly, and rubbed the blade on her skin. While he rubbed the blade on her, he again said he should kill her. She begged him not to strike her with the hatchet. He raised the hatchet over his head, but then dropped it and walked away. The victim could not stand up and asked Golston for help. He started to pick her up, but then shoved her back to the ground and left.

Golston testified to a different version of events. According to his testimony, when he arrived at the house, the victim met him outside and was furious. She said "I'm going" and began walking off. As she walked away, Golston followed her and said, "Where you going? You ain't going nowhere." Without provocation, the victim then turned around, jumped on him, and clawed his face with her fingernails, cutting his face. He testified, "I slapped her, both sides of the face" and "she fell." He then went into the house, washed his face, and retrieved his hatchet. When he went back outside, she asked him for help getting up. He placed the hatchet on her car, helped her walk back to the house, and left.

Golston requested a jury charge on CDV as a lesser-included offense of CDVHAN.³ He also requested a charge on self-defense. The trial court found that depending on whether the jury believed the State or Golston, he either was guilty of CDVHAN or acted in self-defense and thus was not guilty. The trial court therefore charged the jury on self-defense but not on CDV. The jury found Golston guilty, and the trial court sentenced him to ten years in prison.

² The other man was a longtime friend of the victim. He and his wife had helped the victim move furniture that day.

³ Golston also requested a charge on simple assault and battery, but does not challenge on appeal the trial court's decision not to charge it.

II. CDV as a Lesser-Included Offense of CDVHAN

A person is guilty of CDV when the State proves he either "cause[d] physical harm or injury to [his] own household member," or "offer[ed] or attempt[ed] to cause physical harm or injury to [his] own household member with apparent present ability under circumstances reasonably creating fear of imminent peril." S.C. Code Ann. § 16-25-20(A), (B) (Supp. 2011). A person is guilty of CDVHAN when, in addition to proving CDV, the State proves one of the aggravating circumstances set forth in subsection 16-25-65(A) of the Code, such as that the defendant's conduct "result[ed] in serious bodily injury to the victim." § 16-25-65(A)(1) (Supp. 2011).

In most prosecutions for CDVHAN, there will be evidence the defendant committed acts which constitute only CDV in addition to acts which constitute CDVHAN. In this case, for example, Golston's statement to the victim "you ain't going nowhere" and his admitted "slap[ping] her face" could be found by a jury to amount only to CDV and not CDVHAN. However, the mere existence of evidence that Golston committed these acts in addition to other acts which could constitute CDVHAN, such as beating the victim with his fists so severely that her own son could not recognize her and she could not open one of her eyes for ten days, does not warrant a jury charge on simple CDV. Rather, to warrant a jury charge on the lesser offense, the evidence viewed as a whole must be such that the jury could conclude the defendant is guilty of the lesser offense *instead of* the indicted offense. *State v. Drayton*, 293 S.C. 417, 428, 361 S.E.2d 329, 335 (1987) ("A trial judge is required to charge the jury on a lesser included offense if there is evidence from which it could be inferred the lesser, rather than the greater, offense was committed."). In other words, the existence of evidence that Golston committed simple CDV in addition to CDVHAN does not warrant the charge. There must be evidence from which the jury could conclude the defendant committed only the lesser offense. *See State v. Brown*, 269 S.C. 491, 495-96, 238 S.E.2d 174, 176 (1977) ("The trial judge committed no error in refusing to charge simple assault and battery since there was no evidence tending to show appellant was only guilty of the lesser offense.").

Therefore, the task of the trial court in deciding whether to charge the lesser offense, and of this court reviewing that decision on appeal, is to examine the record to determine if there is evidence upon which the jury could find the

defendant was guilty of the lesser offense, but not guilty of the greater offense.⁴ In this case, the jury could have found Golston not guilty of any offense if it determined the State failed to prove he was the person who assaulted the victim, or failed to disprove at least one element of self-defense.⁵ It is also possible the jury could have determined Golston committed some act which constituted CDV. However, there is no evidence in the record that anyone else caused injury to the victim. Therefore, if the State proved Golston committed CDV, then he was necessarily the person whose attack caused all of the victim's injuries. There is no evidence in the record upon which the jury could have found that those injuries were not "serious bodily injur[ies]" under subsection 16-25-65(A)(1). Under these circumstances, it was not possible for the jury to find Golston guilty of CDV but not guilty of CDVHAN.

Golston makes several arguments in support of his position that the charge should have been given. First, he argues simply that whether the victim's injuries were "serious" under subsection 16-25-65(A)(1) is a question of fact, and if the jury found the injuries were not serious, he could be guilty only of CDV. In support of this argument, Golston points out the phrase "serious bodily injury" is not defined in the statute,⁶ indicating the Legislature's intent that the question be decided by a

⁴ In making this inquiry, we are mindful that Golston had no burden of proof. However, we are not permitted to speculate that the jury might not have believed some of the evidence that was presented. See *State v. Franks*, 376 S.C. 621, 624, 658 S.E.2d 104, 106 (Ct. App. 2008) ("The mere contention that the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement that some evidence tend to show the defendant was guilty of only the lesser offense.").

⁵ As to the State's burden to disprove self-defense, see *State v. Bixby*, 388 S.C. 528, 553-54, 698 S.E.2d 572, 585-86 (2010) (stating self-defense consists of four elements, and when a defendant raises that defense, the State bears the burden of disproving at least one of the elements beyond a reasonable doubt).

⁶ "Serious bodily injury" is defined in another section of the Code as "a physical condition which creates a substantial risk of death, serious personal disfigurement, or protracted loss or impairment of the function of a bodily member or organ." S.C. Code Ann. § 23-31-400(A)(2) (2007). We do not decide whether that definition applies to subsection 16-25-65(A)(1). However, even if we decided it did, we do not believe there is any evidence in the record that the victim's injuries

jury. We agree there will be many instances in which the question is one for the jury. However, just as in situations where minor injuries cannot possibly be found by a jury to be serious, and therefore the defendant cannot be guilty of CDVHAN, we find the victim's injuries in this case cannot possibly be found not to be serious. The only evidence in the record is that the blows to the victim's face caused swelling so severe that her son could not recognize her, she had difficulty breathing and feeding herself for several days, and she could not open one of her eyes for ten days. The doctors were so concerned by the severity of the injuries to her face that they ordered a CAT scan and testing for internal trauma. The beating caused such severe swelling that doctors were initially unable to examine her eyes, but when they could, they found permanent injury in that she had to wear glasses for the first time. We disagree with Golston that a jury could possibly find these injuries were not serious.

Golston also argues the jury could have found the State failed to prove two other aggravating circumstances: "an assault and battery which involves the use of a deadly weapon" under subsection 16-25-65(A)(1), and "an assault . . . which would reasonably cause a person to fear imminent serious bodily injury or death" under subsection 16-25-65(A)(2). Additionally, as to the serious bodily injury aggravating circumstance, Golston argues the victim did not suffer any broken bones, she did not permanently lose her eyesight, and there was no evidence she sustained cuts or required stitches. We find it unnecessary to address these arguments because, as we have explained, the only evidence in the record is that the injuries the victim did sustain were serious, and thus the State necessarily proved at least one aggravating circumstance—serious bodily injury. The fact that there may be conflicting evidence as to other aggravating circumstances, or that there may be other serious bodily injuries the victim did not sustain, does not affect the existence of some serious bodily injury, and therefore the necessity that, on these facts, Golston was either not guilty or guilty of CDVHAN.

Because there is no evidence to support a conclusion that the victim did not suffer "serious bodily injury," it was not possible for the jury to find Golston guilty of CDV instead of CDVHAN. The trial court properly refused to charge CDV.

do not meet that definition, as she suffered temporary serious disfigurement to her face, protracted loss of the use of her eyes from the swelling, and permanent impairment of vision.

III. Other Issues

Golston also argues the trial court erred in rejecting his challenge to the sufficiency of his indictment and in denying his motion to suppress evidence of the hatchet deputies found in his house while executing a warrant for his arrest. We disagree and affirm pursuant to Rule 220(b)(1), SCACR, and the following authorities:

As to the challenge to the sufficiency of the indictment: *Evans v. State*, 363 S.C. 495, 508, 611 S.E.2d 510, 517 (2005) (stating the primary purposes of an indictment are to apprise the defendant "of the elements of the offense and to allow him to decide whether to plead guilty or stand trial, and to enable the circuit court to know what judgment to pronounce if the defendant is convicted").

As to the motion to suppress: *State v. Loftin*, 276 S.C. 48, 51, 275 S.E.2d 575, 576 (1981) ("A valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence 'when there is reason to believe the suspect is within.'" (quoting *Payton v. New York*, 445 U.S. 573, 603 (1980))); *United States v. Green*, 599 F.3d 360, 375-76 (4th Cir. 2010) ("Where law enforcement officers possess an arrest warrant and probable cause to believe a suspect is in his home, the officers may enter and search anywhere in that residence in which the suspect might be found.") (citing *Maryland v. Buie*, 494 U.S. 325, 332-33 (1990)); *State v. Morris*, 395 S.C. 600, 605, 720 S.E.2d 468, 471 (Ct. App. 2011) (stating on appeal of the denial of a motion to suppress, this court reviews a trial court's legal conclusions for clear error and factual findings under the any-evidence standard).

IV. Conclusion

We find there is no evidence in the record upon which the jury could have found Golston committed CDV instead of CDVHAN, and therefore the trial court properly refused to charge CDV as a lesser-included offense. We affirm.

AFFIRMED.

HUFF and SHORT, JJ., concur.

THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

Opinion No. 4984

PETITION FOR REHEARING

The Court of Appeals affirmed the above named appellant's conviction and sentence on June 6, 2012. In support of this petition for rehearing, which is being submitted on today's date pursuant to Rules 221 and 224 of the South Carolina Appellate Court Rules, appellant submits the following:

Golston argued three issues on appeal: (1) the trial court erred in denying appellant's motion to proceed solely on a charge of criminal domestic violence (CDV) instead of criminal domestic violence of a high and aggravated nature (CDVHAN) because the language of the indictment was insufficient for CDVHAN but described the charge of CDV as contained in S.C. Code Section 16-25-20; (2) the trial court erred in admitting a hatchet which was seized from the

residence of appellant in violation of his Fourth Amendment rights because the officers did not have a search warrant; (3) the trial court erred in refusing to charge the jury on the lesser included charge of CDV when there was evidence of CDV,

The Court of Appeals affirmed the trial court on the three issues. On Issue One, the Court of Appeals held that the primary purpose of the indictment was to apprise the defendant of the elements of the offense, and to decide whether to plead guilty or stand trial. On Issue Two, the Court ruled that a valid arrest warrant grants the police the limited authority to enter a suspect's residence when the suspect is within. On Issue three, the Court held that because there was no evidence to support a conclusion that the victim did not suffer "serious bodily injury," it was not possible for the jury to find Golston guilty of CDV instead of CDVHAN, and that the trial court properly refused to charge CDV.

The Court of Appeals misapprehended the issues.

ISSUE ONE: On March 22, 2008, a neighbor found the victim, Mrs. Johnson, lying on a mattress in the bedroom with injuries to her face, and her eyes were swollen shut. R. 17, ll. 8 – 25; R. 18, ll. 1 – 25; R. 19, ll. 1 – 15.

Ms. Jones called 911. When the police arrived, they asked Ms. Johnson what happened. She told them that "Bennie" beat her when they had an argument the night before. R. 17, ll. 1 – 22.

Ms. Johnson testified that she and Golston had been in a relationship about five years, and that he stayed with her "off and on." Sometimes he stayed the entire week and other times he would stay maybe two nights at her house. He had some personal belongings there. R. 77, ll. 10 – 25; R. 78, ll. 1 – 25; R. 79, ll. 1 – 25.

On March 22, 2008, Ms. Johnson had a man and his wife who were friends of hers do some work on the house, since she was moving her mother's furniture into her house. R. 80, ll. 1 – 25. She said that Golston became jealous of the man. R. 81, ll. 1 – 25; R. 82, ll. 1 – 25. That night,

she said that Golston was drinking and did not know what he was doing when he started hitting her with his fists. R. 83, ll. 1 – 25; R. 84, ll. 1 – 25; R. 85, ll. 1 – 25. She said he did not hit her with a hatchet but rubbed the steel over her skin. R. 85, ll. 6 – 15. She managed to get back into the house when he left. She went to sleep. She awoke when her neighbor, Gail Jones, came in. R. 86, ll. 1 – 25; R. 87, ll. 1 – 25; R. 88, ll. 1 – 25.

During part of her testimony, Ms. Johnson admitted that that she talked to the police the morning of March 22, 2008, but that she did not remember telling them that no weapons were used in the assault on her. R. 175, ll. 16 – 25; R. 176, ll. 1 – 25; R. 177, ll. 1 – 16.

Gail Jones testified that she was in Ms. Johnson's bedroom with her when the police questioned Ms. Johnson. Ms. Jones told the court that Ms. Johnson told the police approximately three times that no weapons were used against her in the attack. R. 178, ll. 11 – 25; R. 179, ll. 1 – 9.

Deputy Kevin Blake testified that he responded to the call along with Deputy Michael Merckle. He said that Ms. Johnson was hit with a piece of firewood and he found a piece of firewood with hair on it at the residence. However, he did not have an analysis done on the hair. R. 35, ll. 4 – 25; R. 36, ll. 1 – 25; R. 37, ll. 1 – 25; R. 38, ll. 1 – 25; R. 39, l. 1 – 11; R. 126, ll. 15 – 25; R. 127, ll. 1 – 2.

After the police were called, Ms. Johnson was taken to the trauma center at Palmetto Richland Hospital. R. 89, l. 1 – 25; R. 90, ll. 1 – 25. Jennifer Watson, the emergency room nurse testified that Ms. Johnson was alert and could communicate when she arrived. The blood work was normal; the C.A.T. scans showed no fractures. She testified that Ms. Johnson had no broken bones, although there was a large amount of swelling and that her eyes were swollen shut. R. 148, ll. 1 – 25; R. 149, ll. 1 – 29; R. 150, ll. 1 – 24. She spent a few hours at the ER during the day and was discharged. R. 150, ll. 25; R. 151, ll. 1 – 12.

Bennie Golston said that the night of the incident, Ms. Johnson became furious with him, and then she was leaving. When he told her to stay, she turned, jumped on him, and began clawing him in the face. She clawed him on both sides of his nose and cut his lip all the way through. He admitted that he slapped her, and she fell. He went into the house and got a hatchet. When he got outside, she was talking to him so he knew she was okay. He put the hatchet on the car and left. R. 180, ll. 16 – 25; R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 25; R. 185, ll. 1 – 25; R. 186, ll. 1 – 25; R. 187, ll. 1 – 25; R. 188, ll. 1 – 11.

Defense counsel made a pretrial motion, before the jury was sworn, that the language of the indictment was insufficient for the charge of CDVHAN, but was sufficient for CDV, and that appellant was prepared to go forward on the CDV. He explained that the language in the indictment was the language of Section 16-25-20(a)(1) which was the language for CDV. He argued that the statute for CDVHAN in Section 16-25-65 included more elements for high and aggravated than the CDV language. R. 2, ll. 24 – 25; R. 3, ll. 1 – 25; R. 4, ll. 1 – 25.

The assistant solicitor argued that S.C. Code Section 16-25-65 was referenced in the body of the indictment, and that appellant knew what he was being charged with. R. 5, ll. 1 – 25.

Defense counsel argued that the CDVHAN statute used the terms such as “the use of a deadly weapon”, and “serious bodily injury,” and “fear of death or serious bodily injury.” This language was not in the indictment. R. 35, ll. 1 – 19.

The judge cited the cases of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) and State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), which basically held that “an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.” He said the court must look at the indictment in view of all the surrounding circumstances. R. 6, ll. 24 – 25; R. 7, ll. 1 – 25.

The judge continued by stating that the indictment included some language of the CDV statute 16-25-20, but it also included the statute number for CDVHAN of 16-25-65. And, he continued, that 16-25-65 referred back to 16-25-20 which made it part of 16-25-65. He denied the motion. R. 8, ll. 1 – 25; R. 9, ll. 1 – 25.

Section 16-25-20 provides:

(A) It is unlawful to: (1) cause physical harm or injury to a person's own household member; or (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

Indictment 2009-GS-32-05027, which charged Golston with CDVHAN, read:

At a court of General Sessions, convened on May 2009, the Grand Jurors of Lexington County present upon their oath: That Bennie Golston did in Lexington County, South Carolina on or about March 22, 2008, (1) cause physical harm or injury to a family or household member, and/or (2) offer or attempt to cause physical harm or injury to a family or household member with apparent present ability under circumstances reasonably creating fear of imminent peril, namely Myrtle Johnson, by striking the victim an undetermined amount of times with closed fists and a wooden log approximately 18" in length and 3" in diameter and used a hatchet to rub on the victim's arms and threaten her, in violation of Section 16-25-65 of South Carolina Code of Laws (1976) as amended.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Supreme Court held that in determining whether an indictment meets the sufficiency standard, the court must look at the

indictment with a practical eye in view of all the surrounding circumstances. If an objection to an indictment to an indictment is timely made, the circuit court should judge the sufficiency of the indictment by determining whether: (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Id.; Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005).

An indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime, or so plainly that the nature of the offense charged may be easily understood. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006).

The trial judge cited the case of State v. McCloud, 354 S.C. 40, 579 S.E.2d 534 (Ct. App. 2003), where the defendant had argued that the indictment failed to specify circumstances for CDVHAN. It cited the statute just as it did in Golston's case. The body of the indictment in McCloud read as follows: "That Douglas Edward McCloud did in Fairfield County on or about June 16, 2000 commit an act of violence against Kernisha L. Golden, by striking her in the face with his closed fist, also hit her in the head and pulled her hair and scratched her neck." The Supreme Court held that the averments in the indictment were sufficient to notify McCloud that he as charged with causing serious bodily injury to the victim.

McCloud, *supra*, is distinguished from Golston's case because Golston's indictment contained the exact language for simple CDV from Section 16-25-20. Then it included other descriptions which could fit into the CDV statute. However, Golston's indictment did not contain all of the elements for CDVHAN as listed in 16-25-65. The indictment did not include the words "the use of a deadly weapon" and did not specify "serious bodily injury." The indictment in McCloud did state that he committed an "act of violence." Although Golston's indictment described a "log,"

this did not necessarily mean a deadly weapon in the typical sense especially without "serious bodily injury" being mentioned.

The Court of Appeals erred in finding that the indictment was sufficient as the trial judge stated that the indictment contained language of both the CDV statute and the CDVHAN statute. This was confusing to Golston and the jury.

ISSUE TWO: Officer Michael Merckle and Officer Kevin Blake testified they went together to look for Golston. Officer Merckle said they received word that Golston was on the porch of a neighbor. He was not there when they arrived so they called the K-9 tracking dogs. The dog led them to Golston's house. R. 19, ll. 5 – 25; R. 20, ll. 1 – 25.

Officer Merckle described it as an "abandoned house." He said the house was completely dilapidated with no power, no water, and all the windows were broken out. He said the interior was so "hazardous" that they would not take the dog in for fear he would be hurt. He did not believe anyone lived there. R. 21, ll. 1 – 25.

Officer Merckle at first said they thought Golston might be hiding in the house. However, he admitted that he did not know if Golston would actually be in the house. R. 31, ll. 1 – 22.

Officer Kevin Blake testified that he obtained an arrest warrant for Golston after they talked to Ms. Johnson. On his way back to the incident location with the warrant, he heard the call that Golston was seen in the area. They went to Golston's house to serve the arrest warrant. R. 58, ll. 1 – 25; R. 59, ll. 1 – 25; R. 60, ll. 1 – 25; R. 61, ll. 1 – 8.

The two officers went through the house looking for Golston but did not find him there. They looked where they thought a person might hide. Officer Merckle looked in between two mattresses stacked on top of each other because he said he had found people hiding between mattresses. R. 22, ll. 1 – 25; R. 23, ll. 1 – 25; R. 24, ll. 1 – 5. However, he testified on cross

examination that the mattresses were flat on the floor, and the mattress was not "humped" up at all. There was no lump in the mattress. R. 32, ll. 1 – 15.

When he lifted the mattress, Officer Merckle found a hatchet which he took into evidence as he thought this might be the hatchet the victim described as used in the assault. However, he admitted that the hatchet found had a rubber handle and Ms. Johnson described the hatchet as having a wooden handle. R. 24, ll. 1 – 20; R. 34, ll. 1 – 10.

Defense counsel argued that the house was Golston's residence, and therefore he had an expectation of privacy in the house. R. 67, ll. 18 – 25. Two of Golston's nieces, Gail Jones and Bambi Gray, testified that he had lived at the house many years. R. 48, ll. 1 – 25; R. 49, ll. 1 – 25; R. 50, ll. 1 – 25; R. 51, ll. 1 – 5. Golston testified that he lived in the house and had built a brick wall around a mobile home unit. R. 53, ll. 1 – 25. He explained that the house was damaged by several storms, and he did not have the money to repair it. R. 54, ll. 1 – 25; R. 55, ll. 1 – 14; R. 180, ll. 16 – 25; R. 181, ll. 1 – 25. He denied that he lived permanently with Ms. Johnson. R. 55, ll. 15 – 25.

The state argued that Golston had no expectation of privacy in the house. The officers believed it was unlivable. The state argued there was no Fourth Amendment violation as the officers "just happened" to find the hatchet which was clearly being hidden. The state argued that the house was abandoned. R. 65, ll. 13 – 25; R. 66, ll. 1 – 25; R. 67, ll. 1 – 17. The judge ruled that Golston had an expectation of privacy in the house but that it was reasonable for the officers to search given the condition of the house, and that the officers could execute the arrest warrant. He ruled that the hatchet was admissible. R. 71, ll. 15 – 25; R. 72, ll. 1 – 25; R. 73, ll. 1 – 25; R. 74, ll. 1 – 25; R. 75, ll. 1 – 25; R. 76, ll. 1 – 6.

The Fourth Amendment to the United States Constitution provides that the people have a right to be secure in their persons and homes against unreasonable searches and seizures, and no

warrants shall issue, but with probable cause, supported by oath and affirmation, describing the place to be searched and the things to be seized.

In Payton v. New York, 445 U.S. 573 (1980), the United States Supreme Court ruled that a valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence "when there is reason to believe the suspect is within." This ruled was followed by the South Carolina Supreme Court in State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981).

The officers testified that they believed the house was abandoned. Officer Merckle said he did not know if Golston would be inside. They did not have a search warrant but Officer Merckle searched between the mattresses when there was no hump or lump which might indicate a person was there.

The search was a violation of Golston's Fourth Amendment rights and the hatchet should have been suppressed. The hatchet and "log" were used to show the element of "aggravation" to enhance the offense from CDV to CDVHAN.

The Court of Appeals misapprehended the issue as there was not sufficient probable cause for the police to enter as Golston had an expectation of privacy in the home.

ISSUE THREE: Defense counsel requested the judge to charge the jury on the lesser included charge of CDV. R. 199, ll. 1 – 25. The judge ruled that the evidence did not support a charge of CDV because Ms. Johnson's version of the evidence required a CDVHAN based on the use of a deadly weapon and serious bodily injury. And Golston claimed self-defense. Therefore, the judge refused to charge the lesser included CDV. R. 200, ll. 1 – 25; R. 201, ll. 1 – 5.

The judge explained that the law to be charged was determined by the evidence presented at trial. He recognized that the jury has the power and responsibility to rule on the credibility of the witnesses that testified. He stated that the case was CDVHAN and Golston was either guilty or not. R. 201, ll. 13 – 25; R. 202, ll. 1 – 25; R. 203, ll. 1 – 25.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 433 S.E.2d 848, 849 (1993). A request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, 305 S.C. at 447, 409 S.E.2d at 392 (1991). The test for determining if a crime is a lesser included offense of another crime is whether the greater of the two offenses includes all the elements of the lesser offense. State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. (2001).

CDV was clearly a lesser included offense of CDVHAN because the statute for CDVHAN, Section 16-25-65 references the statute for CDV, Section 16-25-20. Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

There was a reasonable probability that the jury may have determined that her injuries were not serious bodily injuries because she had no broken bones; no evidence of any cuts or stitches required; and no permanent damage to her eyes as she said she could see. R. 90, ll. 1 – 25; R. 91, ll. 1 – 18; R. 92, ll. 1 – 25; R. 93, ll. 1 – 25; R. 94, ll. 1 – 12.

She told the officers, according to the witness Gail Jones because Ms. Johnson did not remember, that no weapons were used in the assault. She testified that she was not hit with the hatchet. R. 85, ll. 1 – 10; R. 179, ll. 1 – 25; R. 177, ll. 1 – 25; R. 178, ll. 1 – 25; R. 179, ll. 1 – 8. Ms. Johnson never testified that Golston hit her with the piece of firewood. R. 77 – 103. Officer Blake testified that she was hit with a piece of firewood. R. 114, ll. 1 – 25.

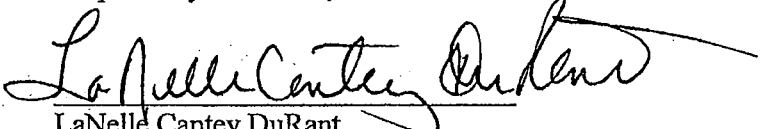
Ms. Johnson did testify that she was afraid that Golston was going to kill her. R. 95, ll. 1 – 21. However, the jury would determine her credibility. The judge should have charged the lesser included offense of CDV because there was evidence from which the jury could reasonably find CDV.

If Golston slapped her as he said, but the jury disbelieved self-defense, then that would be evidence of the lesser offense of simple CDV. The victim never testified that Golston used a weapon. The police officer was the only one who said that she was hit with the firewood or “log”. Therefore, the log or the use of a weapon would be an issue for the jury.

The Court of Appeals misapprehended the issue because the definition of serious bodily injury is not defined in the statute for this offense. Therefore, this was a question for the jury.

THEREFORE, we respectfully ask the Court of Appeals to reconsider its rulings.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

This 19th day of June, 2012.

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

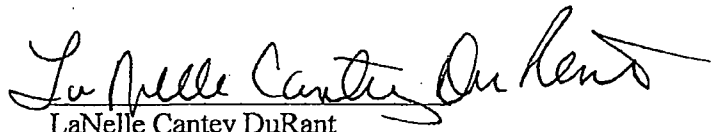
V.

BENNIE GOLSTON,

APPELLANT

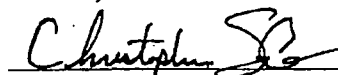
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Rehearing in the above-entitled case has been served upon Deborah R.J. Shupe, Esquire, this 21st day of June, 2012.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SWORN TO BEFORE ME this 21st day
of June, 2012.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: May 16, 2021.

The South Carolina Court of Appeals

The State, Respondent,

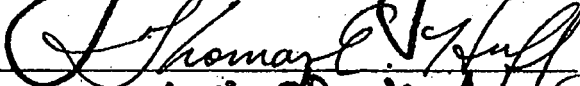
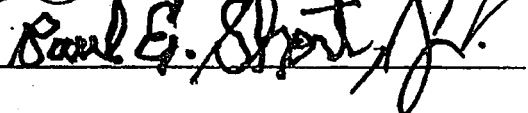
v.

Bennie Golston, Appellant.

Appellate Case No. 2009-127766

ORDER DENYING PETITION FOR REHEARING

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

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

LaNelle Cantey DuRant

Alan Wilson

John W. McIntosh

Salley W. Elliott

Deborah R.J. Shupe

FILED

September 13, 2012

STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY

R. Knox McMahon, Circuit Court Judge

RECEIVED

DEC 13 2012

S.C. Supreme Court

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

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1 maintain that seat.

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

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

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

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

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

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

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

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

25 THE COURT: Your motion?

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

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

8 CLERK: Yes, sir.

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

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

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

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

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

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

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

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

25 THE COURT: Thank you. Solicitor.

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

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

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

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

19 THE COURT: Thank you.

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

1 THE COURT: Anything further, Mr. Buchanan?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. BUCHANAN: Yes, sir.

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

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

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

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

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

21 MS. PATTERSON: Yes, sir.

22 THE COURT: As far as your scheduling.

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

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

1 MR. BUCHANAN: No, Your Honor.

2 THE COURT: Solicitor, any other motions?

3 MS. PATTERSON: No motions by the State.

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

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

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

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

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

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

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

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

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

22 The arrest warrant that is filed in the case,
23 J-846375, alleges that on the same date, 3/22/08,
24 approximately 00:01 hours, while at 4405 Old Wire Road
25 in the Lexington County area of Lexington County, the

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

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

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

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

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

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

7 Mr. Buchanan, you have another motion?

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

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

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

25 Of course, I was reading from McLeod. The

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

4 MR. BUCHANAN: Thank you, Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 IN CAMERA EXAMINATION

11 BY MS. PATTERSON:

12 Q Master Deputy Merckle.

13 A Yes.

14 Q Where are you employed?

15 A Lexington County Sheriff's Department.

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

18 A I'm a road deputy supervisor.

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

21 A Approximately a year and a half.

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

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

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

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

5 A Yes, ma'am, I do.

6 Q What county is that in?

7 A That's in Lexington County.

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

10 A I do.

11 Q What did you observe?

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

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

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

23 Q Did she describe the hatchet to you?

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

1 Q Did she tell you what color it was?

2 A I believe it was a brown wooden handle.

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

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

5 Q Did you eventually see Mr. Golston?

6 A Yes, ma'am, we did.

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

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

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

16 Q Were there any other officers at the scene?

17 A There was.

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

20 A We did.

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

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

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

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

11 Q So the canine unit came out?

12 A Yes.

13 Q To assist you?

14 A Yes, he did.

15 Q Were you a part of that team?

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

18 Q That's the dog?

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

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

4 A Yes, ma'am, I do.

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

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

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

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

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

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

25 A No, ma'am.

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

3 A Yes, ma'am.

4 Q What did you do once you got inside?

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

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

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

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

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

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

1 the residence.

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

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

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

15 A Yes, ma'am, I did.

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

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

25 With the building being open, the exigent

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

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

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

6 Q Did you find anything?

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

10 Q What did you do with the hatchet?

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

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

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

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

24 BY MS. PATTERSON:

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

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

3 A Yes, ma'am, I do.

4 Q What is that?

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

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

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

12 Q Thank you.

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

14 THE COURT: Yes, ma'am.

15 (Pause).

16 BY MS. PATTERSON:

17 Q Please answer any questions the defense has.

18 A Sure.

19 THE COURT: Thank you, Solicitor.

20 Mr. Mauldin.

21 MR. MAULDIN: Thank you, Your Honor.

22 THE COURT: Yes, sir.

23 IN CAMERA EXAMINATION

24 BY MR. MAULDIN:

25 Q Is it deputy or master deputy?

1 A Whichever you feel.

2 Q It's easier to say deputy.

3 A Deputy is fine.

4 Q It's less than a mouthful.

5 A Sure.

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

10 A Yes, sir, I do.

11 Q The same building?

12 A Yes, sir.

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

16 A Yes, sir.

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

20 THE COURT: Any objection?

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

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

24 MS. PATTERSON: No objection.

25 THE COURT: Defendant's 1.

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

3 BY MR. MAULDIN:

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

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

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

10 A Yes, sir.

11 Q -- from her house?

12 A Right.

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

16 A Right.

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

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

23 Q Hopefully this will clear it up for you.

24 A Okay.

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

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

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

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

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

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

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

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

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

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

24 A Yes, sir.

25 Q And what time of day was that?

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

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

6 A Correct.

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

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

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

17 A I did not.

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

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

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

1 Defendant's Exhibit 1?

2 A No, sir.

3 Q Was it another house in that area?

4 A Yes, sir.

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

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

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

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

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

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

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

1 Exhibit 1; is that correct?

2 A Correct.

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

6 A Correct.

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

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

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

15 A No, sir.

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

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

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

25 A Yes, sir.

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

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

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

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

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

12 A Correct.

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

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

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

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

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

2 THE COURT: Yes, sir.

3 (Pause).

4 BY MR. MAULDIN:

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

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

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

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

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

15 A Yes.

16 Q Did you go into that building?

17 A Yes, sir, we did.

18 Q What was in that building?

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

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

25 A Yes, sir.

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

3 A Yes, sir.

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

6 A I do not.

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

10 A Correct.

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

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

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

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

18 THE WITNESS: Thank you, Your Honor.

19 (Witness leaves the witness stand).

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

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

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

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

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

4 IN CAMERA EXAMINATION

5 BY MS. PATTERSON:

6 Q Master Deputy Blake, where are you employed?

7 A Lexington County Sheriff's Department.

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

10 A July 1 will be three years.

11 Q Where were you employed prior to that?

12 A Charleston City Police.

13 Q And how long were you there?

14 A Four years.

15 Q So you have been in law enforcement about?

16 A Just almost seven years.

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

19 A I was a road deputy.

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

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

23 Q Would that include domestic calls?

24 A Yes; it would.

25 Q Were you dispatched to a location on Old Wire Road

1 on March 22, 2008?

2 A I was.

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

5 A 405 Old Wire Road.

6 Q What time did you receive that call?

7 A Approximately 9:40 in the morning.

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

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

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

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

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

18 A No, she was not.

19 Q Did you locate the victim in the case?

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

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

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

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

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

9 Q This was in March, right?

10 A I'm sorry?

11 Q What date did this happen?

12 A March 22.

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

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

16 Q Did she tell you what happened to her?

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

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

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

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

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

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

17 Q Did you find any evidence of this?

18 A We did.

19 Q What did you find?

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

25 A piece of firewood was located away from

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

5 Q Was anything else located?

6 A At that time?

7 Q At that time.

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

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

11 A No, he was not.

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

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

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

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

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

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

3 Q Let me show you six photographs.

4 COURT REPORTER: Excuse me one second, Judge.

5 THE COURT: Yes, ma'am.

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

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

11 A I do.

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

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

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

18 MS. PATTERSON: After.

19 THE COURT: After?

20 MS. PATTERSON: Yes, sir.

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

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

1 THE WITNESS: Can I see the report?

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

4 MS. PATTERSON: May I see it?

5 THE COURT: I have whatever is filed.

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

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

9 CLERK: I'm in the wrong one.

10 THE COURT: But you are in the right decade.

11 (Pause).

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

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

16 THE COURT: Do you have it?

17 THE WITNESS: If I can get my file.

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

20 (Pause).

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

1 there is not.

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

5 MS. PATTERSON: Right, Your Honor.

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

8 MS. PATTERSON: Thank you.

9 BY MS. PATTERSON:

10 Q Did you go into this structure?

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

12 Q Yes.

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

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

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

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

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

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

12 A No.

13 Q Was there any electricity?

14 A No.

15 Q Any water?

16 A No.

17 Q Did you find the Defendant in this place?

18 A Not at that time, no.

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

21 A Master Deputy Merckle located a hatchet.

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

24 A I do.

25 Q Can you tell me what it is?

1 A It's a normal, average hatchet.

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

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

11 Q And you brought it over to the courthouse?

12 A Yes.

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

14 A Not that I can tell.

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

17 A Upon initially receiving it?

18 Q Yes.

19 A Yes.

20 Q What drew your attention to it?

21 A Upon arriving at the 405 residence initially where
22 the site of the scuffle was, there was observed and
23 also on Ms. Johnson in her hair, there were gray
24 colored braids. There was hair located on the back
25 of the hatchet that was also consistent with that

1 same hair.

2 Q Is that hair still attached to the hatchet?

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

6 Q That's why you taped it?

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

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

9 (Pause).

10 BY MS. PATTERSON:

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

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

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

17 THE COURT: Thank you, Solicitor.

18 Mr. Mauldin.

19 MR. MAULDIN: Thank you, Your Honor.

20 IN CAMERA EXAMINATION

21 BY MR. MAULDIN:

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

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

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

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

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

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

7 A I do not.

8 Q Did you flip any light switches?

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

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

13 THE COURT: Thank you. Redirect, Solicitor?

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

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

18 THE WITNESS: Thank you, Your Honor.

19 (Witness leaves the witness stand).

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

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

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

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

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

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

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

10 MR. MAULDIN: Yes, sir.

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

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

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

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

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

20 IN CAMERA EXAMINATION

21 BY MR. MAULDIN:

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

24 A Yes.

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

1 A Bennie Golston is my uncle.

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

5 A I do.

6 Q Whose house is that?

7 A Bennie Golston.

8 Q Does he actually live in that house?

9 A Yes, he does.

10 Q How long has he lived there?

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

12 Q Would you describe it as a nice house?

13 A No.

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

15 A Most definitely.

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

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

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

23 A Yes.

24 Q Did you tell them where he lived?

25 A Yes, I did.

1 Q Where did you tell him that he lived?

2 A Directly behind my mother's house.

3 Q Did you point out that house there?

4 A Most certainly.

5 MR. MAULDIN: No further questions.

6 THE COURT: Thank you, Mr. Mauldin.

7 Solicitor.

8 MS. PATTERSON: No questions, Your Honor.

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

11 (Witness leaves the witness stand).

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

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

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

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

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

21 IN CAMERA EXAMINATION

22 BY MR. MAULDIN:

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

24 A I live at 200 Brookhill Street here in Lexington.

25 THE COURT: Say that again for me.

1 THE WITNESS: 200 Brookhill.

2 BY MR. MAULDIN:

3 Q That is here in Lexington; is that correct?

4 A Correct.

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

7 A Bennie is my uncle.

8 Q And how long have you known him?

9 A Twenty-nine years.

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

12 THE COURT: I do, yes.

13 BY MR. MAULDIN:

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

17 A Yes.

18 Q Whose house is it?

19 A Bennie Golston.

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

22 A All my life, 29 years.

23 Q And have you been in that house yourself?

24 A It's been a while.

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

1 there?

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

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

5 A Yes.

6 MR. MAULDIN: No further questions.

7 THE COURT: Solicitor.

8 IN CAMERA EXAMINATION

9 BY MS. PATTERSON:

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

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

13 Q Why has it been so long?

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

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

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

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

21 A Yes.

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

23 A Yes.

24 Q Do you know that he was sleeping there?

25 A Yes.

1 Q Have you seen him sleeping there?

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

4 Q How do you know this?

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

11 Q So he would stay at different places?

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

15 Q Thank you.

16 A You're welcome.

17 THE COURT: Redirect, Mr. Mauldin?

18 MR. MAULDIN: No, Your Honor.

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

21 (Witness leaves the witness stand).

22 THE COURT: You may call your next witness.

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

25 THE COURT: Mr. Golston, please come around

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

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

THE WITNESS: My full name is Bennie Golston.

IN CAMERA EXAMINATION

BY MR. MAULDIN:

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

A Yeah, that's my building.

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

A That's where I work and stay.

Q How long have you been staying there?

A Thirty years.

Q Did the building always look like that?

A No, the storm tore it up.

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

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

Q What do you mean by that?

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

1 Q What did you build around it?

2 A Years ago.

3 Q And what did you build around it?

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

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

8 A Right.

9 MR. MAULDIN: No further questions.

10 THE COURT: Thank you, Mr. Mauldin.

11 Solicitor.

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

13 (Pause).

14 IN CAMERA EXAMINATION

15 BY MS. PATTERSON:

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

18 A What do you mean?

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

21 A I do brick work. I build buildings.

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

23 A Probably 15 years ago.

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

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

- 1 them, Hugo, some of them, some storm when I got
2 locked up. I ain't been home in 13 months. I
3 don't know which one really tore it all the way
4 up.
- 5 Q When were your lights cut off?
- 6 A I don't know, five or six years ago.
- 7 Q So you haven't had any lights since?
- 8 A No.
- 9 Q What do you do at nighttime?
- 10 A Go to sleep.
- 11 Q Do you have any water in that building?
- 12 A Yeah, I have water.
- 13 Q You had your clothes in that building?
- 14 A Yeah.
- 15 Q Have you ever lived with Myrtle Johnson?
- 16 A Not permanently. She never lived there herself.
17 She just move here.
- 18 Q When you say not permanently, did you ever live
19 there?
- 20 A Not live there. We was having a relationship if
21 that's what you mean.
- 22 Q Did you sleep there?
- 23 A Sometimes.
- 24 Q Did you have your clothes there?
- 25 A No.

1 Q Brush your teeth there?

2 A Sometimes.

3 Q You ate there?

4 A Sometimes.

5 Q And you did sleep there?

6 A I slept a bunch of places.

7 Q Thank you.

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

10 THE COURT: Redirect, Mr. Mauldin?

11 MR. MAULDIN: No, Your Honor.

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

14 (Witness leaves the witness stand).

15 THE COURT: You may call your next witness.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 recall one of my officers, Your Honor.

2 THE COURT: All right. Mr. Mauldin?

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

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

12 MS. PATTERSON: I will recall Officer Blake.

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

15 CLERK: Still under oath?

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

18 THE WITNESS: Yes, Your Honor.

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

22 IN CAMERA EXAMINATION

23 BY MS. PATTERSON:

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

1 out there later on?

2 A Correct.

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

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

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

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

16 A Yes.

17 Q Was this warrant for Bennie Golston?

18 A Yes, it was.

19 Q What charge was on the warrant?

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

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

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

25 Q And did you make it to that area?

1 A I did.

2 Q Did you have backup?

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

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

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

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

17 A To the structure that was nearby.

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

20 A We did.

21 Q Did y'all find him in there?

22 A No, we did not.

23 Q Was anything else found in there?

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

KEVIN BLAKE -- IN CAMERA -- MR. MAULDIN

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

3 A We did.

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

6 THE COURT: Thank you, Solicitor.

7 Mr. Mauldin.

8 MR. MAULDIN: Thank you, Your Honor.

9 IN CAMERA EXAMINATION

10 BY MR. MAULDIN:

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

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

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

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

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

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

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

14 Q So those notes refreshed your memory?

15 A Correct.

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

19 A Correct.

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

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

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

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

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

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

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

12 MS. PATTERSON: No, sir.

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

15 BY MR. MAULDIN:

16 Q If you could continue.

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

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

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

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

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

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

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

19 A Correct, after obtaining the arrest warrant.

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

23 A We were looking for an exact time.

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

1 THE COURT: Thank you. Redirect, Solicitor?

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

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

4 (Witness leaves the witness stand).

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

7 MS. PATTERSON: No, sir Your Honor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Furthermore, Your Honor, the testimony was

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

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

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

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

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

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

4 THE COURT: So it's not relevant?

5 MR. MAULDIN: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 tracks to that residence.

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

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

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

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

20 MR. MAULDIN: The arrest warrant?

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

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

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

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

7 MR. MAULDIN: No, sir.

8 THE COURT: Solicitor?

9 MS. PATTERSON: Nothing from the State.

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

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

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

16 CLERK: Yes, sir, Your Honor.

17 (The jury is duly sworn).

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

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

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

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

5 THE COURT: All right.

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

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

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

12 **DIRECT EXAMINATION**

13 BY MS. PATTERSON:

14 Q Thank you, Ms. Johnson.

15 A Okay.

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

18 A Yes, ma'am.

19 Q Ms. Johnson, where do you live?

20 A 405 Old Wire Road.

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

24 THE WITNESS: Thank you.

25 THE COURT: Yes, ma'am.

1 BY MS. PATTERSON:

2 Q And Ms. Johnson, 405 Old Wire Road, what county is
3 that in?

4 A Lexington.

5 Q How long have you lived at 405 Old Wire Road?

6 A Since about '89, off and on.

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

9 A I'm 70.

10 Q Do you have any children?

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

13 Q I'm sure she'll appreciate you telling her age.

14 Did your children ever reside with you at 405 Old
15 Wire Road?

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

17 Q Different times. Do you know Bennie Golston?

18 A Yes, I do.

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

20 A Yes, ma'am, I do.

21 Q Where is he seated?

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

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

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

2 BY MS. PATTERSON:

3 Q How do you know Bennie Golston?

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

6 Q How did y'all meet?

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

9 Q And did you guys become friends instantly?

10 A Yes.

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

13 A Approximately five years, maybe a little more.

14 Q And you loved him during this time?

15 A Very, very much.

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

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

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

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

21 Q Did he have personal belongings at your house?

22 A Oh, yes.

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

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

1 clothing, like you live on a daily day.

2 Q Did he eat at your house?

3 A Oh, yes, and cooked.

4 Q So he cooked sometimes?

5 A Yes.

6 Q Did he take a bath at your house?

7 A Yes.

8 Q Did he sleep at your house?

9 A Yes.

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

11 A With me.

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

14 A Yes.

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

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

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

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

1 mine.

2 Q So they were over at your house earlier to help you
3 out?

4 A Yes, different times. Sometimes his wife would
5 come with him, but most times he came by his self
6 to work.

7 Q And what were they doing at your house?

8 A Painting, fixing different things, moving things
9 from the house to the garage to make room.

10 Q Were you helping in any way?

11 A Well, the best I could do with telling them where I
12 wanted what.

13 Q Was the Defendant there?

14 A Yes.

15 Q Was he there all day with you?

16 A Most of the time or he would go out periodically
17 and then return.

18 Q Was he helping?

19 A Sometimes.

20 Q And this friend, what was his name?

21 A Alfred Hunter.

22 Q How long -- about what time did Mr. Hunter and his
23 wife leave your house?

24 A That particular night you are speaking of?

25 Q Yes.

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

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

4 A I was alone.

5 Q And what did you do after they left?

6 A Get ready for bed.

7 Q Did the Defendant ever return that night?

8 A Oh, yes, yes.

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

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

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

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

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

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

24 Q Was the Defendant jealous of you?

25 A Yes, ma'am.

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

2 A I could smell it.

3 Q So you just tried to ignore him?

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

6 Q Were you successful in talking calmly to him?

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

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

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

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

20 Q How many times did he hit you?

21 A Many, many, many times.

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

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

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

1 point?

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

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

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

8 Q Where were you laying when he straddled you?

9 A On the ground on my back.

10 Q Did he hit you again at this point?

11 A Many, many times.

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

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

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

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

1 kill me.

2 Q Were you saying anything to him?

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

9 Q Did he hit you with the hatchet?

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

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

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

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

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

1 Q Did this work?

2 A Ma'am?

3 Q Did this subsequently work?

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

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

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

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

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

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

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

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

18 Q Did the Defendant try to help you up?

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

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

25 A Beg your pardon?

1 Q Who is Gail Jones?

2 A That's his niece.

3 Q When you say his?

4 A Ben's niece. Her mother and I were great friends.

5 Q Do you remember her coming into your house?

6 A I remember her calling my name.

7 Q Were you able to respond back to her?

8 A Yes, ma'am, I think I said something, but I could
9 not see her. She called my children, I think.

10 Q Do you have any idea what time this was when she
11 came into your house?

12 A I'd say it was nine-ish, maybe after nine, maybe
13 9:30. It was early morning but I had been asleep.
14 I did go to sleep and she woke me up.

15 Q Do you remember -- let's go back just for a second.
16 Do you remember what time it was when Bennie
17 started assaulting you?

18 A About 11 to 12, somewhere between 11 and 12,
19 because there were no people out. I was screaming
20 help, you know, for somebody to help me, but the
21 houses were dark, like everybody was settled for
22 the evening.

23 Q So when Ms. Jones came to your house, you were able
24 to talk to her, correct?

25 A That morning, yes, ma'am.

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

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

4 Q Did she call for help?

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

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

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

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

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

23 Q Were you transported to the hospital?

24 A Yes, I was.

25 Q Do you know how you got there?

1 A I remember them putting me on a stretcher.

2 Q Do you remember what hospital you went to?

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

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

10 A Yes, and did C.A.T. scans, I think, just a lot of
11 things.

12 Q So they ran different tests on you?

13 A Yes.

14 Q Do you know the results of the tests?

15 A How do you mean?

16 Q Did you have anything broken?

17 A Oh. After they did tests, the doctor came in and
18 he was very surprised that he didn't have to do
19 bone work. He thought some bones in my face was
20 broken, but nothing was broken, but he could not
21 get my eyes open to look in them to see what I
22 possibly could see.

23) So I had to wait, but they sent me to Palmetto
24 Eye Institute a couple of days later, and there
25 they couldn't get my eyes open. It hurt too bad

1 and I couldn't stand them to put any light in.

2 So he sent me back home. Then when I came
3 back the next time, one of them had opened. They
4 did not know how much sight I would ever have
5 again, but everybody was surprised that I wasn't
6 hurt much worse.

7 Q Do you know how long you stayed at Palmetto
8 Richland?

9 A The trauma center?

10 Q Yes, ma'am.

11 A They came and got me that morning after Gail came
12 in. I stayed all day and then they were going to
13 keep me overnight, but after the pictures and
14 things they took, he said the medication that was
15 brought to my daughter, who is a therapist, could
16 handle that if I wanted to go home. I told him,
17 Yeah, I think I will be fine. She and my son took
18 me to her house, I think.

19 Q When you got to your daughter's house, were you
20 able to walk?

21 A Not without help.

22 Q Were you able to talk?

23 A I could communicate, yes, ma'am. It wouldn't be
24 plain talk, but I would get my idea over to her.
25 She had to feed me and I couldn't drink, like a

1 glass of water down. It was like I was losing my
2 breath. I would have to take a swallow and tell
3 her to move it, you know. I couldn't just --
4 couldn't do anything.

5 Q So you said your eyes were still swollen shut at
6 this time?

7 A Oh, yes.

8 Q So you wasn't able to see anything?

9 A No, ma'am. I couldn't see television. About the
10 end of the first week, she came into my room, and I
11 said, Look at me, I am watching television with one
12 eye. Then the other one opened because I think
13 this (indicating) was the worse one.

14 Q So one eye opened after about one week?

15 A Just about, maybe a day or so less, but the other
16 one took much longer. Because Ben is right handed,
17 and this was where I -- that one (indicating) was
18 bad.

19 Q Do you know about how long it took the left eye to
20 open?

21 A About a week and a half at least. I had been to
22 the trauma center -- the eye doctor a couple of
23 times.

24 Q Were you in any pain?

25 A Yes, extremely. It was like I couldn't breathe. I

1 couldn't breathe. I couldn't drink like a half
2 glass of water down. I would have no breath.

3 Q So how did you eat and drink?

4 A My daughter fed me and held the glass while I took
5 little sips, and she put cold compresses all over
6 my face periodically. She would put that ice on
7 me.

8 Q Were you able to bathe yourself?

9 A No, ma'am. She put me in the tub and washed me
10 like a baby.

11 Q You said you had to receive follow-up treatment for
12 your eyes?

13 A Yes, ma'am, to Palmetto -- the eye center. I had
14 sight. I was very lucky I had sight. I knew that
15 I could see, you know. I didn't wear glasses
16 before, and I didn't feel -- neither did they --
17 that glasses was going to necessarily help, but
18 that was about all they could do, you know. They
19 dilated my eyes and all that.

20 Q Who do you live with now?

21 A My daughter most times. I come down to the house.
22 I have about nine cats. So I try to feed them
23 every two to three days and straighten up the house
24 a little bit. I do pretty good.

25 Q Do you ever spend the night by yourself?

1 A Yes, ma'am, but it's not that comfortable. I do
2 sometimes to give my daughter a little space.

3 Q And you say you loved Bennie?

4 A Very, very much.

5 Q Do you still want to be with him?

6 A No, ma'am. I can't take anymore beatings, no,
7 ma'am.

8 Q Are you ever afraid to stay by yourself?

9 A Yes. Noises frighten me. I have a two-door garage
10 that wants to bang when the wind blows, you know.
11 I put some cement blocks behind it to keep it from
12 rocking because it sounds like somebody is breaking
13 in.

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

15 (Pause).

16 BY MS. PATTERSON:

17 Q Ms. Johnson, when Bennie was hitting you, did it
18 hurt?

19 A Very much. I thought each lick would be the last
20 that I would recall.

21 Q And before this incident were you ever -- are you
22 afraid of Bennie?

23 A Oh, yes.

24 Q Before this incident, were you ever afraid of
25 Bennie?

1 A No, no. We had a -- other than that, we had a good
2 relationship. We laughed. We had fun. I was
3 never, never afraid of him.

4 Q Before this incident were you ever afraid to stay
5 by yourself?

6 A No.

7 Q When Bennie was hitting you, did you think you were
8 seriously injured?

9 A Yes, I thought he was going to kill me.

10 Q When Bennie was hitting you -- I apologize. When
11 Bennie was hitting you, you thought you were going
12 to die?

13 A Beg your pardon?

14 Q When Bennie was hitting you, you thought you were
15 going to die?

16 A Yes, ma'am, surely.

17 Q Please answer any questions the defense attorney
18 may have for you.

19 A Yes, I will.

20 THE COURT: Thank you, Solicitor.

21 Mr. Buchanan.

22 CROSS EXAMINATION

23 BY MR. BUCHANAN:

24 Q Thank you, Ms. Johnson. My name is Matt Buchanan.

25 I represent Mr. Golston.

1 A Yes, sir.

2 Q So you said you lived in that area since 1989,
3 correct? So you know that neighborhood pretty
4 well?

5 A Yes. My father built his home there. I lived in
6 it.

7 Q So you knew that Bennie Golston had his own place?

8 A Yes.

9 Q Was that a building that he lived in all the time?
10 He got his mail there, correct?

11 A He had a mailbox.

12 Q So he didn't receive mail at your place?

13 A I think once or twice he got a letter. I can't
14 think of the reason, but he used his box.

15 Q You said that he never stayed for very long at your
16 place because he moved?

17 A No, I meant long periods, like two weeks or three
18 week and so forth. He would go out every day and
19 come back every night. Some nights he may go spend
20 the night at his house, but most nights -- you
21 could look at his house and look at my house.
22 Which one would you rather go to?

23 Q He also had a mother living by, too. Didn't he
24 stay there?

25 A Well, if you can't say something good, you don't

1 want to say anything bad about anybody's momma. So
2 if it's all right, I prefer not to answer that.

3 Q Do you know that he --

4 THE COURT: Listen to his question. I guess
5 his question was, did he ever stay at his mother's
6 house?

7 THE WITNESS: Did he ever stay there? Not
8 while he was with me.

9 THE COURT: Thank you. You may ask your next
10 question.

11 BY MR. BUCHANAN:

12 Q You said you lived there off and on, correct?

13 A Now I do since I been hurt.

14 Q But didn't you have to leave to go up to -- was it
15 New Jersey?

16 A My father died the 22nd of December. I had taken
17 care of him. He had Parkers (sic). My mother died
18 a year or so before. She has Alzheimer's,
19 diabetic, and I took care of her. I would go up
20 there, stay periodically, and then come back to my
21 house and stay periodically. At no time was that
22 my address. My address was 405 Old Wire Road. I
23 took care of my parents. I buried four parents.

24 Q So then while you were there, you let Mr. Golston
25 house watch; correct? Did he watch your house?

1 A Do you mean did he have a key and go in and out my
2 house?

3 Q Yes.

4 A No.

5 Q So he never had a key?

6 A Oh, yes, he has had keys. At different times he
7 had different keys, but I never trusted him. I
8 didn't -- once I did and it was a mistake, and I
9 never did that. So when I wasn't there, he wasn't
10 there.

11 MR. BUCHANAN: Beg the Court's indulgence.

12 THE COURT: Yes, sir.

13 (Pause).

14 BY MR. BUCHANAN:

15 Q On the night of the 22nd, you never told the
16 deputies that you got to the car, correct?

17 A I don't know.

18 Q And also you mentioned a hammer during your direct
19 testimony. You never mentioned a hammer before?

20 A Yes. Oh, yes, I was very aware of the hammer.

21 Q Did you ever tell officers about a hammer?

22 A I'm sure I did. That's not a part I would forget.

23 But where and when, you know, I can't testify to

24 that. But yes, I was very aware of that hammer

25 over my head and possibly could come down.

1 Q So you said when you made it back to the house, you
2 said there was keys hanging out of the door?

3 A There was a key in my doorknob, yes.

4 Q Who had the keys?

5 A All I know, I took a key from him. Now, possibly
6 that was my key. It was two keys. He had one and
7 I had one. But how that one got there, I don't
8 know how it got there or whose key it was, but
9 that's how I got back in the house.

10 Q Did Alfred ever have a key to the house?

11 A He's the one that put the lock in the door. He's
12 the one gave me a key. He's the one took a key
13 from Ben.

14 Q Oh, he took the key --

15 A That's some of what he was so angry about because I
16 had asked him to leave. I did not want him to have
17 to a key.

18 Q So Alfred ending up having a key, right, and took a
19 key from Ben?

20 A Alfred put a lock in the door. The new key he gave
21 me one automatically. Ben wanted the other one.
22 Before Alfred left I asked him to please ask Ben
23 for my key because he wasn't going to give it to
24 me.

25 Q So who locked the door while Mr. Golston allegedly

1 assaulted you?

2 A Can you rephrase that now?

3 Q You said the door was locked --

4 A Right.

5 Q -- outside, but you didn't lock the door. Who
6 locked the door?

7 A The key was in the door. That's what I know. I
8 turned the key to get in the house, but whether the
9 door was locked, I can't tell you. I can just tell
10 you that the key was in the door.

11 I used the key to get in, but it could have
12 already been left and sticking in there because Ben
13 could have let himself in and then take it out. I
14 don't know.

15 Q Did you attack Bennie on that night?

16 A Attack Bennie? Nobody attacks Ben, sir, no.

17 MR. BUCHANAN: Beg the Court's indulgence.

18 (Pause).

19 BY MR. BUCHANAN:

20 Q You had testified that Alfred left the house about
21 ten-ish, leaving you alone in the house; correct?

22 A Uh-huh. (Indicating affirmative response).

23 Q And you were getting ready for bed?

24 A Uh-huh. (Indicating affirmative response).

25 Q And that's when Mr. Golston showed up?

1 A Uh-huh. (Indicating affirmative response).

2 Q How did he get into your house without a key?

3 A I don't know whether I had the door locked because
4 we all live in a neighborhood. You don't always
5 lock doors. I mean, I know it sounds outrageous,
6 but a lot of times we don't lock our doors with
7 each other.

8 But at night I would. If there had come a
9 point where I had been there by myself, I would
10 have locked the door, but all this happened. So I
11 can't swear to that, sir.

12 Q But when you went to bed that night, did you leave
13 the key in the door lock?

14 A Mister, I had just got hit numerous times in the
15 head and the face. I was sliding because I could
16 not get up and crawl. I don't know.

17 Q Had you yourself been drinking that night or taking
18 anything that would affect your thinking?

19 A No.

20 MS. PATTERSON: Objection, Your Honor.

21 THE COURT: I will overrule the objection.

22 She had answered the question.

23 A No.

24 Q Ms. Johnson, I know you testified to this. I want
25 to get a little more specific. So you knew

1 Mr. Golston. You were involved intimately for five
2 years, but at no point did he change his residence,
3 correct, his mailing address?

4 A No.

5 Q And he never spent, what, longer than a week at
6 your residence before going to some other place?

7 A I don't think you can add it up like that. If we
8 were lovey-dovey, he was there. You know, when he
9 got upset with me or upset about something or drank
10 too much, he would go home. So I can't put it in a
11 definite time frame.

12 Q Thank you.

13 A You're welcome, sir.

14 THE COURT: Thank you, Mr. Buchanan. Anything
15 in redirect, Solicitor?

16 MS. PATTERSON: Just briefly.

17 REDIRECT EXAMINATION

18 BY MS. PATTERSON:

19 Q Ms. Johnson, you mentioned a hammer. Could this
20 have been a hatchet?

21 A I'm calling it a --

22 MR. BUCHANAN: Objection.

23 THE COURT: Overruled.

24 A I'm saying hammer but it's a hatchet.

25 Q Thank you.

1 THE COURT: Recross, Mr. Buchanan?

2 MR. BUCHANAN: Nothing, Your Honor.

3 THE COURT: Thank you. Thank you very much,
4 Ms. Johnson.

5 THE WITNESS: Thank you, sir.

6 THE COURT: You may step down.

7 (Witness leaves the witness stand)..

8 THE COURT: Perhaps now would be a good time
9 for us to allow our jury to take their evening recess..

10 Madame Forelady, ladies and gentlemen of the
11 jury, I remind you that during this recess you are not
12 to discuss this case with anyone. That includes your
13 fellow jurors, your family, friends or anyone else.

14 I tell jurors all the time. If your home is
15 anything like my home used to be, when you get home in
16 the evening, the first thing the chaps would say is,
17 What did you do today, daddy, or what did you do today,
18 momma?

19 Of course, those days are way in the rear-view
20 mirror. They are no longer at home and they are off the
21 payroll. That is always a good thing. You can
22 certainly tell your family, your spouses, that you are a
23 member of the jury, but you cannot discuss the case.

24 Also, do not do any investigation of the case
25 on your own or any investigation on the internet or

1 anything of that nature. Remember to keep an open mind
2 about the case and do not begin your deliberations until
3 you are directed to do so by the Court, and then only
4 and then in your jury room with your fellow jurors.

5 I would ask you to please be back at 9:30 in
6 the morning in your new temporary home, your jury room.
7 Hopefully we can get started very promptly thereafter.
8 I hope y'all have a pleasant evening. See you at 9:30
9 in the morning. Thank you very much.

10 (The jury is excused for the day at 5:36 p.m.)

11 THE COURT: One more thing for the record. On
12 the issue that was brought up pretrial concerning the
13 search, to make sure I have got it clear, I considered
14 Mr. Mauldin's argument concerning the hump or, I guess
15 you would say, the lack of hump in the mattress.

16 I take it the inference would be could a
17 person be hiding under that mattress if there wasn't a
18 hump. Originally in the direct examination of the
19 officer, Deputy Merckle, I believe, I took that
20 testimony a little bit to be whether or not you could
21 even see a hump, for example of the hatchet itself, as
22 some type of outline, I didn't address that.

23 I think given the fact that they were
24 searching for an individual that had a felony charge
25 against him and the condition of the residence, the

1 structure as it has been described in the record before
2 the Court, they could move items, including the
3 mattresses.

4 A person would be able to hide or conceal
5 themselves under or between a mattress. You may not
6 have a hump. You could have a hump but if that hump is
7 completely horizontal, you wouldn't know it until you
8 look under that mattress.

9 The other point that Mr. Mauldin brought up,
10 of course, is still the issue of relevance under 401. I
11 haven't addressed that yet. Obviously if that issue is
12 brought up at the time in which the object is attempted
13 to be introduced, I would address that then. I did not
14 rule on that.

15 Also, on the issue overruling your objection
16 concerning the hammer, Ms. Johnson testified more than
17 once that it was a hatchet. Further on in her
18 testimony, she later testified it was a hammer. I think
19 under my discretion under Rule 611, I can control the
20 manner in which testimony is presented.

21 Although it's a leading question -- I don't
22 disagree with that. That may have been the basis of
23 your objection or your objections -- I think that's an
24 appropriate question in that regard.

25 MR. BUCHANAN: For the record the objection

1 was for leading.

2 THE COURT: It clears up also whether there
3 were two weapons, a hammer and a hatchet, which, of
4 course, could be prejudicial to your client, two objects
5 that were there. Be that as it may, if you want to
6 cross examine Ms. Johnson in that regard, I will allow
7 you to do so.

8 Anything further before we break for the
9 evening, Solicitor?

10 MS. PATTERSON: Nothing from the State.

11 THE COURT: Mr. Buchanan?

12 MR. BUCHANAN: Nothing, Your Honor.

13 THE COURT: Thank you very much. See you
14 promptly at 9:30.

15 (Whereupon the proceedings were concluded for
16 May 13, 2009).

17 (The following proceedings were reported on
18 May 14, 2009).

19 THE COURT: Anything, Solicitor, before we
20 bring in our jury?

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

23 THE COURT: Mr. Buchanan?

24 MR. BUCHANAN: Nothing from the defense, Your
25 Honor.

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1 THE COURT: Ms. Jones, you would have to stay
2 with us. You are still subject to subpoena under the
3 power of the Court.

4 With that being said, Solicitor, you may call
5 your next witness.

6 MS. PATTERSON: Thank you, Your Honor. At
7 this time the State calls Master Deputy Kevin Blake.

8 THE COURT: Deputy Blake, come around and be
9 sworn, please.

10 KEVIN NEAL BLAKE, being
11 first duly sworn, testifies as follows:

12 CLERK: State your full name, spelling your
13 last.

14 THE WITNESS: Kevin Neal Blake. Neal is
15 spelled N-E-A-L. The last name is B-L-A-K-E.

16 DIRECT EXAMINATION

17 BY MS. PATTERSON:

18 Q Deputy Blake, where are you employed?

19 A Lexington County Sheriff's Department.

20 Q How long have you been with Lexington County
21 Sheriff's Department?

22 A July of this year will make three years.

23 Q Where were you employed prior to being employed at
24 the Lexington County Sheriff's Department?

25 A Charleston City Police Department.

1 Q How long were you employed there?

2 A Four years.

3 Q So how many years of law enforcement experience do
4 you have?

5 A Just that seven.

6 Q In what capacity are you employed at the Lexington
7 County Sheriff's Department?

8 A Currently I am a master deputy, road supervisor.

9 Q And how long have you been a road supervisor?

10 A Approximately nine months.

11 Q What was your position prior to this current
12 position?

13 A I was a road deputy.

14 Q And what were some of your duties as a road deputy?

15 A Answering calls for service, be they suspicious
16 activity, criminal complaints, civil complaints,
17 just about anything that would come up.

18 Q Were you on duty the morning of March 22, 2008?

19 A I was.

20 Q And were you dispatched to a call on Old Wire
21 Road?

22 A I was.

23 Q Do you remember the address?

24 A 405 Old Wire Road.

25 Q Do you remember what time you got the call?

1 A Approximately 9:40 in the morning.

2 Q Do you remember how long it took you to get to the
3 scene?

4 A I was a little away. It took me about 20 minutes.
5 I got there about 10:00 o'clock.

6 Q And when you got to the scene, what did you first
7 observe?

8 A When I first got to the scene, I observed a moving
9 truck parked roadside with some gentlemen standing
10 around. I tried to make contact with one of them,
11 and they directed me to a lady I learned was
12 Ms. Jones, and she is the one who initially called.

13 Q Were you able to locate her at the scene?

14 A I was.

15 Q Did you talk to her?

16 A I did.

17 Q Did she tell you what she had learned?

18 A She indicated to me that she had located
19 Ms. Johnson in the house after going to find her.
20 When the movers got there, they thought something
21 might have been suspicious or wrong.

22 Q Who is Ms. Johnson?

23 A Ms. Myrtle Johnson, the victim. She was the
24 homeowner, the resident.

25 Q Were you able to locate Ms. Johnson?

1 A I was.

2 Q Where did you find her?

3 A As you entered the house, I went down a hallway and
4 made a right. She was in a bedroom back in the
5 right portion of the house lying in bed.

6 Q Did you notice anything about Ms. Johnson?

7 A She was covered up with a couple of heavy blankets
8 and comforters. After pulling away one of them, I
9 saw her face was extremely swollen, eyes were
10 swollen shut. She could speak but it seemed to be
11 labored.

12 Q Did you notice anything else about her demeanor?

13 A Other than she was in pain.

14 Q How could you tell she was in pain?

15 A Groaning, moaning. We see lots of people with
16 injuries. It's part of our job, and she was in
17 pain.

18 Q Was she able to talk to you?

19 A She was. It took -- a lot of times we have to ask
20 people, especially if they are the victim of an
21 assault or some type of trauma, we ask them the
22 same questions, just to make sure we are clear to
23 them. After asking questions a few times, she was
24 able to give an indication of what happened.

25 Q So she did tell you what happened?

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1 A Yes.

2 Q Did she tell who did this to her?

3 A Yes.

4 Q Did she tell what he did to her?

5 A Yes.

6 Q And what did she say happened to her?

7 MR. BUCHANAN: Objection. Hearsay, Your
8 Honor.

9 THE COURT: Yes, I think that would be
10 hearsay, Solicitor.

11 MS. PATTERSON: Excited utterance, Your Honor,
12 State versus Sims.

13 THE COURT: Under 803(1)?

14 MS. PATTERSON: Yes, sir, Your Honor.

15 THE COURT: Well, my concern is the last three
16 words in 803(1). I would be glad to hear you on that
17 issue.

18 MS. PATTERSON: Can I --

19 THE COURT: Perhaps it's 803(2) you are
20 referring to.

21 MS. PATTERSON: Yes, sir, 803(2), excited
22 utterance. Can we take the matter up outside the
23 presence of the jury?

24 THE COURT: All right. Step to your jury room
25 momentarily, ladies and gentlemen. Do not discuss the

1 case.

2 (The jury retires to the jury room).

3 THE COURT: Tell me your objection again,
4 Mr. Buchanan.

5 MR. BUCHANAN: Your Honor, we would object
6 because what she would be saying would be hearsay.

7 THE COURT: Why wouldn't it meet that test of
8 803(1) or (2) and also this is enumerated under State
9 versus McFadden, 458 S.E.2d 61.

10 MR. BUCHANAN: I think the -- I don't have
11 McFadden directly in front of me. We've already had
12 Ms. Johnson testify that this event happened between 11
13 and 12 the evening prior.

14 Deputy Blake, by his testimony, arrived on the
15 scene at 10:00 a.m. and then making his way through to
16 the house to find Ms. Johnson. We are looking at an
17 11-hour time frame since the event.

18 Therefore, 803(1) describes immediately
19 thereafter while declarant was perceiving the event.
20 Under Subsection (2), the excited utterance, again, it
21 talks about the stress of the excitement caused by the
22 event.

23 Certainly we are not at all saying that this
24 alleged assault was not a startling event, but, again,
25 we are talking about hours later after she said she went

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1 to bed, slept. This would not fall under any sort of
2 excited utterance nor a present sense impression about
3 who was the cause of this.

4 THE COURT: Thank you, Mr. Buchanan. Yes
5 ma'am, Solicitor.

6 MS. PATTERSON: Thank you, Your Honor. In a
7 reading of State v. Sims, Your Honor, the passage of
8 time is not the only determining factor. Ms. Johnson
9 was 69 years old when this happened.

10 She was beaten severely, Your Honor. She had
11 to crawl inside her house, her eyes swollen shut. The
12 deputy testified that when he got there, she was moaning
13 and groaning. She was obviously in pain.

14 This was the first opportunity that she had to
15 report what happened to someone. She was surely still
16 under the stress of the excitement of what had happened
17 to her.

18 Due to age, demeanor, the severity of the
19 incident, Your Honor, we would argue that she was still
20 under the stress of the event and that the hearsay
21 exception of excited utterance should still exist, Your
22 Honor.

23 THE COURT: I tend to agree, Solicitor, under
24 803(2) and State versus McFadden. I am going to allow
25 it. Thank you. Bring us our jury, please.

1 (The jury returns to the courtroom).

2 THE COURT: Solicitor, you may proceed.

3 MS. PATTERSON: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MS. PATTERSON:

6 Q Deputy Blake, you were able to talk to Ms. Johnson?

7 A I was.

8 Q She was able to speak to you?

9 A She was.

10 Q Did she tell you what happened to her?

11 A Yes.

12 Q What did she tell you happened?

13 A She indicated that she and someone she called
14 Bennie had been in an argument earlier in the
15 evening, she figured some time probably around
16 midnight, give or take. She didn't have an exact
17 time, but she knew it was considerably earlier than
18 when I arrived.

19 She indicated that during their argument
20 inside the house that Mr. Golston hit her about the
21 face with his closed fist. She was able to run out
22 of the house to try and flee, at which time she was
23 pulled to the ground, wrestled to the ground, and
24 he assaulted her with a hatchet and a piece of wood
25 that was lying around. Eventually he stopped his

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1 assault, and she crawled back into her home.

2 Q Were you able to identify this Bennie person?

3 A Yes, with the help of Ms. Jones who was actually in
4 the room with us when Ms. Johnson was giving me her
5 account.

6 Q Who did you determine this Bennie to be?

7 A Her boyfriend, somebody she was in an intimate
8 relationship with that was at the house.

9 Q Were you able to find out if he lived there?

10 A By all accounts we understand that he did live
11 there, yes.

12 MR. BUCHANAN: Objection.

13 THE COURT: What is the basis of the
14 objection?

15 MR. BUCHANAN: Hearsay, Your Honor.

16 THE COURT: There has got to be a foundation. I
17 would sustain that objection, there has to be a
18 foundation for that.

19 MR. BUCHANAN: Move to strike, Your Honor.

20 THE COURT: Pardon me?

21 MR. BUCHANAN: Move to strike his answer, Your
22 Honor.

23 THE COURT: I don't recall the answer. But as
24 far as the last question and the last response, Madame
25 Forelady, ladies and gentlemen of the jury, you may not

1 consider that. The defense attorney has moved to strike
2 that testimony. So it would not be part of your
3 deliberations in this matter. Thank you.

4 Solicitor, you may proceed.

5 MS. PATTERSON: Thank you, Your Honor.

6 BY MS. PATTERSON:

7 Q Were you able to collect any evidence from the
8 scene?

9 A I was.

10 Q And what were you able to locate?

11 A At the time of the incident, Ms. Johnson was
12 wearing -- had her gray braided hair. We found an
13 area of ground in front of the residence that had
14 been disturbed, indicating to us that there had
15 been some sort of scuffle on the ground.

16 Braids of Ms. Johnson's hair, I believe it was
17 four that I collected, were actually within three
18 to four feet of that disturbed area of the ground.
19 Just outside the door of the residence was a stick
20 of firewood about 18 inches in length, 3 inches in
21 diameter. There was actually a piece of
22 Ms. Johnson's, the same gray hair, was --

23 MR. BUCHANAN: Objection.

24 THE COURT: What is the objection?

25 MR. BUCHANAN: Your Honor, Deputy Blake has

1 not been established as an expert in hair follicles.

2 THE COURT: I would sustain the objection in
3 that regard. He is not an expert, but he can certainly
4 testify to his observations and the descriptions of
5 items. I don't think it's being offered for scientific
6 reliability. I would sustain the objection in that
7 regard.

8 You may continue, solicitor.

9 MS. PATTERSON: Thank you, Your Honor.

10 BY MS. PATTERSON:

11 Q Where did you find this piece of wood?

12 A Just outside the front door.

13 Q Why did this piece of wood catch your attention?

14 A Everything outside the house seemed to appear in
15 order. To the left of the door, there is a slab
16 concrete porch. To the left of the door, there was
17 neatly stacked firewood, yet this piece was off to
18 the side, to the right-hand side of the porch near
19 the door.

20 (State's Exhibit Number 10 is marked for
21 identification).

22 BY MS. PATTERSON:

23 Q I am going to show you what has been marked as

24 State's Exhibit 10 for identification purposes only
25 and ask if you recognize this.

1 A I do.

2 Q And what is this?

3 A Gray colored braids of hair with grass from where
4 they were pulled off the ground.

5 Q Did you collect this from the scene?

6 A I did.

7 Q What did you do with this when you collected it
8 from the scene?

9 A It was actually placed in that envelope and tagged
10 and placed into our evidence section at
11 headquarters.

12 Q And has this been in the evidence locker since you
13 placed it there on March 22, 2008?

14 A It has.

15 Q And did you check it out of the evidence locker and
16 bring it up to the courthouse?

17 A Yes.

18 Q Did it look like this had been changed or altered
19 in any way?

20 A No.

21 MS. PATTERSON: Your Honor, I would move
22 State's Exhibit Number 10 into evidence.

23 THE COURT: Mr. Buchanan?

24 MR. BUCHANAN: May I see it.

25 (Pause).

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1 MR. BUCHANAN: No objection, Your Honor.

2 THE COURT: State's 10 in evidence without
3 objection.

4 (State's Exhibit Number 10 is received into
5 evidence).

6 BY MS. PATTERSON:

7 Q Deputy Blake, I am going to show you what has been
8 marked as State's Exhibit 2 for identification
9 purposes only and I will ask you if you recognize
10 this.

11 A I do.

12 Q What is that, Deputy Blake?

13 A This is the stick of firewood that was located by
14 myself on the front porch.

15 Q How are you able to determine that is what you
16 located on the front porch?

17 A I placed the tape around this section (indicating)
18 to be sure that I didn't lose a strand of hair. I
19 had this out of our latent lift out of the
20 fingerprint kit tape. I had it and wrapped it
21 around the log so that I would not lose the hair
22 embedded into the bark.

23 Q What did you do after you gathered that from the
24 scene?

25 A I placed it in a paper bag and again secured it in

1 our evidence section at headquarters.

2 Q Has it been in evidence secured since you placed it
3 there?

4 A It has.

5 Q Did you sign it out of the evidence area?

6 A Yes.

7 Q And brought it here to the courthouse today?

8 A Yes, I did.

9 Q And has this log been changed or altered in any
10 way?

11 A No.

12 MS. PATTERSON: Your Honor, I move that
13 State's Exhibit 2 be admitted into evidence.

14 THE COURT: Mr. Buchanan?

15 MR. BUCHANAN: Your Honor, I would object as
16 to the entry of this because the foundation for this log
17 would not have been clearly established.

18 THE COURT: Would you approach the bench. I'm
19 sorry. I can't quite hear you, Mr. Buchanan. Thank
20 you.

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

24 THE COURT: State's 2 is in evidence subject
25 to objection.

1 (State's Exhibit Number 2 is received into
2 evidence).

3 MS. PATTERSON: Your Honor, I will get these
4 marked, please.

5 THE COURT: Yes, ma'am.

6 (State's Exhibits Number 11-21 are marked for
7 identification).

8 BY MS. PATTERSON:

9 Q Deputy Blake, I will show you what has been marked
10 as State's Exhibits 11 through 21 for
11 identification purposes only and ask you if you
12 recognize these photos.

13 A (Pause). I do.

14 Q Who took those photos?

15 A I did.

16 Q What is in photo Number 11?

17 A Photo Number 11 --

18 MR. BUCHANAN: Objection, Your Honor. We
19 don't have a foundation yet.

20 THE COURT: Don't have a foundation?

21 MR. BUCHANAN: Yes, sir.

22 THE COURT: I don't know what we are talking
23 about. Would you hand them to me?

24 THE WITNESS: Yes, Your Honor.

25 THE COURT: Mr. Buchanan, do you want to look

1 at these photographs. It appears -- do you want to look
2 at them and see if you have individual objections to
3 them, 11 through 21.

4 MR. BUCHANAN: Thank you, Your Honor.

5 THE COURT: All right. Do you have objections
6 based on foundation?

7 MS. PATTERSON: If so, I can lay one.

8 MR. BUCHANAN: A moment's indulgence, Your
9 Honor.

10 (Pause).

11 MR. BUCHANAN: Essentially he has not
12 described the where --

13 COURT REPORTER: I'm sorry, I couldn't hear
14 you.

15 THE COURT: Essentially what?

16 MR. BUCHANAN: He has not testified to the
17 where and when.

18 THE COURT: Solicitor, if you would lay the
19 foundation, please. I would sustain the objection at
20 this point.

21 MS. PATTERSON: Thank you, Your Honor.

22 BY MS. PATTERSON:

23 Q You did take those photographs?

24 A I did.

25 Q Where did you take those photographs?

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1 A At the incident location, 405 Old Wire Road.

2 Q And what day did you take those photographs?

3 A March 22, 2008.

4 Q So you took those photographs on the incident date?

5 A Yes.

6 Q And have those pictures remained in your custody
7 and control since you took the pictures?

8 A They were, again, with the other evidence
9 collected, signed into evidence section, and I
10 signed them out before court this morning.

11 Q Have they been altered in any way?

12 A No.

13 Q Do they fairly represent the photos that you took
14 on March 22, 2008, at the incident location?

15 A Yes.

16 MS. PATTERSON: Your Honor, I would move these
17 photos be admitted into evidence.

18 THE COURT: Mr. Buchanan.

19 MR. BUCHANAN: No objection, Your Honor.

20 THE COURT: State's 11 through 21 are in
21 evidence out objection.

22 (State's Exhibits Number 11-21 are received
23 into evidence).

24 BY MS. PATTERSON:

25 Q What does photo 11 show?

1 A It's an area directly in front of the 405 Old Wire
2 Road residence indicating the area of ground that
3 was disturbed and the proximity from that to where
4 the braids of hair were located.

5 Q What is in photo Number 12?

6 A The actual braids of hair before I collected them
7 and placed them in the bag.

8 Q And photo 13?

9 A Number 13 would be a photograph of Ms. Myrtle
10 Johnson in the bed where I located her in her
11 bedroom.

12 Q And that's the way she looked when you located her?

13 A Yes.

14 Q What about photo 14?

15 A Again, photo 14 is the area of disturbed ground
16 outside the residence.

17 Q Photo 15?

18 A Ms. Johnson again in the bed where I initially
19 located her, covered with multiple heavy
20 comforters.

21 Q And photo 16?

22 A A photograph, again, of Ms. Johnson and her
23 injuries to her face when she was lying in the bed.

24 Q Eighteen?

25 A Eighteen is the location of the firewood that was

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1 located to the right of the front door.

2 Q And photo 19?

3 MR. BUCHANAN: Your Honor, I have an objection
4 to the firewood picture based on our side bar
5 conference.

6 THE COURT: Subject to your previous
7 objection. What number was that, Officer?

8 THE WITNESS: The firewood is 18, Your Honor.

9 THE COURT: That would State's 18, subject to
10 your previous objection. Thank you.

11 You may continue, Solicitor.

12 MS. PATTERSON: Thank you, Your Honor.

13 BY MS. PATTERSON:

14 Q And photo 19?

15 A A braid of hair that was located on the front porch
16 in proximity to the firewood.

17 Q And photo 20?

18 A Indicates the stack of firewood that was neatly
19 stacked with a view of the screen door to the right
20 where I located the stick of firewood.

21 Q Photo 21?

22 A Twenty-one is, again, a photograph of the braids
23 near the disturbed area of ground in front of the
24 house.

25 Q Were you able to locate Bennie Golston?

1 A Not upon initially arriving on the scene, no.

2 Q Did you go out and try to look for him?

3 A We did. Other units had responded to the area, and
4 we were canvassing the area and around to see if we
5 could locate him.

6 Q Were you able to locate him at this time?

7 A No, we were not.

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

9 (Pause).

10 MS. PATTERSON: Your Honor, I may need to
11 recall Deputy Blake, but at this time there's no further
12 questions.

13 THE COURT: All right, Solicitor. Thank you.
14 Mr. Buchanan.

15 CROSS EXAMINATION

16 BY MR. BUCHANAN:

17 Q Deputy Blake, you say you took these -- this
18 object, this log, directly into evidence. Did you
19 submit it for fingerprint testing?

20 A No.

21 Q And how about any scientific analysis regarding the
22 strand of hair that is allegedly taped to the log?

23 A No.

24 Q And you yourself are not an expert in identifying
25 hair follicles or stands, correct?

1 A As far as hair analysis, D.N.A., that type of
2 stuff, no.

3 MR. BUCHANAN: Beg the Court's indulgence.

4 THE COURT: Certainly.

5 (Pause).

6 MR. BUCHANAN: No further questions, Your
7 Honor.

8 THE COURT: Redirect, Solicitor?

9 MS. PATTERSON: Nothing on redirect, Your
10 Honor.

11 THE COURT: Thank you. Thank you, Deputy
12 Blake. You may step down, and you are subject to
13 recall.

14 (Witness leaves the witness stand).

15 THE COURT: Solicitor, you may call your next
16 witness.

17 MS. PATTERSON: The State would like to call
18 Master Deputy Mike Merckle.

19 MICHAEL SAMUEL MERCKLE, being
20 first duly sworn, testifies as follows:

21 CLERK: State your full name, spelling your
22 last.

23 THE WITNESS: My name is Michael Samuel
24 Merckle. The last name is spelled M-E-R-C-K-L-E.

25 THE COURT: Solicitor.

1 MS. PATTERSON: Thank you, Your Honor.

2 DIRECT EXAMINATION

3 BY MS. PATTERSON:

4 Q Deputy Merckle, where are you employed?

5 A Lexington County Sheriff's Department.

6 Q And how long have you been employed with the
7 Lexington County Sheriff's Department?

8 A Approximately five years.

9 Q And in what capacity are you employed with the
10 Lexington County Sheriff's Department?

11 A I'm a master deputy, road supervisor.

12 Q What are some of your duties as a master sergeant
13 road deputy.

14 A As a master deputy, basically I'm second in charge
15 of the shift. I respond to calls just like regular
16 deputies do, calls for service, criminal, traffic,
17 any type of law enforcement related call, as well
18 as answering civil complaints or complaints on
19 other deputies on my shift.

20 Q How long have you been in law enforcement?

21 A Ten years.

22 Q Where did you work before you worked with the
23 Lexington County?

24 A Forest Acres Police Department.

25 Q And were you on call the morning of March 22, 2008?

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1 A I was on duty, yes, ma'am.

2 Q Did you respond to a call at 405 Old Wire Road?

3 A I did.

4 Q And was this in Lexington County?

5 A It is in Lexington County.

6 Q What was the reason that you responded to that
7 scene?

8 A Myself and Deputy Blake received a call from
9 dispatch, a call for service, about an assault.
10 The victim, Ms. Myrtle Johnson, was found in her
11 residence, apparently according to dispatch, had
12 been assaulted. It had been called in by a third
13 party.

14 Q Did y'all receive information regarding the
15 suspect?

16 A Once on scene we did.

17 Q And who was the suspect?

18 A It was indicated --

19 MR. BUCHANAN: Objection, Your Honor, hearsay.

20 THE COURT: I would sustain the objection.

21 MR. BUCHANAN: Thank you, Your Honor.

22 BY MS. PATTERSON:

23 Q When you got to the scene, were you able to talk to
24 the victim?

25 A I was.

1 Q Was she able to communicate with you?

2 A She was. She couldn't see us. We had to tell her
3 who we were, that we were law enforcement. We were
4 there to help her. E.M.S. was on the way to help
5 her since she couldn't see us. She could speak to
6 us briefly. It seemed labored, her breathing was
7 labored. She was in pretty bad shape.

8 Q Pretty bad shape. What was her condition like when
9 you saw her?

10 A A woman of her age I was actually shocked to see
11 her that swollen. Her face was swollen and
12 distorted. Her own son who showed up on scene
13 really didn't recognize her immediately as that was
14 his own mother he had known all her life. She
15 looked very bad.

16 Q And eventually you were able to talk to her?

17 A Yes, ma'am, I was.

18 Q Did she tell y'all what happened to her?

19 A She did briefly.

20 Q And what did she say to you?

21 MR. BUCHANAN: Objection.

22 MS. PATTERSON: Excited utterance.

23 THE COURT: Overruled. You may continue.

24 A She had indicated that her boyfriend, Bennie
25 Golston, the Defendant, had assaulted her earlier

1 in the evening or earlier in the evening before,
2 around midnight or so.

3 Q Was Bennie Golston on the scene?

4 A No, he was not.

5 Q Did y'all receive a tip as -- did y'all start
6 looking for him?

7 A We did. As a supervisor, I called other deputies
8 in the area that were not on calls, started
9 saturating. Bennie Golston is known to just kind
10 of wander around that particular neighbor in that
11 area. He grew up in that area. He is well known
12 by all the neighbors. Therefore, we kind of just
13 sent units out to try to canvas the area and talk
14 to the neighbors and try to find out where he might
15 be.

16 Q Where in particular did you go and look for him at
17 this time?

18 A There was no real one particular place. I do
19 believe we ventured over to his mother's residence.
20 Ms. Jones, Gail Jones, we spoke with her. She was
21 actually on scene when we got there. She said she
22 hadn't seen Bennie. He was not over there. We
23 went over there just to make sure.

24 Q Where did his mother live?

25 A Right there next to Ms. Myrtle Johnson's residence,

1 within several minutes of walking distance.

2 Q After you didn't find him there, did you look
3 anywhere else?

4 A Just drove up and down the roadway. We had to
5 answer other calls in between. Once she was
6 transported and we collected our evidence, just
7 initiated the original report and contacted major
8 crimes, we had other calls for service that we had
9 to handle. In the meantime while we were in that
10 area, we looked around and talked to neighbors,
11 generally looked.

12 Q Did you return to this area any time that day?

13 A We did.

14 Q Why did you return?

15 A We received a call, I believe it was from the son
16 of the victim, Myrtle Johnson's son. He indicated,
17 along with several other neighbors in the area,
18 that they had seen Bennie. He had actually been
19 sitting on a porch of another residence -- I'm not
20 sure which residence it was -- and that just prior
21 to our arrival, 10 or 15 minutes prior to our
22 arrival, he had walked off towards a wooded area.

23 Q And did y'all act on that tip?

24 A I did. I called in more units. We set up a
25 perimeter. As the supervisor, I called our dog

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1 team to come out. Deputy Radford, and his canine
2 tracking dog that tracks human scent, showed up on
3 scene, and we began tracking from his last known
4 location.

5 Q And where was the scent tracked?

6 A We tracked through this wooded area and brought it
7 back out towards the roadway, and actually directly
8 behind, I believe, 357 Old Wire Road which the
9 Defendant, Mr. Golston, claims to be his residence.

10 Q I am going to show you what has been marked as
11 State's Exhibits 3 through 8 and ask you to
12 identify what is in that picture.

13 A This is the residence or the building that we
14 tracked to with the canine while looking for
15 Mr. Golston.

16 Q Is that the way that building looked when y'all
17 went in there?

18 A Yes, ma'am.

19 Q Does it fairly and accurately represent the way
20 that building looked when you went in on March 22,
21 2008?

22 A It does.

23 Q Does it look like it has been changed?

24 A No, ma'am.

25 MS. PATTERSON: Your Honor at this time, I

1 move that State's Exhibit 3 through 8 be admitted into
2 evidence.

3 THE COURT: Mr. Buchanan.

4 MR. BUCHANAN: No objections, Your Honor.

5 THE COURT: All right. State's 3 through 8 is
6 in evidence without objection.

7 (State's Exhibits Number 3-8 are received into
8 evidence).

9 BY MS. PATTERSON:

10 Q Deputy Merckle, when y'all got to that building,
11 what did you immediately notice about it?

12 A It was a very unsafe structure. The roof was
13 caving in. All the windows had been broken out.
14 Actually the rear door which we had tracked to with
15 the dog, where the dog had tracked to rather, there
16 was a small porch leading to that, and the porch
17 was caved in. There was just beams of wood going
18 across it. We had to manipulate to actually get
19 into the residence itself.

20 Q Did it look like anybody was living there?

21 A No, ma'am. With the building being in the
22 condition it was, no, ma'am.

23 Q Was there any electricity?

24 A No, ma'am.

25 Q Were there any personal items laying around?

1 A Not that I could distinguish. There was lots of
2 debris and trash, again, pieces of the roof, wood,
3 nails, and everything just kind of scattered about.

4 Q And you actually went inside looking for the
5 Defendant?

6 A I did.

7 Q And when you got inside, did you find him?

8 A No, ma'am, we didn't find him.

9 Q Where did you look for him inside?

10 A I looked on the lower half. I guess it would be
11 the first floor. According to the Defendant, that
12 was a small trailer that he had built around. I
13 really couldn't tell at the time that's what it
14 was.

15 Like I said, the floors were caving in.
16 Myself and Deputy Radford actually went into a
17 back -- what appeared to be some type of bedroom.
18 It had mattress in it, a mattress set just laying
19 on the floor.

20 Deputy Blake went into the upper half, which
21 was access to the garage, from some dilapidated
22 steps, which actually the steps were not even
23 there. It was just boards coming down.

24 Q Now, that mattress that was laying in there on the
25 floor, was any linen on it?

1 A No. It was piles of trash and debris just kind of
2 scattered about all over the place, nothing that I
3 could distinguish as linen. I mean, there was old
4 clothing and just other, what appeared to be old
5 junk just laying around everywhere.

6 Q When y'all got there, did y'all announce yourself?

7 A We did at the doorway where the door was open. It
8 could not be secured back, but it was open when we
9 arrived there. We did, myself and Deputy Radford
10 made our presence known.

11 We announced loudly, gave many, multiple
12 verbal commands that we were there, that we had a
13 dog, a canine tracking dog, that did apprehension
14 work that does bite.

15 We were unable to actually bring the dog into
16 the residence because the interior of it was so
17 bad. The floor was busted out. There was, like I
18 said, nails and debris everywhere. We feared the
19 dog would actually be injured just walking inside,
20 his paws and stuff.

21 Q Did you locate anything -- when you saw the
22 mattress, what did you do with the mattress?

23 A Well, we were searching for a person. Therefore, I
24 was looking in any areas where a person can hide.
25 In my ten years of experience, I have found people

1 hiding in the most unbelievable places --
2 trashcans, underneath sinks, actually people have
3 been found in between mattresses, in between a box
4 spring and a mattress laying flat.

5 Q And did you look for the Defendant under this
6 mattress?

7 A I did. I raised the mattress up.

8 Q Did you find him there?

9 A I did not.

10 Q Did you find anything there?

11 A I did. I immediately noticed a hatchet.

12 MR. MAULDIN: Your Honor, I would renew our
13 objections based on the previous motion.

14 THE COURT: Yes, sir, objection so noted,
15 Mr. Mauldin.

16 MR. MAULDIN: Your Honor, do I have a ruling
17 on that?

18 THE COURT: Yes, I would affirm my pretrial
19 rulings in that regard.

20 MR. MAULDIN: Yes, sir.

21 BY MS. PATTERSON:

22 Q What did you find under the mattress?

23 A It was a hatchet.

24 Q And did this hatchet grab your attention?

25 A It did. Earlier when we spoke with the victim, it

1 was indicated that a hatchet may have been used in
2 the assault. Therefore, I suspected that to be
3 evidence in that crime.

4 Q I will show you what has been marked as State's
5 Exhibit 1 for identification purposes only and ask
6 if you recognize this.

7 A Yes, ma'am, I do. This is a --

8 MR. MAULDIN: I apologize, but I will have to
9 renew the grounds of the objection on relevance. I
10 don't believe this hatchet has been identified by
11 Ms. Johnson.

12 THE COURT: Well, that wouldn't be relevance,
13 I don't think, but I agree with your characterization.
14 I would overrule your objection. Thank you.

15 BY MS. PATTERSON:

16 Q I apologize. What is this exhibit? What is this?

17 A It looks like a standard hatchet used for
18 multiple -- cutting wood and stuff like that.

19 Q Is this the hatchet that you found under the
20 mattress?

21 A It is the hatchet.

22 Q When you got this hatchet from under the mattress,
23 what did you do with it?

24 A I secured it, walked out with it, and immediately
25 handed it to Master Deputy Blake, who was securing

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1 all evidence because he was actually doing the
2 report. So I handed it over to Deputy Blake.

3 Q Does this hatchet fairly represent the hatchet that
4 you got under that mattress on March 22?

5 A It does.

6 Q Is it altered in any way?

7 A No, ma'am, other than the tag that has been placed
8 on it.

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

10 (Pause).

11 BY MS. PATTERSON:

12 Q Thank you, Deputy Merckle. Please answer any
13 questions the defense may.

14 A Certainly.

15 THE COURT: Mr. Mauldin.

16 MR. MAULDIN: Thank you, Your Honor.

17 CROSS EXAMINATION

18 BY MR. MAULDIN:

19 Q Deputy Merckle, you testified at the prior hearing
20 that Ms. Johnson had described the hatchet used in
21 the assault as one having a brown wooden handle; is
22 that correct?

23 A Yes, sir.

24 MR. MAULDIN: No further questions.

25 THE COURT: Redirect?

1 MS. PATTERSON: No further questions.

2 THE COURT: Thank you. Thank you very much,
3 Deputy Merckle. You may step down.

4 (Witness leaves the witness stand).

5 THE COURT: Perhaps this would be a good time
6 to take our brief morning recess.

7 Madame Forelady, ladies and gentlemen, we will
8 take about a 15-minute recess. I remind you during the
9 recess, do not discuss the case amongst yourselves.
10 Remember to keep an open mind. Do not begin your
11 deliberations until I instruct you to do so. You may
12 now go with the bailiff.

13 (The jury retires to the jury room).

14 THE COURT: Mr. Buchanan, anything?

15 MR. BUCHANAN: Your Honor, I would like to
16 take this opportunity to put our sidebar objection on
17 the record.

18 THE COURT: Certainly.

19 MR. BUCHANAN: The argument I had, under the
20 objection based on a prior objection to hearsay, was
21 brought in by Ms. Johnson's comments regarding the log.
22 But for that objection being ruled in the State's favor,
23 the relevance for the log would not -- there would be no
24 relevance and no foundation for the entry of the log
25 into evidence.

1 THE COURT: Certainly your objection is on the
2 record. I would affirm my prior ruling concerning the
3 testimony under 803 exceptions and McFadden. Further,
4 as far as relevancy on the log, the officer's testimony
5 was he noticed it because it appeared out of place.

6 He further noticed that it had hair on it. In
7 his opinion as a non-expert, it was consistent with the
8 gray braided hair of Ms. Johnson. So I think there is
9 an independent relevancy to that particular item of
10 evidence, but your objections are certainly noted. Was
11 there any others?

12 MR. BUCHANAN: I don't believe so.

13 THE COURT: Thank you very much. We will take
14 about 15 minutes.

15 (Whereupon there is a recess).

16 THE COURT: Anything before we bring in our
17 jury, Solicitor?

18 MS. PATTERSON: Nothing from the State, Your
19 Honor.

20 THE COURT: Mr. Buchanan?

21 MR. BUCHANAN: No, Your Honor.

22 (The jury returns to the courtroom).

23 THE COURT: Our jury is back present in the
24 courtroom. We are continuing the trial of the case with
25 the presentation of testimony by the State in its case

1 in chief.

2 Solicitor, you may call your next witness.

3 MS. PATTERSON: Thank you, Your Honor. The
4 State would like to recall Master Deputy Kevin Blake.

5 CLERK: Still under oath, Your Honor?

6 THE COURT: Come around, please. You are
7 still under oath.

8 KEVIN NEAL BLAKE, having been
9 previously duly sworn, resumes the witness stand and
10 testifies as follows:

11 DIRECT EXAMINATION

12 BY MS. PATTERSON:

13 Q Deputy Blake, do you remember what time you left
14 the incident location on March 22, 2008?

15 A Around 10:45, 11:00 o'clock a.m.

16 Q What did you do after you left the incident
17 location?

18 A Being a weekend I immediately went into bond court.
19 It was the first available judge to obtain an
20 arrest warrant based on evidence collected and what
21 we had on scene for Mr. Golston.

22 Q What did you do once you received the arrest
23 warrant?

24 A I started traveling back to the area to help other
25 units assist in trying to locate Mr. Golston.

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1 Q So at that time other units were still at the scene
2 looking for him?

3 A Answering calls. And due to the severity of the
4 injuries and what had happened based on us
5 responding out there initially that morning, when
6 deputies got a free moment between calls or
7 reports, they were back in the area. I was
8 traveling in that direction with the warrant in my
9 possession.

10 Q Do you know around what time you got back to the
11 incident location with the warrant?

12 A We were specifically directed there later on
13 because we did get a phone call indicating that
14 Mr. Golston was spotted at a residence and later
15 going into a wooded area. We knew he was
16 definitely in the area. So at that point I
17 probably got there, I think, around 3:00 o'clock
18 maybe.

19 Q When you got to the area, were you involved in the
20 search for him?

21 A Only to the extent as a perimeter unit. We like to
22 set up a perimeter the best we can with as many
23 units as we can and stay near our cars so as not to
24 contaminate any possible scent for the dog to
25 track.

1 Q Was the dog able to track a scent to a certain
2 place?

3 A It was. The dog and the handlers went to a
4 residence located nearby Ms. Johnson's house at
5 405. If you are looking at her house from the
6 roadway, it was back and to the left of
7 Ms. Johnson's residence.

8 Q I show you what has been admitted into evidence as
9 State's Exhibit 3 through 8 and ask you if you
10 recognize those photos.

11 A (Pause). I do.

12 Q And what is in that photo?

13 A This is the structure that the dog tracked to. The
14 dog actually tracked to the rear door, which was
15 open.

16 Q And did you go into this structure?

17 A I only went into one part of the structure. There
18 is a part above where two cars are parked in an
19 open area. There's no doors sealing it off. You
20 can see the tail end of the white car with the
21 brick column in between.

22 Directly between the two vehicles that are
23 there, there used to be a set of stairs, but there
24 is no longer any risers on the stairs. It's only
25 the stringers or runners.

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1 I had to balance on the center one and the two
2 on the outside and make my way to an open area
3 above the garage. There is no walls or anything
4 and nothing to indicate anybody could hide in
5 there. So I did a cursory look up there.

6 Q So that's as far as you got, like that bottom level
7 of that structure?

8 A Into the upstairs above the garage. I made it up
9 that far through an opening in the floor.

10 Q Did you find Bennie Golston?

11 A I did not.

12 Q Were other officers present at this location?

13 A Yes, Master Deputy Merckle and Deputy Radford were
14 at the other part of the structure just behind the
15 garage in the area above that.

16 Q Were they able to locate Bennie Golston in this
17 structure?

18 A No, they were not.

19 Q Was anything located in this structure?

20 A Yes. Deputy Merckle, while I was making my way
21 around the residence, after I cleared my section
22 and was walking back to the rear door to see if I
23 could assist, he advised me that he had located a
24 hatchet beneath a mattress. I collected the
25 evidence on scene, and he immediately, while we

1 were there with the structure, handed the hatchet
2 over to me.

3 Q I will show you what has been marked as State's 1
4 for identification purposes only and ask if you
5 recognize this.

6 A I do.

7 Q What is this?

8 A That is the hatchet recovered by Deputy Merckle.

9 Q How are you sure?

10 A It's got my tag attached, as well as I placed this
11 piece of tape on the back of the hatchet head at
12 the time. Again, we are talking about a year ago.
13 There was a fine piece of what appeared to be gray
14 fiber or hair consistent with what I had located at
15 the house, and I put the tape on here in an attempt
16 to preserve that.

17 Q What did you do when you took the hatchet from the
18 scene?

19 A I immediately -- I had already turned in the other
20 evidence. I took that and logged it in the same
21 procedure with the other evidence from earlier that
22 day to the evidence section at headquarters.

23 Q Has this hatchet remained in the evidence section
24 until you signed it out?

25 A It has.

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1 Q Did you sign it out?

2 A I did.

3 Q And you brought it over to the courthouse?

4 A This morning, yes, ma'am.

5 MS. PATTERSON: Your Honor, at this time I
6 would move that the hatchet be admitted into evidence.

7 MR. BUCHANAN: We object based on previous
8 objections.

9 THE COURT: Thank you, Mr. Buchanan. State's
10 1 is in evidence subject to previous objections. I
11 reaffirm my previous rulings.

12 (State's Exhibit Number 1 is received into
13 evidence).

14 BY MS. PATTERSON:

15 Q When Ms. Johnson described the hatchet to you --
16 did she describe the hatchet to you?

17 A She did. She said it was a hatchet with a dark
18 colored handle. That is the information I got from
19 her.

20 Q When she also talked to you, did she tell you about
21 what time the assault took place?

22 A She said it was dark. It was late at night, very,
23 very early in the morning, somewhere around
24 midnight or after, somewhere in the time frame.

25 Q So it was dark?

1 DIRECT EXAMINATION

2 BY MS. PATTERSON:

3 Q Ms. Watson, where are you employed?

4 A Palmetto Health Richland Emergency Department.

5 Q And how long have you been employed at Palmetto
6 Health Richland Emergency Department?

7 A About four years.

8 Q And how long have you been a nurse?

9 A I've been a nurse for ten years.

10 Q And were you on duty at Palmetto Health Richland on
11 the morning of March 22, 2008?

12 A Yes, ma'am.

13 Q And did you receive a patient named Myrtle Johnson?

14 A Yes, ma'am.

15 Q Have you had opportunity to review her record?

16 A I have.

17 Q Can you tell us about what time she came in that
18 morning?

19 A She arrived to us at 11:14 in the morning.

20 Q Can you tell us how she was transported?

21 A By E.M.S.

22 Q Can you tell us under what circumstances she was
23 brought into the E.R.?24 A She came in with lots of facial pain and swelling,
25 and that's the reason that she was transported to

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1 us.

2 Q Do you have anything -- do you know how she looked
3 when she came in?

4 A Yes, ma'am. I have documented in several places in
5 my notes that she had lots of edema to her face,
6 which is swelling, and that her eyes were so
7 edematous that they were swollen shut.

8 Q Were you able to communicate with her?

9 A Yes, ma'am. I documented that she was alert and
10 oriented times three and that she was able to
11 follow commands.

12 Q Did her appearance cause any kind of medical
13 concerns?

14 A Yes, ma'am, to the point where the physician
15 ordered some of the trauma scans that we routinely
16 do on patients who come in with lots of trauma.
17 They had ordered C.A.T. scans of the face and then
18 routine trauma blood work.

19 Q Do you know what the results of these tests were?

20 A The trauma blood work that we do, just for example,
21 the hemoglobin and hematocrit in her blood levels,
22 they came back within normal limits. Then the
23 C.A.T. scans that they did, the C.T. of the head,
24 showed tissue swelling, no visible facial
25 fractures.

1 We also did the cervical spine or the neck,
2 which showed no cervical spine fracture but left
3 posterior soft tissue hematoma noted, which would
4 have been bruised, and a large amount of swelling
5 to the back of the neck.

6 Q So she had no fractures?

7 A No, ma'am.

8 Q No broken bones?

9 A No, ma'am.

10 Q But she had a great amount of swelling?

11 A Yes, ma'am.

12 Q And she also had a great amount of bruising?

13 A Yes, ma'am.

14 Q Did Ms. Johnson complain of any pain?

15 A Yes, ma'am. I documented -- we do a scale, a zero
16 to ten scale. Tell me and rate your pain on a
17 scale of zero to ten. Zero is no pain and ten is
18 the worst. I got documented that she told me her
19 pain scale was eight.

20 Q Was she treated with any kind of pain medicine?

21 A She was. She was given morphine for pain.

22 Q When is morphine normally prescribed for patients?

23 A That is at the doctor's discretion. It's usually
24 for severe pain.

25 Q Severe pain. Do you know how long Ms. Johnson was

1 at the emergency room?

2 A Yes, ma'am. She came in at 11:14 in the morning
3 and was discharged around 5:30 in the afternoon.

4 Q Do you know who she left the hospital with?

5 A It was documented that she left with her son.

6 Q And was she given any kind of follow-up
7 instructions?

8 A She was. She was giving discharge instructions for
9 facial contusion and also eye contusion, which is
10 bruising around the face and the eye, and also
11 instructed to follow up with Richland Ophthalmology
12 Clinic to get her eyes examined again.

13 Because at this point the doctor documented
14 that she was so swollen, he couldn't do the type of
15 exam that he wanted to do to make sure that she
16 could have vision.

17 Q What type of instructions was she given for the
18 contusion and the swelling?

19 A She was given -- it says Vicodin, which is a pain
20 tablet, and he has prescribed that for every four
21 hour as needed for pain. Also, the eye ointment
22 and then instructed to return to the emergency
23 department for any other concerns.

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

25 (Pause).

1 A Oh, yes, ma'am.

2 Q Who is your mother?

3 A Ms. Myrtle Johnson.

4 Q Is that the victim in this case?

5 A Yes, ma'am, it is.

6 Q Can you tell me when you lived with her?

7 A Yes, ma'am. I stayed with momma after grandpapa
8 passed, and we moved into the house in '99, 2000,
9 somewhere in there. My sister was there, I was
10 there, my wife and kids were there. My wife and I
11 split up. I was there from that point to probably
12 about '05, '06, at which point I just couldn't take
13 the Defendant anymore.

14 Q So during this time while you were living at home,
15 did your mother meet Mr. Golston?

16 A Yes, ma'am. Yes, ma'am. They met one day -- at
17 the time I had and I still have an '84 Camaro. I
18 was under the hood doing some work, and the
19 Defendant came over to allegedly help me.

20 Q At that point did your mother and the Defendant
21 begin a relationship?

22 A Oh, no, ma'am. This is probably 2000, maybe 2001
23 at this point. As a matter of fact, it had to be
24 late 2000, early 2001. At that point, no. Ben
25 was -- that's when Ben started sniffing around a

1 lot, but they weren't in a relationship for a year
2 or two at that point. I would say it would be less
3 than a year before they would enter into a real
4 relationship.

5 Q Can you tell us about when that started?

6 A Roughly '03, '04, somewhere in the time. When I
7 had shoulder surgery, I say they really got
8 serious. Prior to that mom knew that Ben and I
9 didn't get along. She kind of tried to hide it,
10 but I was aware of what was going on. So I would
11 say maybe '02, '03, but definitely '04, '05, it was
12 pretty well known.

13 Q And just for clarification, I don't believe I asked
14 you, where were you living at this point?

15 A I was with momma at 405 Old Wire Road.

16 Q Thank you. Did you eventually move out?

17 A Yes, ma'am, I had to leave. My wife and I had
18 separated. The kids were gone, so it was just me
19 and momma. My sister had moved out at that point.
20 It was pretty good but Ben was there.

21 It was at first during the day and I wasn't
22 there, so it didn't bother me. He would leave
23 early evenings usually, and then it gradually came
24 to the point where Ben was there all the time or
25 90 percent of the time.

1 If I came home, Ben was there. When I woke
2 up, Ben was there. When I went to sleep, Ben was
3 there, and half the time Ben would come in drunk,
4 loud. He had this guitar that he loved to play --

5 MR. BUCHANAN: Objection.

6 THE COURT: I would sustain that objection,
7 Solicitor, as far as the 403(3) type of testimony.
8 Anything further?

9 MR. BUCHANAN: That's what we objected to.

10 THE COURT: Anything further you want to say
11 in that regard, Mr. Buchanan?

12 MR. BUCHANAN: Move to strike all of that.

13 THE COURT: Thank you. Mr. Foreman and ladies
14 and gentlemen of the jury, I would ask you to strike
15 responses concerning any prior conduct relating to
16 drinking. It's not relevant.

17 I am not fussing at you at all, Mr. Johnson.
18 Don't take it like that. I couldn't compete with you
19 historically or in political science. It's not a matter
20 of fussing at you, but it's not relevant to what may or
21 may not have happened on the 22nd of March of '08.

22 THE WITNESS: Yes, sir.

23 THE COURT: That would not be part of your
24 deliberations. Thank you. Thank you, Solicitor. You
25 may continue.

1 MS. WHETSTONE: Thank you, Your Honor.

2 BY MS. WHETSTONE:

3 Q At the point when you began to move out or during
4 that time, would you say that the Defendant was
5 living with your mother?

6 A Oh, yes, ma'am. Actually at that point, Ben was
7 there 90 percent of the time. He was probably
8 there more than I was. I would spend most of my
9 days out and come in in the evening. Even after I
10 had my shoulder surgery, Ben was there most of the
11 time. I couldn't go anywhere, so I was there.

12 Q Did he have clothing at the house?

13 A Yes, ma'am. Momma washed his clothing and mine,
14 shoes, ate with momma, cooked for momma, chopped
15 the wood, stacked the wood, built a fire. He was
16 there.

17 Q When he was living there, where did he stay in the
18 house? Did he sleep in a particular bedroom?

19 A Momma's, yes, ma'am.

20 Q Did the Defendant have a key during this time at
21 all?

22 A Yes, ma'am. About the time momma started having to
23 go up to Jersey, she would go to take care of my
24 grandparents. She would stay maybe four weeks,
25 come back home for four weeks and stay.

1 At that point we had just found out that my
2 grandmother had Alzheimer's and my grandfather had
3 Parkinson's and some type of cancer. So she and my
4 cousin Jowanna (phonetic), who stays in
5 Philadelphia, which is where I was born, would
6 trade off.

7 Nobody could kind of take care of both of them
8 at the same time. Jowanna would come over and stay
9 with grandma and grandpop for awhile. They would
10 switch off.

11 One of the early trips momma took, Ben had a
12 key, and I raised a big stink about it. When momma
13 came back, she took the key. After I was gone, she
14 gave him the key back.

15 He broke the key off in the lock, which is why
16 Alfred was changing the locks. So there were only
17 two keys at that point. It was my key and momma's
18 key, but we couldn't use the front door.

19 We had to use the door through the garage or
20 the back door to get in. He had a key at that
21 point, and then there was some debate between
22 myself and momma about giving him a key after she
23 got the locks changed.

24 Q When you say when Alfred was changing the locks,
25 can you tell us when that happened?

1 A That was after both my grandparents had passed and
2 momma had moved in full-time down at 405. He
3 changed the locks the night/day of the incident.
4 That's when he finally changed the locks.

5 We had been talking about getting it done for
6 months now because grandma's probate was about up,
7 and they were bringing the furniture from grandma's
8 house to the house. We wanted to get things real
9 pretty. My grandmomma had some beautiful
10 furniture, and we wanted to get the house right for
11 it.

12 Q Moving forward, when did you learn that something
13 had happened with your mother?

14 A That morning I was -- it was roughly 9, 9:30. I
15 usually get up and go for breakfast --

16 Q When you are talking about that morning -- sorry to
17 interrupt you -- what date was that? Do you recall
18 that date?

19 A That would have been the 22nd, March 22, 08. But I
20 was going for breakfast as I normally do. I got to
21 the Waffle House, ordered my food and everything,
22 and my phone rang.

23 It was a number I didn't recognize; which
24 usually I don't answer. Since it was a Saturday, I
25 picked it up. That's when Miss Gail had told me

1 that momma was in trouble, to make it, come over or
2 whatever.

3 So I asked Gail what happened. She couldn't
4 really tell me at that point. She just said,
5 Something has happened to your momma. I said,
6 Okay, have we called the police? Gail said -- I
7 think she said, No I'm about to or maybe I asked
8 her to. I'm not sure which way, but we involved
9 the police.

10 So I canceled my order, headed onto the house,
11 and somewhere in between there, I realized I hadn't
12 talked to momma. I didn't really know what was
13 happening. So I called Gail back, and Gail said
14 she had called the police.

15 I asked to talk to momma, and I heard momma's
16 voice, but she was -- her breathing was kind of
17 labored, and I was getting a little worried about
18 her. So I was like, I'm on the way. I am already
19 on 77. I will be there soon.

20 Q How long between when you received the call from
21 Ms. Jones until you arrived at 405?

22 A No more than 20 minutes, no more than 20 minutes.
23 I probably did it that day in about 15. I wasn't
24 speeding but I wasn't exactly going slow either.

25 Q Tarik, do you recall how the yard and the residence

1 looked upon your arrival?

2 A Yes, ma'am.

3 Q Can you describe for me what you did upon your
4 arrival at your mother's house?

5 A I parked my car -- actually I wasn't driving my
6 car. I was driving a friend's car. I parked her
7 car, went into the house, went to the back, and I
8 saw my momma laying there. That was my momma but
9 that wasn't my momma. I wasn't prepared for that.

10 I worked rescue at Rocket Rescue for about two
11 years, and I've seen wrecks with fatalities. I've
12 never seen anybody's face swollen like that. If
13 she hadn't talked, I wouldn't have known that was
14 my momma.

15 Q Was she able to say anything when you arrived?

16 A Yes, ma'am. She asked me -- I asked her what
17 happened and she said, she told me, that the
18 Defendant had done this to her.

19 MR. BUCHANAN: Objection, hearsay, Your Honor.

20 THE COURT: Solicitor, will you lay the
21 foundation for that testimony, please.

22 MS. WHETSTONE: Thank you, Your Honor.

23 BY MS. WHETSTONE:

24 Q Who was there when you arrived at the scene?

25 A When I got there, Miss Gail was the only one there.

1 Deputy Blake arrived shortly thereafter. I
2 couldn't have beat him by more than five minutes at
3 the most.

4 But when I spoke to momma, he hadn't arrived
5 yet. So it was the movers and they wouldn't come
6 in. It was just Miss Gail and myself in momma's
7 room.

8 Actually it was my bedroom. We had put
9 everything in my bedroom while they painted her
10 room. So my mattress was on the floor. Her
11 mattress was up against the wall.

12 Q At this point where was she?

13 A She was laying in the bed. She was kind of curled
14 up. She kept complaining that she was cold, and
15 she was -- she could answer you. She kind of
16 seemed incoherent, but I think that was more
17 because you couldn't understand what she was
18 saying.

19 She would try to speak to you. She would
20 answer you, but it came in short, little, ragged
21 breaths. She wasn't -- she was responsive but she
22 wasn't able to communicate greatly.

23 Q Could she tell you what had happened?

24 A All she could say was that Ben had beat her up.
25 She didn't go into any detail.

1 MR. BUCHANAN: Objection Your Honor.

2 THE COURT: I would overrule your objection.

3 (State's Exhibits Number 22-25 are marked for
4 identification).

5 BY MS. WHETSTONE:

6 Q Tarik, I am going to show you some pictures. Can
7 you tell me if you recognize the subject of these
8 pictures?

9 A Yes, ma'am, that is momma.

10 Q I have shown you 22. Can you go through the
11 pictures and see if you recognize all of them.

12 A This is momma. Judging by where she was at, that
13 is shortly after we got to Huriya's house, maybe
14 the next day, but I don't think so. It looks like
15 she has on like a little hospital thing. That's
16 momma in the house.

17 Q Can you tell me what number you are referring to.

18 A Sorry, I'm on Number 23. I can't tell exactly
19 which one this is, but I do believe this is also at
20 my sister's house. This must be three or four days
21 later because one of her eyes is starting to open
22 at this point, and she is looking a little better.

23 This is another one at my sister's house. I
24 can't tell you exactly what time it is. I can't
25 see if her eyes are open or not. I don't know how

1 far it was after this was taken. This one looks
2 like pretty much the shot earlier when momma's one
3 eye had started to open.

4 Q Thank you. I am going to show some additional
5 pictures that have already been entered into
6 evidence. Can you tell me what is in State's 13?

7 A Yes, ma'am, that was how we found momma in the bed.
8 Actually at this point they had -- must have got
9 her to roll over to take the picture because she
10 was on her side when I got there.

11 She was just holding my hand and trying to
12 cover herself up, so we had to get her more covers.
13 That's her. You can see the dirt and some wet
14 substance down her shirt that -- where she had been
15 there.

16 Q And State's 16?

17 A Yes, ma'am. That is pretty much the picture of
18 where momma was when we found her. You could see
19 her braids and everything. She was like -- that's
20 exactly how she was.

21 Q The picture you are referring to is now State's 16.
22 In this picture this is how your mother appeared?

23 A Yes, ma'am, that is almost verbatim how she was
24 when I found her. She might have had her hand in a
25 different position when I got there. You can see

1 she is kind of hunched over and swollen up. That
2 is just how she looked. That's her at that point.

3 Q You described she was on her side when you
4 appeared?

5 A Yes.

6 Q What does this picture depict?

7 A That's a picture of her. That's further out but
8 that's the same time. That is how it would have
9 looked when you came into the room had you been
10 standing at the foot of the bed. She was laying on
11 her side curled up, just kind of moaning and
12 groaning that she hurt, and that was it.

13 Q That was State's 15 for the record. Finally
14 State's 17. I believe that is similar to the one
15 we just looked at.

16 A Yes. I think that was the first attempt that they
17 tried to get her to roll over on her back. She
18 just moaned so much she couldn't make it. They
19 kind of stopped there and took the picture.

20 Then she was able to kind of twist herself
21 over and get over onto her back to take the other
22 one, but that was as good as we thought we were
23 going to get at that point. Moving hurt. She said
24 every time she moved it hurt.

25 Q What happened after these pictures were taken that

1 day?

2 A After those pictures, shortly after that, the
3 ambulance arrived. They came in and talked to
4 momma. The officers were outside, and I think
5 Deputy Blake stayed inside with us. They got momma
6 onto one of those C.T. back board things and got
7 her onto the stretcher and rolled her outside.

8 I was holding her hand, and momma asked, She
9 said, I am moving? I said, Yes, ma'am, you are
10 moving. She said, Am I outside yet? I said, Yeah,
11 momma, you are almost at the edge of the driveway.

12 The E.M.S. asked her where she wanted to go.
13 She said Lexington. One of the E.M.T.s or
14 paramedics asked me, she told me they would rather
15 take her to Palmetto Health Richland because they
16 have a better trauma center.

17 I said take her there. I said, Momma, they
18 are going to take you to Palmetto Health Richland.
19 She say okay. They took her over there. I
20 followed them over there.

21 In between leaving and while they were talking
22 to momma, I called my sister and told her where we
23 were going. She said she would meet me there. We
24 got there.

25 We sat around and waited while they had momma

1 back there. But during the initial checkup or
2 something like that, we couldn't be back there. We
3 stayed and waited for awhile.

4 I tried to tell Huriya how -- prepare her for
5 how momma was going to look. We were finally
6 allowed back. She went back and my sister started
7 crying when she saw momma. I held onto her for a
8 little while, and I told her -- oh, I skipped.

9 In between that on the road I had called
10 Alfred, who was doing the work in the house, and
11 told him to go back to the house to help the movers
12 get things in because they couldn't move things in
13 without somebody being there. Obviously I couldn't
14 stay at that point.

15 Q When did you call Alfred?

16 A Before I left from the scene, before they carted
17 momma off in E.M.S.

18 Q Then you followed the ambulance to the hospital?

19 A Yes, then I followed the ambulance to the hospital.
20 My sister had arrived there. She was already
21 waiting when we got there. I think she had to work
22 that day anyway because she was in her little
23 scrubs.

24 Q Did you stay there all day?

25 A No, ma'am. I told Alfred I would be back, and I

1 actually had to get my car. My car was being
2 repaired in West Columbia. So I switched cars out.
3 I told Huriya, Stay with momma. I will be back or
4 call me if anything happens. I will go to the
5 house.

6 Because, again, we still had to get the
7 things -- they still had to get the things off the
8 truck --

9 MR. BUCHANAN: Objection, Your Honor,
10 relevance.

11 THE COURT: I sustain the objection. I don't
12 know how it hurts, but I will sustain the objection.
13 You can ask your next question, Solicitor.

14 BY MS. WHETSTONE:

15 Q Did you ever see the Defendant that day?

16 A Yes, ma'am. When I came back to the house, Alfred
17 told me that he had seen him and somebody else had
18 seen him. So I said, Okay, I am going to go ahead.
19 They had told me to call. I believe Officer Blake
20 had given me a card.

21 So I called the non-emergency number and
22 called for Deputy Blake to come out. They got
23 there pretty quick. So they had asked what
24 happened, and I told them, you know, that I had
25 heard that he had been right in the area. So

1 Deputy Blake had the arrest warrant in his hand.
2 He said, I am going to go down here and talk to
3 some of his people.

4 Q Down here meaning?

5 A The dirt road that sits by -- my mother's house and
6 Miss Gail's house is separated by a little dirt
7 road. I mean, it's not more than 50 feet. It
8 would take you two minutes at the most to walk to
9 Miss Gail's house, and that is a slow crawl.

10 Q Is that where you saw the Defendant?

11 A Actually he was back behind the dirt road. When
12 the officers went down, he was behind the dirt
13 road. There is kind of like a shack, shanty, tool
14 shed out there, and I saw him poke his head around,
15 at which point I started running, and I yelled to
16 the deputies, I see him. I see him. I see him.

17 They were further down on Lee street -- I
18 think that's the name of that road. They started
19 running up. He headed into the high grass woods
20 area. The officers stopped, I stopped, and they
21 called for the canine units.

22 Q Did you see the Defendant again after that?

23 A The next time I saw him was at the -- where they
24 set bond after they had caught him. Again, after
25 that I didn't see him until then.

1 Q Did you see your mother later that day?

2 A Yes, ma'am. After that I went back to the hospital
3 and momma was actually speaking pretty good. She
4 was -- she had called down, I guess, so she was
5 speaking much better. She still couldn't see and
6 she still hurt a lot.

7 I think she was happy because Huriya and I
8 were there. They asked her if she wanted to go
9 home. They said, We will keep you overnight, but
10 you don't have any broken bones, and you can go
11 home if you have somebody to take care of you.

12 Q Did she go home with you?

13 A Yes, she went home with me. My sister said she
14 would take care of her. She had more flexibility
15 in her schedule. But at that point she couldn't
16 take her back to her house.

17 I took momma home. It was kind of easier to
18 get her in my car. I took momma home. We started
19 with the -- they told us to get a bag of frozen
20 peas and put it over her face every so often to try
21 to get the swelling to go down.

22 I took her home, and later that evening I
23 tried to feed her some soup, but it just dribbled
24 out. So later that evening my sister came and took
25 her home. From that point until she could actually

1 kind of function on her own and actually still
2 today, we switch off.

3 Momma will go down to her house every now and
4 again, but a lot of times if my sister has
5 something to do, I will take care of momma. If I
6 have something to do, momma will stay with Huriya.
7 She doesn't like being by herself too much anymore.
8 She will go with me often to Rock Hill since my
9 children, her grandchildren, are there. She will
10 spend the day with them.

11 Q So you saw your mother in the week following this
12 incident?

13 A Yes, ma'am.

14 Q You described for me moments earlier what was in
15 this. Does this -- do these pictures, State's for
16 identification 25, 24, 23, and 22, do they fairly
17 and accurately represent the stages your mother was
18 in a week after this incident?

19 A Yes, ma'am. You could see that one of her eyes had
20 opened to a point. I actually had to go -- I think
21 Huriya had to work one day. I said, I will take
22 care of momma.

23 I got there and momma was laying in the bed.
24 This is the first joke she told me after. You have
25 to understand, my momma is a jovial person. She

1 loves jokes. We always laughed. She said, I see
2 you today --

3 MR. BUCHANAN: Objection, Your Honor.

4 THE COURT: Objection to what?

5 MR. BUCHANAN: Relevance.

6 THE COURT: What part of it, that she is a
7 joking person?

8 MR. BUCHANAN: Basically.

9 THE COURT: I sustain the objection.

10 A She opened that eye, and she said, I see you today.

11 Q So what does this picture represent?

12 A This is probably, I would say, at most a week.

13 Q That's State's 22?

14 A Twenty-five.

15 Q Thank you. That's State's 25 you are referring to?

16 A Yes, ma'am. This is at most a week because I can
17 see one eye is open, but the other one is not. It
18 was probably four or five days before one eye
19 opened, and it was more like another week before
20 the second eye opened because I had take her to the
21 eye doctor.

22 They were concerned that since her eyes swole
23 up, they had got dirt or something in them, and
24 they were concerned she might have lost some kind
25 of sight, so we had to wait until they opened up.

1 I couldn't take her that week because the
2 second eye hadn't opened enough. When the second
3 eye opened up, which would have been a week after
4 that one, I took her to the doctor, but they
5 couldn't get the eye open enough to examine it.

6 Q Would State's Exhibit 23 represent about the same
7 time period?

8 A Yes, definitely. You can see that that eye has not
9 opened yet. At that point you could actually see
10 her eyes again, the eyelids, but she couldn't -- I
11 think maybe she could have got it opened, but that
12 one eye -- she could see out of the other one --
13 was always scrunched up. So that's got to be about
14 the same time.

15 Q Then we are looking at State's 24. What time
16 period was that? Was that a little prior or after?

17 A That was before that actually happened. At this
18 point she doesn't have either eyes opened. You can
19 barely see one eyelid. You can see the other one
20 fairly well.

21 So that is before that eye opened but not
22 before she actually got the swelling to the point
23 where she could actually open it. So I would say
24 that is probably three days at the most.

25 Q And when would you say State's 22 would fall in

1 that time range?

2 A That has to be the day -- that's either the night
3 we got her to Huriya's house or the next morning.
4 That's very recent. As a matter of fact, it looks
5 like one of us has put medicine in her eye. I
6 would say that is either that morning after or that
7 evening.

8 MS. WHETSTONE: Your Honor, at this point we
9 would move to enter State's 22 through 25 into evidence.

10 THE COURT: Mr. Buchanan.

11 MR. BUCHANAN: Your Honor, we object. I don't
12 believe they have laid the proper foundation. We don't
13 know who took those photographs.

14 THE COURT: Let me see them a minute,
15 Solicitor.

16 (Hands to Court).

17 THE COURT: I would overrule the objection. I
18 believe this witness has testified as to the various
19 stages and times, general times, in which those
20 photographs were taken. Twenty-two through 25 are in
21 evidence.

22 MS. WHETSTONE: Thank you, Your Honor.

23 THE COURT: Subject to the foundation
24 objection.

25 MR. BUCHANAN: Thank you, Your Honor.

TARIK JOHNSON -- DIRECT -- MS. WHETSTONE

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1 (State's Exhibits Number 22-25 are received
2 into evidence).

3 MS. WHETSTONE: Thank you, Your Honor.
4 Permission to publish these to the jury.

5 THE COURT: Yes, ma'am.

6 BY MS. WHETSTONE:

7 Q Briefly will you identify these pictures I am going
8 to show you again. This is State's 22.

9 A Yes, ma'am, that's the first one. That had to be
10 taken either that evening or the very next morning.

11 Q And State's 24?

12 A That one could be a day or two afterwards. Her
13 eyes haven't opened yet. You can start to see the
14 eyelids, but she hasn't got one eye opened. That's
15 at least four to five days. It was four to five
16 days before she opened her eyes. So I would say
17 that was two to three days before then.

18 Q And then State's 23?

19 A That's when momma got that first eye opened. She
20 was actually -- at that point she could get up and
21 kind of stumble to the bathroom on her own because
22 she could see where she was going.

23 That would be, I would say, five days after
24 the incident, which would make it the 27th, I
25 believe. That's five days after the incident. She

1 is sitting up and she has got her eye open.

2 MS. WHETSTONE: Beg the Court's indulgence,
3 Your Honor.

4 THE COURT: Yes, ma'am.

5 (Pause).

6 BY MS. WHETSTONE:

7 Q Tarik, since this incident has happened, have you
8 observed a change in your mother in her quality of
9 life?

10 A Yes, ma'am. Momma was very independent and she was
11 really proud and made us independent. So she
12 didn't like to get us to do things or take her
13 around too much. She liked to drive places on her
14 own. She will still drive places on her, but she
15 can't drive to Rock Hill anymore.

16 She will not -- she is almost always with my
17 sister or myself. She calls me, and granted I
18 probably talk to my momma every day of my life, but
19 she calls me two and three times a day now.
20 Sometime it's just to talk. She is a bit nervous
21 or she is down and depressed, and she just wants to
22 talk.

23 I will pick her up and take her up to Rock
24 Hill with me before I go to school so that she can
25 stay with the grandkids, which she is spending a

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1 THE COURT: Ms. Johnson, would you come around
2 for us, please.

3 CLERK: Is she still under oath from
4 yesterday?

5 THE COURT: Yes, she is still under oath.
6 That would be appropriate.

7 MYRTLE JOHNSON, having been
8 previously duly sworn, resumes the witness stand and
9 testifies as follows:

10 THE COURT: Ms. Johnson, if you would please
11 consider yourself to still be under oath.

12 THE WITNESS: Yes, sir.

13 THE COURT: Thank you very much.

14 Mr. Buchanan.

15 MR. BUCHANAN: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. BUCHANAN:

18 Q Good afternoon, Ms. Johnson.

19 A Good afternoon.

20 Q I called you back up here because I wanted to ask
21 you a couple more questions just real briefly,
22 Ms. Johnson. The morning of March 22, 2008, you
23 were questioned by police; were you not?

24 A Yes, sir.

25 Q Before you got on the ambulance, the police asked

1 you some questions?

2 THE COURT: What date is that? Let me get
3 that straight.

4 MR. BUCHANAN: March 22, 2008.

5 THE COURT: Thank you.

6 BY MR. BUCHANAN:

7 Q The police asked you some questions, one of them
8 being that they asked you if any weapons were used
9 in the assault?

10 A I'm sure they did, sir.

11 Q Do you remember telling them no?

12 A No, I don't remember exactly what I said. At that
13 time that was just hours after the attack, correct?

14 Q Well, you are the one who is testifying so I can't
15 answer.

16 A That's when the police came into my home. I was
17 awakened by Gail. That means that was hours after
18 the attack, and I was very woozy. I couldn't
19 hardly speak. So I'm not real clear on the events,
20 how they happened.

21 Q That's fine, just what you remember. So you don't
22 remember telling them, no? When the police asked
23 you were there any weapons used in the attack, you
24 don't recall telling them no?

25 A I don't remember telling them no. What I do

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1 remember is telling them there was a hatchet, but
2 he didn't hit me, like on the head with the
3 hatchet. He rubbed the hatchet over my neck and
4 skin. That's what I remember.

5 Q Did the topic of the hatchet come up when they
6 asked you if Mr. Golston was known to carry any
7 weapons?

8 A Did he ordinarily carry weapons?

9 Q Did the officers ask you that?

10 A I don't remember that.

11 Q That's fine. Do you remember them asking you
12 several times, at least three times, about weapons,
13 and you answered no all three times?

14 A I don't remember that.

15 Q Thank you very much.

16 A You are welcome, sir.

17 THE COURT: Solicitor? Let's see if
18 Ms. Patterson or Ms. Whetstone have any questions for
19 Ms. Johnson.

20 MS. PATTERSON: No, sir, Your Honor. No
21 questions.

22 THE COURT: I didn't mean to slow you down.

23 THE WITNESS: I will start again.

24 THE COURT: You may step down, Ms. Johnson.

25 (Witness leaves the witness stand).

1 THE COURT: Mr. Buchanan, you may call your
2 next witness.

3 MR. MAULDIN: The defense would call Gail
4 Jones to the stand.

5 THE COURT: I apologize, Mr. Mauldin. You may
6 call your next witness.

7 MR. MAULDIN: That's fine.

8 CLERK: Still under oath, Your Honor?

9 THE COURT: Yes, Ms. Jones is still under
10 oath. Thank you.

11 GAIL JONES, having been
12 previously duly sworn, resumes the witness stand and
13 testifies as follows:

14 DIRECT EXAMINATION

15 BY MR. MAULDIN:

16 Q Ms. Jones, where were you when the police arrived
17 at Myrtle Johnson's house on March 22, 2008?

18 A In Myrtle Johnson's bedroom.

19 Q And where were you when they were asking her
20 questions about what had happened?

21 A Right beside Myrtle.

22 Q And what, if anything, did she say about a weapon
23 being used in the attack?

24 A The question was asked, Did he use any weapons on
25 you? She stated no.

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1 Q And how many times did she say that?

2 A Approximately three times.

3 Q When was the first time you heard her mention a
4 hatchet?

5 A One of the officers asked, Do you know if Ben
6 carried or have any weapons in his possession? She
7 said that he had been known to carry an axe.

8 MR. MAULDIN: No further questions, Your
9 Honor.

10 THE COURT: Thank you, Mr. Mauldin.
11 Solicitor?

12 MS. PATTERSON: No questions for this witness.

13 THE COURT: Thank you very much, Ms. Jones.
14 You may step down.

15 (Witness leaves the witness stand).

16 THE COURT: Mr. Buchanan, you may call your
17 next witness.

18 MR. BUCHANAN: The defense wishes to call
19 Ms. Bambi Gray.

20 THE COURT: Ms. Gray, if you would come
21 around, please.

22 BAMBI LADAWN GRAY, being
23 first duly sworn, testifies as follows:

24 CLERK: State your full name, spelling your
25 last, please.

1 MR. BUCHANAN: Your Honor, we move to allow
2 Ms. Gray to be excused.

3 THE COURT: She can remain. I'm not excusing
4 her.

5 MR. BUCHANAN: Understood, Your Honor.

6 THE COURT: Thank you. You may call your next
7 witness.

8 MR. BUCHANAN: Your Honor, the defense calls
9 Bennie Golston.

10 THE COURT: Mr. Golston, if you would come
11 around, please, and be sworn.

12 BENNIE GOLSTON, being
13 first duly sworn, testifies as follows:

14 CLERK: State your full name once you are
15 seated, spelling your last.

16 THE WITNESS: Bennie Golston, G-O-L-S-T-O-N.

17 DIRECT EXAMINATION

18 BY MR. BUCHANAN:

19 Q Mr. Golston, how long have you lived on Old Wire
20 Road?

21 A About 45 years.

22 Q How old are you?

23 A Fifty-five.

24 Q What is the address of where you live on Old Wire
25 Road?

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- 1 A 357 Old Wire Road.
- 2 Q Is that the number of the lot?
- 3 A That's my mailing address.
- 4 Q Now, could you describe your house.
- 5 A It was a 48-foot mobile home. All right. I came
6 up 48-foot on the back, and I added 14-foot out,
7 and I went down 48 inches. I left at 48 inches. I
8 went out 26 inches -- 26 feet. Then I put the two
9 story on the top. Then I bricked the thing and put
10 a patio in the back with a fireplace.
- 11 Q What's your trade?
- 12 A Brick mason.
- 13 Q So it's kind of the worse for wear. How did that
14 happen?
- 15 A How what?
- 16 Q How would you describe your house right now?
- 17 A The storm tore it up.
- 18 Q Which storm?
- 19 A About two or three of them. It seems like it was
20 right when the storm passed.
- 21 Q Did you ever try fixing it up?
- 22 A I didn't have any money.
- 23 Q How did you use your house?
- 24 A Well, I go there when I don't want to be bothered.
25 I sleep, get up, and go.

1 Q Do you know Myrtle Johnson?

2 A Yes, I know Myrtle.

3 Q Did you ever live with Ms. Johnson?

4 A I spent a night sometimes.

5 Q Are you aware of Ms. Johnson having other
6 relationships?

7 A She had a boyfriend and she was married once.

8 Q Not to you?

9 A No.

10 Q Let's go back roughly a year, a little bit more
11 than a year, March of 2008. Did Ms. Johnson have a
12 boyfriend at that time?

13 A I don't know.

14 Q Let's talk about March 21, 2008. Do you remember
15 that day?

16 A Yes.

17 Q What did you do in the early parts of the day?

18 A There wasn't no early part of that day for me. I
19 worked at March 21. I knocked off 5:00 o'clock
20 that evening.

21 Q What did you do after you finished work?

22 A I rode with Myrtle to take the worker home.

23 Q The worker home, who is that?

24 A The worker she had working there.

25 Q Do you know who that person was?

- 1 A Alfred.
- 2 Q Alfred. So you took him home?
- 3 A Right.
- 4 Q Then what did you and Myrtle do?
- 5 A I sat on the front porch and started drinking a
6 beer.
- 7 Q Then what happened?
- 8 A I was waiting on the guys I work for to bring my
9 money I had worked for. So I sit and sit and
10 nobody never came. So after a while Alfred came
11 back, him and some girl, and they all went in the
12 house.
- 13 They stayed there, stayed, so finally after a
14 while I ran out of beer. I walked down to the
15 store and got another one and came back and sat and
16 drank that. It done got dark. So then I went
17 home.
- 18 Q Did you observe anything inside the house? Was
19 Alfred and Myrtle still inside?
- 20 A No, I didn't even look in it.
- 21 Q So then you went home? When you said it went dark,
22 you said then you went home?
- 23 A Yeah, I went home and went to bed.
- 24 Q That was at which house?
- 25 A About probably 8:30 or 9:00 o'clock.

1 Q Which house was that you went home?

2 A My house.

3 Q So what happened? You said you went home and went
4 to bed? Did you sleep any?

5 A I slept till about 12:00 o'clock.

6 Q That same night --

7 A The same night. I got up 12:00 o'clock, and I went
8 up to Myrtle's house.

9 Q Was she still awake?

10 A I knocked on the door. It was like she was
11 standing to the door waiting on me.

12 Q What did you do then?

13 A She was all right. I told her I was going to go up
14 the street to the barbecue.

15 Q What is the barbecue?

16 A About a half mile up the street.

17 Q Is that a barbecue store?

18 A No, they was getting it ready for a party the next
19 day.

20 Q One of those longterm, long-cooking barbecues?

21 A Yeah, they was cooking all night. I didn't stay
22 down there but about an hour.

23 Q So you stayed there for about an hour. Then what
24 did you do?

25 A I came back to Myrtle's house.

1 Q Did you meet Myrtle there?

2 A I knocked on the door. She came out the house.

3 Q Then what happened?

4 A I don't know. She was furious. She said, I'm
5 going. I said, You ain't going nowhere. She
6 started walking off. I went behind her and said,
7 Where you going? You ain't going nowhere. She
8 turned around and jumped on me, clawed me in the
9 face.

10 Q How would you describe that clawing?

11 A She clawed me on both sides of my nose and must be
12 a thumb cut my lip all the way through, stuck her
13 fingernails all the way down in my face.

14 Q How did you respond?

15 A I slapped her, both sides of the face.

16 Q Then what?

17 A She fell. Then I walked off. I went in the house.

18 Q Whose house?

19 A Her house. I went in the house looking to see how
20 she done blooded my face up. I wipe that off. So
21 I reach up in her bedroom, and I picked the hatchet
22 up. When I came back out the door, she called me.
23 She say, Ben, come help me get up.

24 So after she called me, I knew then she was
25 sorry. Everything was all right. I laid the

1 hatchet on the car. I said okay. I went and
2 picked her up. She was real nice and all. She
3 kind of hobble off. I took her back to the front
4 porch. When I reached to the door, the door was
5 locked.

6 Q Had you locked the door when you left her house?

7 A No.

8 Q Were there any keys in the lock?

9 A No.

10 Q Where was her pocketbook?

11 A She didn't have a pocketbook.

12 Q So what did you do then?

13 A Well, I said, Well, Somebody here. After all the
14 commotion, I said I am going on home. I went on
15 home.

16 Q So where was Ms. Johnson?

17 A She was laying right on the front step on that pile
18 of wood.

19 Q Which home did you go to?

20 A I went to my house.

21 Q Let me go back a few days earlier. You said Alfred
22 was working on Ms. Johnson's house, right?

23 A Right.

24 Q He had changed the lock?

25 A Right.

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1 Q Who had the keys to her house with the new lock?

2 A When he changed the lock, I got one key and she got
3 one, the big key thing that go around her neck.

4 Q Did you have the keys that night?

5 A No, he demanded the key back the next day. He
6 demanded it back, so I give to him. She didn't say
7 nothing, so I gave it to him.

8 Q The next day, you mean the day he installed the
9 lock?

10 A The day he installed the lock. I mean, no, the
11 next day after the lock was installed.

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

14 THE COURT: Yes, sir.

15 (Pause).

16 BY MR. BUCHANAN:

17 Q Now, sorry we are jumping around, but going back to
18 the night of the incident, when Ms. Johnson clawed
19 you, did you provoke her?

20 A No, she just was going, and it was 12:00 o'clock in
21 the night.

22 Q Did you feel you could get away?

23 A What do you mean?

24 Q How did you --

25 A When she clawed me?

1 Q Yes.

2 A Her fingernails were stuck down in my skin, and she
3 had done peeled the skin on my face both sides of
4 my nose probably about two inches and cut my lip
5 all the way through. She was locked in my face.

6 Q Did you feel then that you could get away?

7 A I had to tap her lose to get her away. She was
8 furious.

9 Q Mr. Golston, no further questions. Please answer
10 anything the solicitor asks you.

11 THE COURT: Thank you, Mr. Buchanan.

12 Solicitor.

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

14 (Pause).

15 CROSS EXAMINATION

16 BY MS. PATTERSON:

17 Q Mr. Golston, were you ever in a romantic
18 relationship with Ms. Johnson?

19 A We was good friends and lovers at times.

20 Q And did you ever live with her?

21 A I spent the night there and a bunch of places.

22 Q About how many nights a week did you spend at her
23 house?

24 A Sometimes I didn't spend a night in months.

25 Q Did you have clothes at her house?

- 1 A No, she had clothes there for me. She's a
2 seamstress. She make clothes.
- 3 Q Did you wear those clothes?
- 4 A What clothes?
- 5 Q That she would make for you?
- 6 A They would be used clothes she done got somewhere
7 or something.
- 8 Q Did you have shoes at her house?
- 9 A No, she had shoes there if I wanted them.
- 10 Q Did you ever wear those shoes she had at the house
11 for you?
- 12 A I got a pair at a few different times, yeah, from
13 cleaning up, taking them to the trash pile or
14 whatever.
- 15 Q Did you ever cook at the house for her?
- 16 A Oh, yeah.
- 17 Q And when you did spend the night, where did you
18 sleep?
- 19 A We slept together.
- 20 Q You said on this date you took Mr. Alfred home?
- 21 A Right.
- 22 Q Do you have a driver's license?
- 23 A She drove.
- 24 Q Then you came back to her house?
- 25 A Right.

1 Q And you left?

2 A No, I didn't leave. I stayed on the porch.

3 Q You stayed on the porch. You had a beer?

4 A Right.

5 Q Ran out of beer?

6 A Before I ran out he came back with some woman with
7 him, and they went in the house. I stayed on the
8 porch.

9 Q How many beers did you have?

10 A I hadn't had but that one then. After I finished
11 that one while they was in the house, I walked to
12 the store and got another one. I was waiting on
13 the guys to bring my pay back.

14 Q Do you know why -- do you know why Ms. Johnson was
15 so furious?

16 A I don't know.

17 Q You said she clawed your face?

18 A Definitely.

19 Q Was it messed up pretty bad?

20 A Yeah, it was messed up.

21 Q Did you see a doctor about it?

22 A No.

23 Q When did you learn that the police were looking for
24 you?

25 A When he pulled the gun on me and told me he had a

1 warrant.

2 Q You didn't know before this that the police were
3 looking for you?

4 A No, I hadn't talked to no polices. I just seen
5 them.

6 Q Why were you hiding behind a tree?

7 A Because I was staying out his way.

8 Q You said after Ms. Johnson slapped you, you went in
9 the house and went and got a hatchet. Why did you
10 get a hatchet?

11 A Because I was going home.

12 Q What were you going to do with this hatchet?

13 A I was just taking it with me.

14 Q Do you carry around a hatchet often?

15 A I'm a construction worker. I might have anything.

16 Q Including a hatchet --

17 THE COURT: That wasn't her question. Her
18 question was, do you carry around a hatchet often?

19 THE WITNESS: No.

20 THE COURT: Listen to her questions and answer
21 them. You may continue, Solicitor.

22 MS. PATTERSON: Thank you, Your Honor.

23 BY MS. PATTERSON:

24 Q Did you have a key to Ms. Johnson's house?

25 A No.

1 Q You never had a key to her house?

2 A I've had one before.

3 Q What happened to it?

4 A It broke.

5 Q How did it break?

6 A It just wore out and broke.

7 Q Did you get another key after that?

8 A They changed the lock.

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

10 THE COURT: Yes, ma'am.

11 (Pause).

12 BY MS. PATTERSON:

13 Q Mr. Golston, where were you arrested?

14 A 1606 Gum Street.

15 Q What day were you arrested on?

16 A March the 22nd.

17 Q Were you booked into the Lexington County Detention
18 Center on this day?

19 A Right.

20 Q I am going to show you your booking form.

21 A Uh-huh. (Indicating affirmative response).

22 Q Can you please take a look at that.

23 MR. BUCHANAN: Objection, Your Honor. The
24 picture has not yet been authenticated.

25 THE WITNESS: I am looking at it.

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1 BY MS. PATTERSON:

2 Q Is that your picture on that photo?

3 A Right.

4 MR. BUCHANAN: Objection, Your Honor. I don't
5 believe we have had a ruling yet.

6 THE COURT: She is asking him the question if
7 that is his picture. He can say yes or no or he can say
8 I don't know. I overrule your objection.

9 MR. BUCHANAN: Thank you, Your Honor.

10 BY MS. PATTERSON:

11 Q What date is on that booking photo?

12 A I don't have my glasses. I can't even see the date
13 on it.

14 MS. PATTERSON: May I approach the witness,
15 Your Honor.

16 THE COURT: Yes, ma'am, you may.

17 A Where is it? Show it to me.

18 Q (Indicating).

19 A Yes, that is 3/22/08.

20 THE COURT: What was the date on it,
21 Mr. Golston?

22 THE WITNESS: 3/22/08.

23 BY MS. PATTERSON:

24 Q So that was the incident date?

25 A Right.

1 Q Was that booking photo related to this charge that
2 you are on trial for?

3 A Yes.

4 Q Is there anything on that booking report to
5 indicate that you had any injury to your face?

6 A No, but ask the police. He took me in.

7 MR. MAULDIN: Objection, Your Honor --

8 THE WITNESS: Ask the officer --

9 THE COURT: Wait just a minute. Let me hear
10 from your lawyer, Mr. Golston. Yes, sir.

11 MR. BUCHANAN: That information, that document
12 would be hearsay.

13 THE COURT: You can mark it as State's Exhibit
14 for identification, Solicitor. We can get the
15 appropriate person to authenticate it if you choose to
16 do so.

17 MS. PATTERSON: We don't choose to. Beg the
18 Court's indulgence.

19 (Pause).

20 MS. PATTERSON: Your Honor, may we approach?

21 THE COURT: Yes, ma'am.

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

25 MS. PATTERSON: Your Honor, I would like to

1 get this booking photo marked for identification
2 purposes.

3 THE COURT: That would be State's 26, Madame
4 Court Reporter?

5 COURT REPORTER: Yes, sir.

6 (State's Exhibit Number 26 is marked for
7 identification).

8 BY MS. PATTERSON:

9 Q Mr. Golston, I am going to show you what has been
10 marked as State's Exhibit 3 and 4 and ask you if
11 you remember this.

12 A Yeah, that's my house and trucks.

13 Q And you are you saying that you live in that house?

14 A Not on the front part, on the other part, the
15 little part. There is a mobile home in there.
16 That's just a structure built around it. There's a
17 unit in there. It's a unit.

18 Q And did you have any power in this place?

19 A No, did I need power?

20 THE COURT: That's not a proper answer.

21 THE WITNESS: No, I didn't have any power.

22 THE COURT: Thank you, Mr. Golston.

23 BY MS. PATTERSON:

24 Q How long has it been since you have had power in
25 there?

1 THE COURT: Let me interrupt you one more
2 time. I didn't mean to cut you off a minute ago. You
3 can answer the question, and then you can explain your
4 answer.

5 If you say no, I didn't have power because
6 whatever. I don't mean to cut you off in that regard,
7 sir. You may explain your responses but try to respond
8 first, and then you can explain as fully and completely
9 as you think is necessary.

10 A I don't remember. It was the last storm broke the
11 power pole. Since I had this other structure added
12 on there, they was going to put the meter on the
13 other part of the house that tapped the central
14 heating and air conditioning unit in. It would
15 have put it back on the regular pole for the
16 trailer.

17 Q Did you have any running water in this structure?

18 A Ma'am, there is water there.

19 Q And did you have any furniture in this place?

20 A Yes, ma'am.

21 Q So you had floors in it, right?

22 A Yes.

23 Q Thank you.

24 MS. PATTERSON: No further questions.

25 THE COURT: Let me see if your lawyer has got

1 photo.

2 THE COURT: Would you please keep Mr. Buchanan
3 and the Court advised as far as the timing of that.

4 MS. PATTERSON: Yes, sir, I certainly will.

5 THE COURT: How long do you think it will take
6 to get someone over here?

7 Of course, Mr. Buchanan, as you know, you can
8 offer testimony or evidence in sur-reply.

9 MR. BUCHANAN: Yes, Your Honor.

10 THE COURT: Keep that in mind. If you want to
11 be thinking about it and have somebody in mind, you can
12 do that now or if you need time after the State's reply,
13 if they do present a witness, I will certainly grant the
14 defense that.

15 I'm a little unsure, quite frankly, what I
16 will do about the diametrically opposed testimony that I
17 heard in this case from two of the witnesses. Once I
18 make my decision in that regard, I will certainly advise
19 the parties.

20 Anything further, Mr. Buchanan?

21 MR. BUCHANAN: Just, Your Honor, that once we
22 get a name from the State who they intend to call, I
23 would ask you to do a brief voir dire to make sure none
24 of the jury knows them.

25 THE COURT: Sure. You don't have any

1 objection to that?

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

3 THE COURT: Thank you very much. Court will
4 be in recess. Y'all let me know as soon as we are ready
5 to go.

6 Let me ask you one other thing, Mr. Buchanan.
7 Do y'all have any other requested charges?

8 MR. BUCHANAN: Given Mr. Golston's testimony,
9 we do request a charge of self-defense.

10 THE COURT: Solicitor, do you have an
11 objection to that?

12 MS. PATTERSON: Yes, sir, I object to that. I
13 don't think enough has been established to get the
14 charge of a self-defense charge. I will look over some
15 case law, but he is saying that Ms. Johnson clawed his
16 face and that he -- I just need a minute, Your Honor,
17 but I will object to that on the jury instruction.

18 THE COURT: I will look at it. I will look at
19 it during the break. Do you have a charge?

20 MR. BUCHANAN: A charge for?

21 THE COURT: Self-defense charge?

22 MR. BUCHANAN: I am going to -- I will try to
23 do one during the recess.

24 THE COURT: I will look at it during the
25 break. Thank you very much.

1 MR. BUCHANAN: Also, Your Honor, just one
2 additional thing.

3 THE COURT: Yes, sir.

4 MR. BUCHANAN: We would also like to request
5 an instruction on the lesser-included offense, both of
6 C.D.V., criminal domestic violence, as well as assault
7 and battery.

8 THE COURT: Do you have a position on that,
9 Solicitor?

10 MS. PATTERSON: There are not lesser-included
11 offenses of C.D.V.H.A.N., Your Honor. We would ask that
12 you don't instruct with respect to C.D.V. and assault
13 and battery of a high and aggravated nature.

14 THE COURT: Say that again.

15 MS. PATTERSON: Assault and battery of a high
16 and aggravated nature is not a lesser-included offense.
17 C.D.V. is.

18 THE COURT: I didn't think he asked for
19 assault and battery of a high and aggravated nature.

20 MR. BUCHANAN: I did not, Your Honor. I asked
21 for simple assault and battery, as well as criminal
22 domestic violence.

23 THE COURT: Simple assault and battery is not
24 because there are different elements. They are
25 different elements to simple assault and battery, as

1 opposed to criminal domestic violence. I think there is
2 a case directly on point as far as simple assault and
3 battery. What about criminal domestic violence?

4 MR. BUCHANAN: Your Honor, it would be our
5 position that the language of C.D.V.H.A.N. includes the
6 language of assault and battery. We agree with the
7 State that assault and battery of a high and aggravated
8 nature does not. I did find some case law to that
9 point.

10 The simple assault and battery is simply an
11 unlawful attempt, coupled with the present ability, to
12 commit a violent injury upon the person of another.
13 That is State v. Jones, a classic case from 1925, 33
14 S.C. 167. I believe that the elements for assault and
15 battery are contained within criminal domestic violence,
16 high and aggravated nature.

17 MS. PATTERSON: We would still object to that
18 charge as well.

19 THE COURT: Here is what the evidence shows,
20 depending on whose version you believe. If you believe
21 Ms. Johnson, it's criminal domestic violence of a high
22 and aggravated nature based on both the use of the
23 deadly weapon and serious bodily injury.

24 If you believe Mr. Golston, he is not guilty
25 because of self-defense. So factually I do not think

1 under these facts as presented and these witnesses, it
2 is not sufficient to charge either criminal domestic
3 violence or assault and battery, simple assault and
4 battery. Court will be in recess. Just let me know
5 when you get your witness here.

6 MS. PATTERSON: Thank you, Your Honor.

7 (Whereupon there is a recess).

8 THE COURT: Where is Ms. Gray? She hasn't
9 left?

10 UNIDENTIFIED MAN: No.

11 THE COURT: Anything before we bring in our
12 jury?

13 MR. BUCHANAN: Yes, Your Honor. I was hoping
14 we could revisit your ruling on the lesser-included
15 offense. There's a couple more points I would like to
16 make for the record in all due respect.

17 THE COURT: All right.

18 MR. BUCHANAN: Essentially, Your Honor, it's
19 our contention that the jury is given unfettered power
20 to believe all or even some parts of the testimony or no
21 parts of the testimony as the deciders of the fact.

22 Therefore, Your Honor, it could be conceivable
23 in their weighing of the facts, they could find the
24 elements of the lesser-included offenses met but the
25 principal offense not met. Therefore, again, Your

1 Honor, that's a point I would like to address and make
2 for the record regarding that.

3 THE COURT: Anything further?

4 MR. BUCHANAN: Just, Your Honor, I would like
5 to have a ruling on that for the record.

6 THE COURT: I thought I had already ruled. I
7 apologize if I didn't.

8 MR. BUCHANAN: I'm just wanted to be sure.

9 THE COURT: Let me look a little bit.

10 (Pause).

11 THE COURT: Under State versus Lacoste,
12 L-A-C-O-S-T-E, 553 S.E.2d 464, which is a case that
13 holds simple assault is a lesser-included offense of
14 criminal domestic violence. When I read that -- and I
15 certainly appreciate the fact that the jury has the
16 power and responsibility to rule on the credibility of
17 the witnesses that have testified under oath.

18 However, when I look at that case and many
19 other lines of cases, it advises the law to be charged
20 to the jury is determined by the evidence presented at
21 trial. The substance of the law must be charged to the
22 jury, not particular verbiage.

23 So the Court, as the gatekeeper of determining
24 what should or should not be charged, has to make
25 factual decisions to determine if a particular charge

1 would be appropriate to the jury under the testimony
2 that has been presented.

3 As I understand the testimony that has been
4 presented, again, as far as Ms. Johnson, it would
5 clearly be criminal domestic violence of a high and
6 aggravated nature.

7 As I understand Mr. Golston's testimony, it
8 goes to the issue if there is any evidence of
9 self-defense, the issue should be submitted to the jury
10 upon request. A trial court permits reversible error if
11 it fails to give a requested charge on the issues raised
12 by the evidence.

13 I am just going on the evidence and what law
14 may apply and what may have been raised by the evidence.
15 I do not think that simple assault and battery and
16 criminal domestic violence have been raised by the
17 evidence.

18 I think it's criminal domestic violence of a
19 high and aggravated nature, either guilty of that, or he
20 is not guilty and he is entitled to a charge on
21 self-defense.

22 If there are any particular cases you would
23 like me to look at in regards to revisiting the issue of
24 simple assault and battery or criminal domestic
25 violence, Mr. Buchanan, I would be glad to do so. If

1 there are any such cases, I would be more than happy to
2 look at them. Anything further?

3 MR. BUCHANAN: Your Honor, I do have a couple
4 of cases. I am certainly not interested in testing the
5 Court's patience.

6 THE COURT: All right.

7 MR. BUCHANAN: But I do have State versus, I
8 think, Cude, C-U-D-E, 265 S.C. 313, a 1975 case. The
9 actual language that I am referring to is found on page
10 316.

11 An instruction on the lesser-included offense
12 is proper only when the charged greater offense requires
13 that the jury find a disputed factual element which is
14 not a requisite for a conviction of a lesser offense.

15 THE COURT: Tell me what would be a disputed
16 factual element that would make this just simple assault
17 and battery or just criminal domestic violence.

18 MR. BUCHANAN: This is referring to just the
19 simple assault and battery, and that is the household
20 member requirement that is found in criminal domestic
21 violence and criminal domestic violence high and
22 aggravated.

23 THE COURT: If they don't meet the element,
24 tell me how it would be simple assault and battery
25 though? Because you still have serious bodily injury,

1 and you still have a deadly weapon. So I still do not
2 see how it would be simple assault and battery.

3 Because if you had a simple assault and
4 battery and a defendant was armed with a deadly weapon
5 or there was a threat of a deadly weapon, then it
6 wouldn't be simple assault and battery. It would be
7 assault and battery of a high and aggravated nature,
8 which we all know does not apply.

9 So I am little unsure how I get from these
10 facts to simple assault and battery. Obviously the
11 State has got to prove beyond a reasonable doubt that he
12 is a household member, that he fits that definition,
13 which I am going to charge under the statute about
14 cohabitation. But just because they don't cohabit
15 doesn't make it simple assault and battery under these
16 facts.

17 MR. BUCHANAN: Well, Your Honor, my only
18 response is I can't think of anything else.

19 THE COURT: That's not a bad response.

20 MR. BUCHANAN: I can't think of anything else
21 that is a lesser-included offense under the law that
22 everyone would agree, Yes, it is a lesser-included
23 offense, that does not include the point of contention,
24 disputed factual elements. That's the only one I could
25 come to obviously, and that is the basis of my motion.

1 THE COURT: It may be a lesser-included
2 offense, but it's not one that is chargeable under
3 these -- this set of facts. That's my view of the
4 evidence and the law that should be charged.

5 It's kind of like I heard a lawyer one time
6 ask -- excuse me -- heard a judge one time ask the
7 lawyer, said, Have you got anymore motions? He said,
8 Judge, I can't think of any right now, but if there is
9 any you will grant, I would be glad to make them.

10 So if that's all you can think of, that's
11 fine. That's no problem at all. But I just don't see
12 this set of facts raises that issue as a lesser-included
13 offense.

14 Solicitor, anything further before we bring in
15 our jury?

16 MS. PATTERSON: Nothing from the State, Your
17 Honor. We chose not to put any other witnesses up in
18 reply.

19 THE COURT: So there is no evidence in reply?

20 MS. PATTERSON: No, sir.

21 THE COURT: How long then will your -- let's
22 start with our closings. How long is this going to
23 take? What time will I get this case to the jury?

24 MS. PATTERSON: My closing is probably about
25 30 minutes, Your Honor.

1 MR. BUCHANAN: I'm still not very good at
2 estimating those things, Your Honor. Roughly I will say
3 20 minutes, if that.

4 THE COURT: That's 50 minutes. It would be
5 5:00 o'clock before I would start charging.

6 MS. PATTERSON: Yes, sir.

7 THE COURT: And 5:30 before we got it to the
8 jury. Let's see what the jury wants to do.

9 MS. PATTERSON: Your Honor, did you rule on
10 the self-defense instruction?

11 THE COURT: Yes, I am going to charge
12 self-defense.

13 MR. BUCHANAN: Your Honor, we have a suggested
14 jury charge.

15 THE COURT: I have the basic standard charge.
16 I would be glad to look at it.

17 MR. BUCHANAN: I have also included one on the
18 burden of proof, which I will just allow you to look at
19 it.

20 THE COURT: All right.

21 (Hands to Court).

22 THE COURT: This self-defense charge that he
23 handed up appears to be the standard charge, Solicitor.

24 MS. PATTERSON: Yes, sir.

25 THE COURT: I think this second one that you

1 handed up, I generally -- I was looking at it at the
2 break as far as the charge on self-defense. The last
3 two sentences I have in this charge, three sentences:
4 Absence of self-defense must be proven by the
5 prosecution beyond a reasonable doubt.

6 If you have a reasonable doubt of the
7 Defendant's guilt after considering all the evidence,
8 including the evidence of self-defense, then you must
9 find him not guilty.

10 On the other hand, if you have no reasonable
11 doubt of the Defendant's guilt after considering all the
12 evidence, including the evidence of self-defense, then
13 you must find him guilty. I think that encapsulates
14 your number two request.

15 MR. BUCHANAN: Yes, Your Honor.

16 THE COURT: We will press on. I will ask the
17 jury and tell them it will probably be about an hour,
18 hour and a half before the case gets to them for their
19 consideration. If they are willing to do that, I
20 certainly am. Bring us our jury, please.

21 (The jury returns to the courtroom).

22 THE COURT: Madame Forelady, ladies and
23 gentlemen of the jury, thank you very much for your
24 patience this afternoon and your continued focus during
25 the trial of this case.

1 he lived with her. He assaulted her seriously. He did
2 not feel the threat of imminent danger, and she thought
3 she was going to die. It's a burden that I gladly
4 accept. It's a burden that I'm certain I have met.

5 But if you think that the Defendant didn't
6 live with her, if you think he didn't assault her, if
7 you think he didn't make her feel like she was going to
8 die that night, then you give him this hatchet, and you
9 return him to that structure. Thank you.

10 THE COURT: Thank you. Thank you very much,
11 Solicitor.

12 (Whereupon the Court charged the jury as
13 follows).

14 THE COURT: Madame Forelady, ladies and
15 gentlemen of the jury, I would ask you to please give me
16 your complete and undivided attention. It generally
17 takes me a little over 20 minutes or so to charge the
18 jury.

19 The manner in which I do that is I charge you
20 the general law that applies to all criminal cases in
21 South Carolina first. After that I will give you the
22 specific law or statute as it applies to criminal
23 domestic violence of a high and aggravated nature.

24 I will then charge you the law on
25 self-defense, and finally I will charge you the form of

1 the verdict. Generally when I change from one topic to
2 another, I will give you kind of the caption or the area
3 that I am fixing to cover.

4 Charge, arrest, indictment, not evidence. The
5 indictment charges the Defendant under 2009-GS-32-05027
6 with the offense of criminal domestic violence of a high
7 and aggravated nature.

8 I remind you that the fact that the Defendant
9 was arrested, charged, and indicted in this case is not
10 evidence in the case and cannot be considered by you as
11 evidence of guilt in the case, nor does it create any
12 presumption or inference of guilt.

13 This document, this indictment, is simply the
14 formal written instrument which contains the charge made
15 against the Defendant. It is the formal notice document
16 which places the Defendant on notice of the charge
17 placed against him and brings the case before this
18 court.

19 Presumption of innocence. The Defendant has
20 pled not guilty to the indictment, and that plea puts
21 the burden on the State to prove the Defendant guilty.
22 A person charged with a committing a criminal offense in
23 South Carolina is never required to prove himself
24 innocent.

25 I charge you that it is an important rule of

1 the law that the Defendant in a criminal trial, no
2 matter the seriousness of the charge, will always be
3 presumed to be innocent of the crime for which the
4 indictment was issued unless guilt has been proven by
5 evidence satisfying you the jury of that guilt beyond a
6 reasonable doubt.

7 This presumption of innocence does not end
8 when you begin your deliberations, but it accompanies
9 the Defendant throughout the trial until you reach a
10 verdict of guilt based on evidence satisfying you of
11 that guilt beyond a reasonable doubt.

12 The presumption of innocence is like a robe of
13 righteousness placed about the shoulders of the
14 Defendant which remains with the Defendant until it has
15 been stripped from the Defendant by evidence satisfying
16 you of the Defendant's guilt beyond a reasonable doubt.

17 The presumption of innocence is not a mere
18 legal theory. It is not just a legal phrase. It is a
19 substantial right to which every defendant is entitled
20 unless you the jury are satisfied from the evidence of
21 the Defendant's guilt beyond a reasonable doubt.

22 Reasonable doubt. The State has the burden of
23 proving the Defendant guilty beyond a reasonable doubt.
24 Some of you may have served as jurors in civil cases
25 where you were told that it is only necessary to prove

1 that a fact is more likely true than not true, such as
2 by the greater weight or the preponderance of the
3 evidence.

4 In criminal cases the State's proof must be
5 more powerful than that. It must be beyond a reasonable
6 doubt. Proof beyond a reasonable doubt is proof that
7 leaves you firmly convinced of the Defendant's guilt.

8 There are very few things in this world that
9 we know with absolute certainty, and in criminal cases
10 the law does not require proof that overcomes every
11 possibly doubt.

12 If based upon your consideration of the
13 evidence you are firmly convinced that the Defendant is
14 guilty of the crime charged, you must find the Defendant
15 guilty.

16 If, on the other hand, you think there is a
17 real possibility that the Defendant is not guilty, you
18 must give him the benefit of that doubt and find him not
19 guilty.

20 Duties of jury and trial judge. I remind you
21 that during this trial, you and I have certain duties to
22 perform. As the trial judge, it is my responsibility to
23 preside over the trial of this case, and I also have the
24 additional duty to rule on the admissibility of the
25 evidence offered during the trial.

1 You are to consider only the competent
2 evidence before you. If there was any testimony ordered
3 stricken from the record during this trial, you must
4 disregard that testimony. You are to consider only the
5 testimony which has been presented from this witness
6 stand and any exhibits which have been made a part of
7 the record.

8 I have the additional duty to charge you the
9 law that applies to this case. As the presiding judge,
10 I am the sole judge of the law of this case, and it is
11 your duty as jurors to accept and apply the law exactly
12 as I now state it to you.

13 If you already have any idea as to what the
14 law is or what the law ought to be and it does not agree
15 with what I now tell the law is, you must abandon your
16 idea because you are sworn to accept the law and apply
17 the law exactly as I state it to you.

18 In every case tried in this court before a
19 jury, the jury becomes the sole and exclusive judge of
20 the facts in a case. A trial judge cannot intimidate,
21 state, comment on or make any statement to a trial jury
22 about the facts in a case.

23 Since you the jury are the sole judge of the
24 facts in this case, you are not to infer from what I
25 have said during the progress of this trial in ruling

1 upon the admissibility of evidence or otherwise or
2 anything that I say now during the course of this
3 instruction to you that I have any opinion about the
4 facts in this case.

5 The law does not allow me to have an opinion
6 about the facts in the case. This is a matter solely
7 for you the jury to determine. As jurors, using your
8 good judgment and common sense, it is your duty to
9 determine the effect, the value, the weight, and the
10 truth of the evidence that has been presented during
11 this trial.

12 Direct and circumstantial evidence. There are
13 two types of evidence which are generally presented
14 during a trial, direct evidence and circumstantial
15 evidence.

16 Direct evidence is the testimony of a person
17 who claims to have actual knowledge of a fact, such as
18 an eye witness or an ear witness. It is evidence which
19 immediately establishes the main fact to be proved.

20 Circumstantial evidence is proof of a chain of
21 facts and circumstances indicating the existence of a
22 fact. It is evidence which immediately establishes
23 collateral facts from which the main fact may be
24 inferred. Circumstantial evidence is based on inference
25 and not on personal knowledge or observation.

1 Our law makes absolutely no distinction
2 between the weight or the value to be given to either
3 direct or circumstantial evidence, nor is there a
4 greater degree of certainty required of circumstantial
5 evidence than of direct evidence.

6 You should weigh all of the evidence in the
7 case. After weighing all of the evidence if you are not
8 convinced of the guilt of the Defendant beyond a
9 reasonable doubt, you must find the Defendant not
10 guilty.

11 Credibility of witnesses. Necessarily you
12 must determine the credibility of the witnesses who have
13 testified in this case. Credibility simply means
14 believability.

15 Again, using your good judgment and your
16 common sense, it becomes your duty to analyze and
17 evaluate the evidence and determine which evidence
18 convinces you of its truth.

19 In determining the believability of the
20 witnesses who have testified in this case, you may
21 believe one over several or several over one. You may
22 believe the part of the testimony of a witness and
23 reject the remaining part of the testimony of that same
24 witness.

25 You may believe the testimony of a witness in

1 its entirety or reject the testimony of a witness in its
2 entirety. You may consider whether any witness has
3 exhibited to you any interest, bias, prejudice or other
4 motive in this case. You may also consider the
5 appearance, the demeanor, the manner of the witness
6 while testifying on the witness stand.

7 Intent. In order to establish criminal
8 liability. Criminal intent is required. For example,
9 the mental state required to be proven by the State for
10 a particular crime might be purpose or intent, knowledge
11 or recklessness.

12 Criminal intent must be proven by the State
13 beyond a reasonable doubt. Criminal intent is always a
14 matter that must be determined by the jury from the
15 circumstances surrounding the situation.

16 There is no way to prove intent to a
17 mathematical certainty. There is no way that medical
18 science can dissect a person's brain and determine what
19 the person had in mind.

20 So the law says that criminal intent may be
21 infer from the circumstances shown to have existed.
22 This is how you make your determination of whether or
23 not the element requiring intent was present.

24 It is not necessary to establish intent by
25 direct and positive evidence, but intent may be

1 established by inference in the same way as any other
2 fact, by taking into consideration the acts of the
3 parties and all the facts and circumstances of the case.

4 Ladies and gentlemen, that is the law,
5 criminal law, of South Carolina that applies to all
6 criminal cases in South Carolina. Next I am going to
7 cover the specific charge of criminal domestic violence
8 of a high and aggravated nature, the charge for which
9 the Defendant has been indicted.

10 The Defendant is charged with criminal
11 domestic violence of a high and aggravated nature. The
12 State must prove several things. The State must prove
13 beyond a reasonable doubt that the Defendant caused
14 physical harm or injury to a member of the Defendant's
15 own household or that the Defendant offered or attempted
16 to cause physical harm or injury to a member of the
17 Defendant's own household with the apparent present
18 ability to cause harm or injury under circumstances
19 reasonably creating a fear of imminent danger.

20 The State must also prove beyond a reasonable
21 doubt one of the following occurred. The person who
22 committed the criminal domestic violence would have
23 either, number one, committed an assault and battery
24 which involved the use of a deadly weapon or resulted in
25 serious bodily injury to the victim.

1 Now, a deadly weapon is defined as any object
2 or substance which is used in such a way that it is
3 reasonably likely to cause death or serious bodily
4 injury.

5 Serious bodily injury. As to bodily injury,
6 it is up to you the jury to determine whether or not the
7 State has proven beyond a reasonable doubt that any
8 injury sustained by the victim in this case would
9 constitute serious bodily injury.

10 So, again, the State must prove beyond a
11 reasonable doubt that the Defendant caused physical harm
12 or injury to a member of the Defendant's own household
13 or that the Defendant offered or attempted to cause
14 physical harm or injury to a member of the Defendant's
15 own household with the apparent present ability to cause
16 harm or injury under circumstances creating a fear of
17 imminent danger.

18 The State must also prove either one or more
19 of following: That the assault and battery -- that the
20 person committed an assault and battery which involved
21 the use of a deadly weapon or resulted in serious bodily
22 injury to the victim or an assault with or without an
23 accompanying battery which would reasonably cause a
24 person to fear imminent serious bodily injury or death.

25 The statute also defines household member. A

1 household member means either, one, a spouse; two, a
2 former spouse; three, persons who have a child in
3 common; or, four, a male and female who are cohabitating
4 or formerly have cohabitated.

5 Cohabitation. Cohabitation is defined as the
6 act or state of living together, especially as partners
7 in life, usually with the suggestion of sexual
8 relations, at common law the act of a man and a women
9 openly living together without being married to each
10 other.

11 Cohabitation is defined as the act of living
12 together and having a sexual relationship, especially
13 without being married. That is the charge of criminal
14 domestic violence of a high and aggravated nature.

15 Next I am going to cover the charge of
16 self-defense. Self-defense is a complete defense. Thus
17 you must find the Defendant is not guilty unless the
18 State proves beyond a reasonable doubt that each of the
19 four elements of self-defense did not exist in this
20 case.

21 The four elements are: First, the Defendant
22 must be without fault in bringing on the difficulty.
23 Second, the Defendant must have actually believed he was
24 in imminent danger or he was actually in such imminent
25 danger.

1 Three, if the defense is based upon a belief
2 of imminent danger, if the Defendant bases his belief --
3 bases his defense on a belief of imminent danger, a
4 reasonably prudent person of ordinary firmness and
5 courage would have entertained the same belief.

6 If the Defendant actually was in imminent
7 danger, the circumstances were such that would warrant a
8 reasonable man of ordinary prudence, firmness, and
9 courage to strike the blow in order to save himself from
10 that danger.

11 And, fourth, the Defendant had no other
12 probable means of avoiding the danger than to act as he
13 did in this particular circumstance. These are the four
14 elements of self-defense that the State must prove did
15 not exist.

16 If you have a reasonable doubt of the
17 Defendant's guilt after considering all of the evidence,
18 including the evidence of self-defense, then you must
19 find him not guilty.

20 If, on the other hand, you have no reasonable
21 doubt of the Defendant's guilt after considering all of
22 the evidence, including the evidence of self-defense,
23 then you must find him guilty. That concludes the
24 charge on self-defense.

25 Finally, ladies and gentlemen, there are two

1 regardless of what the verdict is. Please keep that in
2 mind because I advise the sheriff to take into custody
3 anyone that cannot contain their emotions. If you feel
4 like you cannot, I would ask you to please leave prior
5 to the jury returning.

6 (The jury returns to open court to report its
7 verdict).

8 THE COURT: Madame Clerk.

9 CLERK: Madame Forelady, have you reached a
10 verdict?

11 FOREMAN: Yes, we have.

12 CLERK: Please pass it up by the bailiff.

13 (Hands to Court).

14 THE COURT: Our verdict appears to be in the
15 proper form, Madame Clerk.

16 (Whereupon the verdict of the jury is
17 published as follows).

18 CLERK: Indictment 2009-GS-32-5027, the State
19 versus Bennie Golston, as to the charge of criminal
20 domestic violence of a high and aggravated nature, we
21 the jury unanimously find the Defendant, Bennie Golston,
22 guilty, and it is so signed Diane Davis, forelady.

23 Madame Forelady, and ladies and gentlemen of
24 the jury, if this is your verdict, please indicate each
25 of you by raising your right hand.

1 both collectively and taken individually.

2 THE COURT: All right. I would respectfully
3 deny your motion for a new trial. I will reaffirm all
4 my trial rulings.

5 MR. BUCHANAN: Then, Your Honor, we would make
6 a motion for a verdict in arrest of judgment. Again,
7 the argument is based on our arguments for the directed
8 verdict.

9 THE COURT: I would deny that motion also.

10 MR. BUCHANAN: Also, Your Honor, we did
11 have -- never mind, Your Honor. I did put that on the
12 record. I was thinking we were going to do that after
13 the jury arguments, but I'm fine.

14 THE COURT: All right. Any reason why
15 sentence cannot be imposed at this time?

16 MS. PATTERSON: No reason by the State, Your
17 Honor.

18 THE COURT: Mr. Buchanan?

19 MR. BUCHANAN: I don't see a reason, Your
20 Honor.

21 THE COURT: Sheriff, could you bring the
22 Defendant around, please. Mr. Buchanan, come around.

23 (Pause).

24 THE COURT: Madame Solicitor, anything further
25 from the State?

1 MS. PATTERSON: It is, Your Honor. On behalf
2 of the victim, her daughter, Huriya Johnson, would like
3 to be heard by the Court at the appropriate time, and I
4 would also like to address, Your Honor, before
5 sentencing.

6 THE COURT: I would be glad to hear from
7 Ms. Johnson, if she would come around, please.

8 (Pause).

9 THE COURT: Tell me your name, please.

10 MS. JOHNSON: Huriya Johnson H-U-R-I-Y-A.

11 THE COURT: Madame Clerk, would you place
12 Ms. Johnson under oath for me, please.

13 HURIYA JOHNSON is first duly
14 sworn.

15 THE COURT: Ms. Johnson, I would be glad to
16 hear from you.

17 MS. JOHNSON: If there is such a thing as an
18 innocent victim, if there is such a thing as a
19 defenseless victim, if there is such thing as an honest
20 victim, then it is Myrtle Johnson.

21 If there is such a thing as an unapologetic
22 criminal, if there is such thing as a blatant criminal,
23 if there is such thing as a malicious criminal, then it
24 is the Defendant in this case.

25 This jury has found him guilty. That's why I

1 called him a criminal. It has been tried. It has been
2 proven in this court of law. From what I understand by
3 sitting here is that law proceedings and these types of
4 things are about setting a standard and establishing
5 some type of border and precedent.

6 So if there is a case in which we should enact
7 the full realm of the law, then this would be it. If
8 there is a case that would be fitting of a maximum
9 sentence, then this is it.

10 If you want to teach the world, if you want to
11 set a precedent for South Carolina, if you want to say
12 what is right and what is wrong, you will give this
13 Defendant the maximum sentence because that is what he
14 deserves.

15 I don't know what else to say, and I don't
16 want to come about as though emotional because what I'm
17 saying is actually factual. There were no lies. There
18 was evidence. There was testimony. There was a
19 verdict.

20 I beseech you that you use all of the things
21 that have happened here today, all of the preparation
22 that you have had in your life to do what you are
23 capable of doing, and give this man the maximum sentence
24 that he so rightfully deserves. Thank you very, very
25 much.

1 THE COURT: Thank you very much, Ms. Johnson.
2 Solicitor.

3 MS. PATTERSON: Thank you, Your Honor. I
4 would like to mimic what Ms. Johnson stated, Your Honor.
5 This was a cruel, this was an uncalled for assault on
6 Ms. Johnson. She was 69 years old. She is 70 now. Her
7 life will never be the same.

8 She loved this man and she trusted this man,
9 and he hurt her. He hurt her brutally, Your Honor.
10 It's the State's position that he should receive the
11 maximum sentence allowed by law of the ten years, Your
12 Honor. He does have a prior record if Your Honor would
13 like to hear it at this time.

14 THE COURT: Yes, ma'am.

15 MS. PATTERSON: He has a 1982 disorderly
16 conduct, a 1984 carrying a pistol, 1994 threatening the
17 life of a public official, 1996 disorderly conduct,
18 driving under the influence.

19 In 1997 obstructing justice, 1999 disorderly
20 conduct and obstructing justice, 2002 disorderly
21 conduct, two counts, 2003 petty larceny, disorderly
22 conduct, two counts, 2004 possession of cocaine,
23 disorderly conduct, 2006 disorderly conduct.

24 THE COURT: Anything further, Solicitor?

25 MS. PATTERSON: Nothing from the State, Your

1 Honor.

2 THE COURT: Thank you. Mr. Buchanan.

3 MR. BUCHANAN: Thank you, Your Honor. Your
4 Honor, as to the Defendant's prior record, I do believe
5 the second obstructing justice was actually a probation
6 violation for the previous one.

7 THE COURT: All right. I will not consider
8 that. I will just consider one prior obstruction of
9 justice charge.

10 MR. BUCHANAN: One thing, Your Honor, that
11 this trial should have brought forth is that Mr. Golston
12 does have a big family. I met other members of his
13 family in my investigation of this case.

14 Mr. Golston has been at the Lexington County
15 Detention Center since his arrest on that day back in
16 2008. If I added it up correctly, that's 418 days.
17 Certainly this crime carries a mandatory minimum. I
18 would submit he has met that.

19 I think based on a lot of the -- even his
20 record actually shows he has got problems with alcohol
21 and getting rowdy when he drinks, though this one really
22 has been uncharacteristic of him.

23 He has maintained since the very start that it
24 was a freak accident of how she swelled up. Your Honor,
25 of course, heard his testimony. Obviously the jury has

1 spoken. So he stands before you convicted.

2 What he hopes Your Honor will consider is his
3 age, 55 years old. He has been around the block a few
4 times and certainly would not be a spring chicken over
5 there at the Department of Corrections.

6 If you are to consider the maximum, that would
7 be something that would be -- especially considering
8 this crime is considered violent, he would be housed
9 with other violent offenders. At his age it would be
10 more difficult.

11 His family, some of his members here, do wish
12 to address, Your Honor, and speak on his behalf.

13 THE COURT: I would be glad to hear from them,
14 Mr. Buchanan.

15 (Pause).

16 THE COURT: Ms. Jones, if you would consider
17 yourself still under oath.

18 MS. JONES: Yes, sir, I do.

19 THE COURT: Tell me your full name again for
20 the record.

21 MS. JONES: Gail M. Jones.

22 THE COURT: I would be glad to hear from you,
23 Ms. Jones.

24 MS. JONES: Your Honor, I have sat here and
25 heard all the testimony. I am Ben's niece's and I am

1 Myrtle Johnson's friend. I have been with Myrtle and
2 Ben for the last three years. Both of them know that my
3 mother suffered from Alzheimer's and my father had a
4 terminal cancer.

5 I don't know what happened that night, but I
6 do know that neither one were in their right mind. I
7 can truthfully say that from the bottom of my heart. My
8 condolence go out to Myrtle. I have been beside Myrtle
9 since day one, and I stand beside her.

10 I stand beside my uncle because both of them
11 needs help, and that is the truth from the bottom of my
12 heart. All the truth did not come out here today, and I
13 can say that because I'm right beside Myrtle and Bennie.
14 I know what happened. I know what goes on there.

15 But Ben have changed tremendously. Yes, he
16 had a problem. Yes, Ben have done some bad things, but
17 I truly think he is on the right path to change. So I
18 come asking for leniency on Ben. I do think he could
19 make a difference in society.

20 I'm just saying what I feel at this point. I
21 need him. His sister needs him. My father needs him.
22 His family needs him. Please, I beg you, show some
23 mercy.

24 THE COURT: What do you say happened?

25 MS. JONES: They were both doing drugs if the

1 truth has to be told. I seen it. I seen it. Her
2 daughter knows it. Her son knows it. Ben knows it. It
3 wasn't stated here. It's still going on, Your Honor.

4 I didn't get the opportunity to say it, but I
5 can say it now, and I'm saying it from the bottom of my
6 heart. This is what is going on. I have pleaded to
7 Myrtle to get help and Ben. I have just recently talked
8 to Myrtle last week.

9 But, you know, I was abiding by the Courts.
10 It exists whether we recognize it or not, and I'm using
11 this as a platform to bring it before y'all. That's
12 what happened.

13 Now, I can't tell you all the details of what
14 went on that night. But had that not been a
15 contributing factor, I don't think we would have been
16 here today.

17 Your Honor, that is the truth. I see it every
18 day, and it's still going on. Ben is not there, but
19 it's still going on. I'm sorry, but that is the truth.

20 THE COURT: Thank you. Thank you, Ms. Jones.

21 Anyone else, Mr. Buchanan?

22 MR. BUCHANAN: Beg the Court's indulgence,
23 Your Honor.

24 (Pause).

25 MR. BUCHANAN: Apparently, no, Your Honor.

1 But those were some factors that I had heard about in my
2 investigation of the case. Obviously I chose not to try
3 and really shine the spotlight on that for the Court's
4 decorum and for Ms. Johnson's sake.

5 I hope Your Honor will see that that is
6 something that was appropriate. Again, Your Honor, I've
7 worked with Bennie for more than a year. He wanted to
8 say his piece. He wanted to have his day in court, and
9 we gave it to him.

10 It's something that, Your Honor, we are asking
11 for mercy. The amount of time that he has done exceeds
12 the mandatory minimum. Your Honor has essentially in
13 its discretion the amount of jail time or probation,
14 whatever you might feel appropriate in this case. So I
15 would echo Ms. Jones' call for mercy.

16 THE COURT: Thank you. Anything you would
17 like to say, Mr. Golston?

18 THE DEFENDANT: No, sir.

19 THE COURT: Solicitor, do you have a
20 sentencing sheet?

21 MS. PATTERSON: Yes, sir.

22 THE COURT: Well, it's obvious to this Court
23 that this was not some type of freak accident. You can
24 look at the photographs and tell the multiple brunt
25 trauma that was inflicted upon a 69-year-old slightly

1 built female that the jury has found by what appears to
2 be a healthy built 55-year-old male, much larger and
3 much stronger.

4 Really what amazes me is that from listening
5 to the testimony of Ms. Johnson after the infliction of
6 the injuries and attempting to get back in her house and
7 her eyes being swollen and crawling until she hit the
8 pavement, if that happened at midnight, I guess if the
9 movers weren't coming that morning, I don't know how
10 long she would have been laying there.

11 I guess she would have laid there until she
12 ended up in her grave. I don't understand the
13 callousness of not helping any fellow human being, but
14 particularly one that from her testimony, she loved you.
15 I take it at some point in your testimony was that y'all
16 were lovers, so you loved her.

17 That's almost an incomprehensible callousness
18 in my mind. You could have made an anonymous call in
19 that regard. 09-GS-32-5027 -- is that the indictment
20 number?

21 CLERK: 5027, yes, your Honor.

22 THE COURT: The State versus Bennie Golston,
23 the jury having returned a verdict of criminal domestic
24 violence of a high and aggravated nature, the Defendant
25 is committed to the State Department of Corrections for

1 a determinate term of ten years, credit for time served.

2 Good luck you to, Mr. Golston.

3 MS. PATTERSON: Thank you.

4 THE COURT: Anything further, solicitor?

5 MS. PATTERSON: Nothing further, Your Honor.

6 THE COURT: Thank you very much. Court will
7 be in recess.

8 *** END OF REQUESTED TRANSCRIPT OF RECORD ***

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WITNESSES

Lexington County Sheriffs Department

K. Blake

RWP

ARREST WARRANT NUMBER

J846375

ACTION OF GRAND JURY

TRUE BILL

Foreperson of Grand Jury
Date: 5-12-09

VERDICT:

GUILTY

Foreperson of Petit Jury
Date:

DOCKET NO. 2009-GS-32-05027

The State of South Carolina

County of Lexington

COURT OF GENERAL SESSIONS

MAY TERM 2009

THE STATE

vs.

Bennie Golston

CDR #: 2988

Indictment for

Criminal Domestic Violence High and
Aggravated Nature

§ 16-25-0065

DONALD V. MYERS, SOLICITOR

That **Bennie Golston** did in Lexington County, South Carolina on or about March 22, 2008.

Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

4/10/1945

ASSISTANT SOLICITOR

CERTIFICATE OF COUNSEL FOR APPELLANT

Counsel for appellant certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material and that this Record on Appeal complies to the best of my ability, with the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

May 27th, 2011


LaNelle Cantey DuRant
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
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ATTORNEY FOR APPELLANT

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

FINAL BRIEF OF APPELLANT

LANELLE CANTEY DURANT
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S.C. Code Section 16-25-20	passim
S.C. Code Section 16-25-65	passim

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying appellant's motion to proceed solely on a charge of criminal domestic violence (CDV) instead of criminal domestic violence of a high and aggravated nature (CDVHAN) because the language of the indictment was insufficient for CDVHAN but described the charge of CDV as contained in S.C. Code Section 16-25-20?
2. Did the trial court err in admitting a hatchet which was seized from the residence of appellant in violation of his Fourth Amendment rights because the officers did not have a search warrant?
3. Did the trial court err in refusing to charge the jury on the lesser included charge of CDV when there was evidence of CDV?

STATEMENT OF THE CASE

In May 2009, the Lexington County Grand Jury indicted Bennie Golston on the charge of criminal domestic violence of a high and aggravated nature (CDVHAN). On May 13 – 14, 2009, Golston proceeded to trial before the Honorable R. Knox McMahon and a jury. He was represented by Matthew C. Buchanan, Esquire, and David M. Mauldin, Esquire. The jury found Golston guilty as indicted. Judge McMahon sentenced Golston to the maximum sentence of ten years imprisonment. Golston's attorney filed a notice of appeal. This appeal follows.

ARGUMENT

I.

The trial court erred in denying appellant's motion to proceed solely on a charge of criminal domestic violence (CDV) instead of criminal domestic violence of a high and aggravated nature (CDVHAN) because the language of the indictment was insufficient for CDVHAN but described the charge of CDV as contained in S.C. Code Section 16-25-20.

On March 22, 2008, movers approached the home of Myrtle Johnson in Lexington to deliver furniture from her deceased mothers' home in New Jersey. However, when the movers did not get an answer to their knock on the door, they went to the home of a nearby neighbor, Gail Jones. When Ms. Jones entered the home of Ms. Johnson, she found Ms. Johnson lying on a mattress in the bedroom with injuries to her face, and her eyes were swollen shut. R. 17, ll. 8 – 25; R. 18, ll. 1 – 25; R. 19, ll. 1 – 15.

Ms. Jones called 911. When the police arrived, they asked Ms. Johnson what happened. She told them that "Bennie" beat her when they had an argument the night before. R. 17, ll. 1 – 22.

Ms. Johnson testified that she and Golston had been in a relationship about five years, and that he stayed with her "off and on." Sometimes he stayed the entire week and other times he would stay maybe two nights at her house. He had some personal belongings there. R. 77, ll. 10 – 25; R. 78, ll. 1 – 25; R. 79, ll. 1 – 25.

On March 22, 2008, Ms. Johnson had a man and his wife who were friends of hers do some work on the house, since she was moving her mother's furniture into her house. R. 80, ll. 1 – 25. She said that Golston became jealous of the man. R. 81, ll. 1 – 25; R. 82, ll. 1 – 25. That night, she said that Golston was drinking and did not know what he was doing

when he started hitting her with his fists. R. 83, ll. 1 – 25; R. 84, ll. 1 – 25; R. 85, ll. 1 – 25. She said he did not hit her with a hatchet but rubbed the steel over her skin. R. 85, ll. 6 – 15. She managed to get back into the house when he left. She went to sleep. She awoke when her neighbor, Gail Jones, came in. R. 86, ll. 1 – 25; R. 87, ll. 1 – 25; R. 88, ll. 1 – 25.

During part of her testimony, Ms. Johnson admitted that that she talked to the police the morning of March 22, 2008, but that she did not remember telling them that no weapons were used in the assault on her. R. 175, ll. 16 – 25; R. 176, ll. 1 – 25; R. 177, ll. 1 – 16.

Gail Jones testified that she was in Ms. Johnson's bedroom with her when the police questioned Ms. Johnson. Ms. Jones told the court that Ms. Johnson told the police approximately three times that no weapons were used against her in the attack. R. 178, ll. 11 – 25; R. 179, ll. 1 – 9.

Deputy Kevin Blake testified that he responded to the call along with Deputy Michael Merckle. He said that Ms. Johnson was hit with a piece of firewood and he found a piece of firewood with hair on it at the residence. However, he did not have an analysis done on the hair. R. 35, ll. 4 – 25; R. 36, ll. 1 – 25; R. 37, ll. 1 – 25; R. 38, ll. 1 – 25; R. 39, l. 1 – 11; R. 126, ll. 15 – 25; R. 127, ll. 1 – 2.

After the police were called, Ms. Johnson was taken to the trauma center at Palmetto Richland Hospital. R. 89, l. 1 – 25; R. 90, ll. 1 – 25. Jennifer Watson, the emergency room nurse testified that Ms. Johnson was alert and could communicate when she arrived. The blood work was normal; the C.A.T. scans showed no fractures. She testified that Ms. Johnson had no broken bones, although there was a large amount of swelling and that her

eyes were swollen shut. R. 148, ll. 1 – 25; R. 149, ll. 1 – 29; R. 150, ll. 1 – 24. She spent a few hours at the ER during the day and was discharged. R. 150, ll. 25; R. 151, ll. 1 – 12.

Bennie Golston testified that he did not live permanently with Ms. Johnson, but they had a relationship and he slept there sometimes. R. 55, ll. 15 – 25. He said that the night of the incident, Ms. Johnson became furious with him, and then she was leaving. When he told her to stay, she turned, jumped on him, and began clawing him in the face. She clawed him on both sides of his nose and cut his lip all the way through. He admitted that he slapped her, and she fell. He went into the house and got a hatchet. When he got outside, she was talking to him so he knew she was okay. He put the hatchet on the car and left. R. 180, ll. 16 – 25; R. 181, ll. 1 – 25; R. 182, ll. 1 – 25; R. 183, ll. 1 – 25; R. 184, ll. 1 – 25; R. 185, ll. 1 – 25; R. 186, ll. 1 – 25; R. 187, ll. 1 – 25; R. 188, ll. 1 – 11.

Defense counsel made a pretrial motion, before the jury was sworn, that the language of the indictment was insufficient for the charge of CDVHAN, but was sufficient for CDV, and that appellant was prepared to go forward on the CDV. He explained that the language in the indictment was the language of Section 16-25-20(a)(1) which was the language for CDV. He argued that the statute for CDVHAN in Section 16-25-65 included more elements for high and aggravated than the CDV language. R. 2, ll. 24 – 25; R. 3, ll. 1 – 25; R. 4, ll. 1 – 25.

The assistant solicitor argued that S.C. Code Section 16-25-65 was referenced in the body of the indictment, and that appellant knew what he was being charged with. The assistant solicitor argued that Section 17-19-20 required the plain language of the statute and that appellant could read the indictment and easily understand the charge. She cited the case of Browning v. State, 320 S.C. 366, 465 S.E.2d 358 (1995). R. 5, ll. 1 – 25.

Defense counsel argued that the CDVHAN statute used the terms such as “the use of a deadly weapon”, and “serious bodily injury,” and “fear of death or serious bodily injury.” This language was not in the indictment. R. 35, ll. 1 – 19.

The judge cited the cases of State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005) and State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006), which basically held that “an indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime or so plainly that the nature of the offense charged may be easily understood.” He said the court must look at the indictment in view of all the surrounding circumstances. R. 6, ll. 24 – 25; R. 7, ll. 1 – 25.

The judge continued by stating that the indictment included some language of the CDV statute 16-25-20, but it also included the statute number for CDVHAN of 16-25-65. And, he continued, that 16-25-65 referred back to 16-25-20 which made it part of 16-25-65. He denied the motion. R. 8, ll. 1 – 25; R. 9, ll. 1 – 25.

Section 16-25-20 provides:

(A) It is unlawful to: (1) cause physical harm or injury to a person’s own household member; or (2) offer or attempt to cause physical harm or injury to a person’s own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

Indictment 2009-GS-32-05027, which charged Golston with CDVHAN, read:

At a court of General Sessions, convened on May 2009, the Grand Jurors of Lexington County present upon their oath: That Bennie Golston did in Lexington County, South Carolina on or about March 22, 2008, (1) cause physical harm or injury to a family or household member, and/or (2) offer or attempt to cause physical harm or injury to a family or household member with apparent present ability under circumstances reasonably creating fear of imminent peril, namely Myrtle Johnson, by striking the victim an undetermined amount of times with closed fists and a wooden log approximately 18" in length and 3" in diameter and used a hatchet to rub on the victim's arms and threaten her, in violation of Section 16-25-65 of South Carolina Code of Laws (1976) as amended.

In State v. Gentry, 363 S.C. 93, 610 S.E.2d 494 (2005), the Supreme Court held that in determining whether an indictment meets the sufficiency standard, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. If an objection to an indictment to an indictment is timely made, the circuit court should judge the sufficiency of the indictment by determining whether: (1) the offense is stated with sufficient certainty and particularity to enable the court to know what judgment to pronounce, and the defendant to know what he is called upon to answer and whether he may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that is intended to be charged. Id.; Evans v. State, 363 S.C. 495, 611 S.E.2d 510 (2005).

An indictment passes legal muster when it charges the crime substantially in the language of the statute prohibiting the crime, or so plainly that the nature of the offense charged may be easily understood. State v. Means, 367 S.C. 374, 626 S.E.2d 348 (2006).

The trial judge cited the case of State v. McCloud, 354 S.C. 40, 579 S.E.2d 534 (Ct. App. 2003), where the defendant had argued that the indictment failed to specify circumstances for CDVHAN. It cited the statute just as it did in Golston's case. The body of the indictment in McCloud read as follows: "That Douglas Edward McCloud did in Fairfield County on or about June 16, 2000 commit an act of violence against Kernisha L. Golden, by striking her in the face with his closed fist, also hit her in the head and pulled her hair and scratched her neck." The Supreme Court held that the averments in the indictment were sufficient to notify McCloud that he was charged with causing serious bodily injury to the victim.

McCloud, *supra*, is distinguished from Golston's case because Golston's indictment contained the exact language for simple CDV from Section 16-25-20. Then it included other descriptions which could fit into the CDV statute. However, Golston's indictment did not contain all of the elements for CDVHAN as listed in 16-25-65. The indictment did not include the words "the use of a deadly weapon" and did not specify "serious bodily injury." The indictment in McCloud did state that he committed an "act of violence." Although Golston's indictment described a "log," this did not necessarily mean a deadly weapon in the typical sense especially without "serious bodily injury" being mentioned.

Although the caption on Golston's indictment stated "Criminal Domestic Violence of a High and Aggravated Nature", the Supreme Court held in State v. Means, *supra*, that the court should focus primarily on the charging language in the body of the indictment, but that a caption or title which is consistent with the language in the body of the indictment may be considered in conjunction with the body in determining the sufficiency of the

indictment as a whole. The caption on Golston's indictment was not consistent with the language in the body of the indictment which was the language for CDV.

The court should have gone forward with the trial on CDV only.

ARGUMENT

II.

The trial court erred in admitting a hatchet which was seized from the residence of appellant in violation of his Fourth Amendment rights because the officers did not have a search warrant.

After Ms. Johnson told the officers that “Bennie” did this to her, Gail Jones told them that Golston lived behind her mother where he had lived all of her life (49 years) as she was Golston’s niece. She said it was not a nice house. R. 39, ll. 9 – 25; R. 40, ll. 1 – 2; R. 47, ll. 17 – 25; R. 48, ll. 1 – 25; R. 49, ll. 1 – 10.

Officer Michael Merckle and Officer Kevin Blake testified they went together to look for Golston. Officer Merckle said they received word that Golston was on the porch of a neighbor. He was not there when they arrived so they called the K-9 tracking dogs. The dog led them to Golston’s house. R. 19, ll. 5 – 25; R. 20, ll. 1 – 25.

Officer Merckle described it as an “abandoned house.” He said the house was completely dilapidated with no power, no water, and all the windows were broken out. He said the interior was so “hazardous” that they would not take the dog in for fear he would be hurt. He did not believe anyone lived there. R. 21, ll. 1 – 25.

Officer Merckle at first said they thought Golston might be hiding in the house. However, he admitted that he did not know if Golston would actually be in the house. R. 31, ll. 1 – 22.

Officer Kevin Blake testified that he obtained an arrest warrant for Golston after they talked to Ms. Johnson. On his way back to the incident location with the warrant, he

heard the call that Golston was seen in the area. They went to Golston's house to serve the arrest warrant. R. 58, ll. 1 – 25; R. 59, ll. 1 – 25; R. 60, ll. 1 – 25; R. 61, ll. 1 – 8.

The two officers went through the house looking for Golston but did not find him there. They looked where they thought a person might hide. Officer Merckle looked in between two mattresses stacked on top of each other because he said he had found people hiding between mattresses. R. 22, ll. 1 – 25; R. 23, ll. 1 – 25; R. 24, ll. 1 – 5. However, he testified on cross examination that the mattresses were flat on the floor, and the mattress was not “humped” up at all. There was no lump in the mattress. R. 32, ll. 1 – 15.

When he lifted the mattress, Officer Merckle found a hatchet which he took into evidence as he thought this might be the hatchet the victim described as used in the assault. However, he admitted that the hatchet found had a rubber handle and Ms. Johnson described the hatchet as having a wooden handle. R. 24, ll. 1 – 20; R. 34, ll. 1 – 10.

Defense counsel argued that the house was Golston's residence, and therefore he had an expectation of privacy in the house. R. 67, ll. 18 – 25. Two of Golston's nieces, Gail Jones and Bambi Gray, testified that he had lived at the house many years. R. 48, ll. 1 – 25; R. 49, ll. 1 – 25; R. 50, ll. 1 – 25; R. 51, ll. 1 – 5. Golston testified that he lived in the house and had built a brick wall around a mobile home unit. R. 53, ll. 1 – 25. He explained that the house was damaged by several storms, and he did not have the money to repair it. R. 54, ll. 1 – 25; R. 55, ll. 1 – 14; R. 180, ll. 16 – 25; R. 181, ll. 1 – 25. He denied that he lived permanently with Ms. Johnson. R. 55, ll. 15 – 25.

The state argued that Golston had no expectation of privacy in the house. The officers believed it was unlivable. The state argued there was no Fourth Amendment violation as the officers “just happened” to find the hatchet which was clearly being hidden.

The state argued that the house was abandoned. R. 65, ll. 13 – 25; R. 66, ll. 1 – 25; R. 67, ll. 1 – 17. The judge ruled that Golston had an expectation of privacy in the house but that it was reasonable for the officers to search given the condition of the house, and that the officers could execute the arrest warrant. He ruled that the hatchet was admissible. R. 71, ll. 15 – 25; R. 72, ll. 1 – 25; R. 73, ll. 1 – 25; R. 74, ll. 1 – 25; R. 75, ll. 1 – 25; R. 76, ll. 1 – 6.

The Fourth Amendment to the United States Constitution provides that the people have a right to be secure in their persons and homes against unreasonable searches and seizures, and no warrants shall issue, but with probable cause, supported by oath and affirmation, describing the place to be searched and the things to be seized.

In Payton v. New York, 445 U.S. 573 (1980), the United States Supreme Court ruled that a valid arrest warrant implicitly grants police the limited authority to enter a suspect's residence "when there is reason to believe the suspect is within." This ruled was followed by the South Carolina Supreme Court in State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981).

The officers testified that they believed the house was abandoned. Officer Merckle said he did not know if Golston would be inside. They did not have a search warrant but Officer Merckle searched between the mattresses when there was no hump or lump which might indicate a person was there.

The search was a violation of Golston's Fourth Amendment rights and the hatchet should have been suppressed. The hatchet and "log" were used to show the element of "aggravation" to enhance the offense from CDV to CDVHAN.

ARGUMENT

III.

The trial court erred in refusing to charge the jury on the lesser included charge of CDV when there was evidence of CDV.

Defense counsel requested the judge to charge the jury on the lesser included charge of CDV. R. 199, ll. 1 – 25. The judge ruled that the evidence did not support a charge of CDV because Ms. Johnson's version of the evidence required a CDVHAN based on the use of a deadly weapon and serious bodily injury. And Golston claimed self-defense. Therefore, the judge refused to charge the lesser included CDV. R. 200, ll. 1 – 25; R. 201, ll. 1 – 5.

The judge explained that the law to be charged was determined by the evidence presented at trial. He recognized that the jury has the power and responsibility to rule on the credibility of the witnesses that testified. He stated that the case was CDVHAN and Golston was either guilty or not. R. 201, ll. 13 – 25; R. 202, ll. 1 – 25; R. 203, ll. 1 – 25.

The law to be charged to the jury is determined by the evidence presented at trial. State v. Cole, 338 S.C. 97, 101, 525 S.E.2d 511, 512 (2000). A trial court commits reversible error if it fails to give a requested charge on an issue raised by the evidence. State v. Hill, 315 S.C. 260, 433 S.E.2d 848, 849 (1993). A request to charge a lesser included offense is properly refused only when there is no evidence that the defendant committed the lesser rather than the greater offense. Casey v. State, 305 S.C. at 447, 409 S.E.2d at 392 (1991). The test for determining if a crime is a lesser included offense of another crime is whether the greater of the two offenses includes all the elements of the lesser offense. State v. LaCoste, 347 S.C. 153, 553 S.E.2d 464 (Ct. App. (2001).

CDV was clearly a lesser included offense of CDVHAN because the statute for CDVHAN, Section 16-25-65 references the statute for CDV, Section 16-25-20. Section 16-25-65 provides:

(A) A person who violates 16-25-20(A) is guilty of the offense of criminal domestic violence of a high and aggravated nature when one of the following occurs. The person commits: (1) an assault and battery which involves the use of a deadly weapon or results in serious bodily injury to the victim; or (2) an assault, with or without an accompanying battery, which would reasonably cause a person to fear imminent serious bodily injury or death.

There was a reasonable probability that the jury may have determined that her injuries were not serious bodily injuries because she had no broken bones; no evidence of any cuts or stitches required; and no permanent damage to her eyes as she said she could see. R. 90, ll. 1 – 25; R. 91, ll. 1 – 18; R. 92, ll. 1 – 25; R. 93, ll. 1 – 25; R. 94, ll. 1 – 12.

She told the officers, according to the witness Gail Jones because Ms. Johnson did not remember, that no weapons were used in the assault. She testified that she was not hit with the hatchet. R. 85, ll. 1 – 10; R. 179, ll. 1 – 25; R. 177, ll. 1 – 25; R. 178, ll. 1 – 25; R. 179, ll. 1 – 8. Ms. Johnson never testified that Golston hit her with the piece of firewood. R. 77 – 103. Officer Blake testified that she was hit with a piece of firewood. R. 114, ll. 1 – 25.

Ms. Johnson did testify that she was afraid that Golston was going to kill her. R. 95, ll. 1 – 21. However, the jury would determine her credibility. The judge should have

charged the lesser included offense of CDV because there was evidence from which the jury could reasonably find CDV.

If Golston slapped her as he said, but the jury disbelieved self-defense, then that would be evidence of the lesser offense of simple CDV. The victim never testified that Golston used a weapon. The police officer was the only one who said that she was hit with the firewood or "log". Therefore, the log or the use of a weapon would be an issue for the jury.

CONCLUSION

Based on the above, the conviction and sentence should be reversed and the case remanded to the circuit court.

Respectfully submitted,


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

This 17th day of June, 2011.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."


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STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Lexington County

R. Knox McMahon, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

BENNIE GOLSTON,

APPELLANT

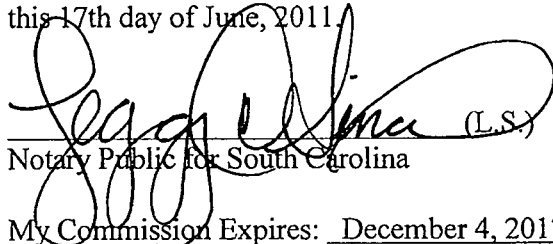
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Final Brief of Appellant in the above referenced case has been served upon Deborah Shupe, Esquire, at Rembert Dennis Building, Room 519, 1000 Assembly Street, Columbia, SC 29201, this 17th day of June, 2011.


LaNelle Cantey DuRant
Appellate Defender

ATTORNEY FOR APPELLANT

SUBSCRIBED AND SWORN TO before me
this 17th day of June, 2011.

 (L.S.)
Notary Public for South Carolina

My Commission Expires: December 4, 2017

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE

Respondent

VS.

BENNIE GOLSTON

Appellant

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I.

The indictment sufficiently alleged criminal domestic violence of a high and aggravated nature, and Appellant had ample notice of the charge against him.

II.

The circuit court did not abuse its discretion in admitting the hatchet found by officers when they entered a structure to search for Appellant and place him under arrest pursuant to a valid arrest warrant.

III.

The circuit court properly refused to give a jury charge on criminal domestic violence because the evidence presented at trial did not support such a charge.

STATEMENT OF THE CASE

Respondent concurs with Appellant's procedural Statement of the Case.

STATEMENT OF FACTS

On May 12, 2009, the Lexington County Grand Jury indicted Appellant Bennie Golston ("Golston") on one count of criminal domestic violence of a high and aggravated nature ("CDVHAN"), in violation of S.C. §16-25-65 (Supp. 2007). (Indictment No. 2009-GS-32-05027; Record on Appeal [R.], pp. 233-234). The case was called for a jury trial on May 13, 2009, before the Honorable R. Knox McMahon, Circuit Court Judge.

Prior to trial, Golston moved to proceed on a charge of criminal domestic violence ("CDV") rather than CDVHAN, arguing the language in the indictment only alleged CDV under S.C. §16-25-20 (Supp. 2007). The circuit court denied the motion, finding the indictment cited §16-25-65 in three different places, and the caption specifically referenced CDVHAN; therefore, Golston had notice he was charged with CDVHAN. (Trial Transcript [TT], pp. 32-38, 40-44; R., pp. 3-9, 11-15).

Golston also moved to suppress evidence officers found while searching for him. (TT, pp. 44-45; R., pp. 15-16). Master Deputy Michael Merckle ("Deputy Merckle") of the Lexington County Sheriff's Department, testified *in camera* that he responded to a call on March 22, 2008, and when he arrived at the scene, the victim was laying on a bed in a fetal position, her face extremely swollen and her breathing shallow. The victim indicated Golston lived with her, and he assaulted her the night before with his fists and a hatchet. (TT, pp. 46-48, 56-57; R., pp. 17-19, 27-28).

Golston was not at the victim's residence when Deputy Merckle arrived, so he and other officers at the scene spoke to neighbors in an effort to locate Golston. Later that day, someone reported seeing Golston sitting on the porch of a residence near the scene, and then

walking toward the woods. Officers tracked him with a canine unit from the yard where he was seen, through the woods to the open back door of a dilapidated structure. (TT, pp. 48-50, 57-60; R., pp. 19-21, 28-31).

Deputy Merckle described the structure as "unlivable," with no power or water, broken windows and open doors. The back porch had fallen in, and there were only small two by six boards going across it. After looking inside through the open door, the officers determined the structure was so hazardous the canine could not go through it without being injured. Deputy Merckle stated the structure was in such bad shape they believed it was abandoned. (TT, pp. 50-51; R., pp. 21-22).

After entering the structure, the officers searched places Golston could be hiding. Deputy Merckle testified "[w]e have found people hiding in closets, underneath beds, in between mattresses, underneath piles of clothes, trash, this, that, and the other." There were two mattresses stacked up on the floor, so he looked between them and found a hatchet matching the description the victim gave of the weapon Golston used while beating and threatening her. (TT, pp. 51-54, 60-62; R., pp. 22-25, 31-33).

Master Deputy Kevin Neal ("Deputy Neal") testified he also responded to a call on March 22, 2008, regarding a possible assault at the victim's house. Information officers initially gathered at the scene was sufficient to obtain an arrest warrant for Golston's arrest, and he left the scene to secure a warrant from the magistrate. After the warrant was issued, he returned to the scene, and had it in his patrol car when they received information Golston was seen in the area. (TT, pp. 64-68, 87-93; R., pp. 35-39, 58-64).

Deputy Neal was present when the canine tracked Golston to a structure, which he

described as "abandoned" and "dangerous." He stated the back door was open, the windows were broken out, there were holes in the roof and the floors were rotted out, and there was no electricity or water. When Deputy Merckle found the hatchet between the mattresses, he turned it over to Deputy Neal, who logged it into the Sheriff's Department's evidence room. (TT, pp. 68-69, 71-74; R., pp. 39-40, 42-45).

The circuit court found Golston had a reasonable expectation of privacy in the structure, but the officers had a valid arrest warrant for Golston and the canine tracked him to the structure. Finding the officers acted reasonably in light of the arrest warrant and information known to them at the time they entered the structure, the court found the hatchet was admissible. (TT, pp. 94-105; R., pp. 65-76).

The victim testified she had a relationship with Golston for approximately five years prior to March 22, 2008. During their relationship, Golston lived with her "off and on," and kept personal belongings at her house, including clothing, shoes and a toothbrush. On March 22, 2008, he got angry with her about a male friend who helped her do some things around the house that day, and started hitting her. She managed to get outside the house and into her car, but he drug her out of the car, threw her on the ground, and continued hitting her "many, many, many times." (TT, pp. 120-126; R., pp. 78-84).

She testified her eyes were closed during much of the beating so she did not know what he was using to hit her, but at one point she opened them and saw Golston holding a hatchet over her head. He did not hit her with the hatchet, but brought it down slowly and rubbed it all over her skin. During the assault, Golston told her he should kill her. (TT, pp. 126-127; R., pp. 84-85).

When Golston finally stopped beating the victim, he left her on the ground outside her house, even though she begged him not to leave her outside. After he left, she crawled inside the house, and onto a mattress lying on the floor. She stayed there until a neighbor found her the next morning and called for help. (TT, pp. 128-131; R., pp. 86-89).

Due to the extent of her facial trauma, emergency medical personnel took the victim to Palmetto Richland because it had a better trauma center. At the hospital, the doctor determined she did not have any broken bones in her face, but he could not get her eyes open enough to evaluate any damage to her sight. (TT, pp. 131-133, State's Exhibits 13, 16, 17, 22, 23, 24, 25 [Photographs]; R., pp. 89-91).¹

The hospital gave the victim medication for pain, and sent her home with her daughter, with subsequent treatment by an eye specialist. The victim's sight eventually returned to a certain extent, but she had to get glasses, which she did not wear prior to the beating. (TT, pp. 133-135; R., pp. 91-93).

Deputy Blake testified about responding to the call about a possible assault at the victim's house, the victim's physical condition when he arrived, and her statement that Golston beat her after an argument. He stated he found some of the victim's hair on the ground in front of the house, and just outside the door he found a firewood log approximately eighteen inches long and three inches in diameter, with strands of hair embedded in the bark. He also testified he obtained the arrest warrant for Golston, and was present when the canine tracked Golston to the structure. (TT, pp. 165-169, 172-178, 180-184, 200-205; R., pp. 107-

¹State's Exhibits 3-8 and 11-25 [Photographs] will be transported to the Court for consideration.

111, 114-120, 122-126, 142-147).

Deputy Merckle also testified about responding to the call at the victim's house, her condition when he arrived, and her statement Golston was the one who beat her. He also testified about the search for Golston, the canine tracking Golston to the structure, and his discovery of the hatchet between two mattresses inside. (TT, pp. 186-197; R, pp. 128-139).

A hospital emergency room nurse testified she was present when the victim was brought to the hospital. The victim had facial pain and swelling, with her eyes swollen shut, and a great amount of bruising. Based on the severity of her injuries, the doctor ordered trauma scans routinely done on patients with a significant amount of trauma, and was unable to do a sufficient eye exam due to the swelling around her eyes. The victim received morphine for severe pain while in the hospital, and a prescription for vicodin when she left the hospital. (TT, pp. 228-231; R., pp. 148-151).

The victim's son testified Golston started living with the victim around 2003. The son lived with the victim at that time, and he stated Golston was at the victim's residence ninety percent of the time. (TT, pp. 236-239; R., pp. 152-155).

By March 22, 2008, the son no longer lived with the victim, but the neighbor who found the victim that morning called him and said something had happened to his mother. He immediately went to the victim's residence, and almost did not recognize the victim because of the injuries to her face. He and his sister took care of the victim after she was released from the hospital, and it took several weeks for the swelling around her eyes to subside enough for her to see well enough to do anything for herself. (TT, pp. 240-258; R., pp. 156-174).

Golston testified he lived in the structure described by the officers, and spent the night with the victim sometimes. On the night of March 21, 2008, he was at the victim's house until 8:30 or 9:00 p.m., and then went to the structure and fell asleep. He got up around midnight and returned to the victim's house. (TT, pp. 287-291; R., pp. 180-184).

He stated when he knocked on the door, the victim came outside and was "furious." Without any provocation, she jumped on him and clawed him in the face, so he "slapped her" on both sides of her face. When the victim fell down, he walked into the house to check on his face., then "picked the hatchet up" and went back outside. The victim called him to help her get up, and he helped her off the ground and up to the porch, but the front door was locked. He then left the victim laying on the front step on a pile of wood, and went back to the structure. (TT, pp. 291-298, 302-303; R., pp. 184-191, 195-196).

During the jury charge conference, Golston requested charges on self-defense, and on CDV, as well as assault and battery, as lesser included offenses of CDVHAN. The circuit court granted the request for a self-defense charge, but denied the request as to CDV and assault and battery, finding the evidence did not support those charges. Specifically, the court found Golston was either guilty of CDVHAN based on the victim's testimony, or he was not guilty by reason of self-defense based on his testimony. (TT, pp. 305-309; R., pp. 197-201).

In response, Golston argued:

[t]he jury is given unfettered power to believe all or even some parts of the testimony or no parts of the testimony as the deciders of fact. Therefore, Your Honor, it could be conceivable in their weighing of the facts, they could find the elements of the lesser-included offenses met but the principal offense not met.

(TT, pp. 309-310; R., pp. 201-202). The court again found the evidence as presented did not support jury charges on CDV or assault and battery. (TT, pp. 310-316; R. pp. 202-208).

The jury convicted Golston of CDVHAN, and the circuit court sentenced him to ten years incarceration. (TT, pp. 353, 358-368; R., pp. 221, 222-232).

ARGUMENT

I. The indictment sufficiently alleged criminal domestic violence of a high and aggravated nature, and Appellant had ample notice of the charge against him.

Golston asserts the language in the indictment was insufficient to charge CDVHAN, and the circuit court erred in allowing the case to proceed on CDVHAN rather than CDV. This contention is patently meritless.

An indictment is merely a notice document. State v. Gentry, 363 S.C. 93, 610 S.E.2d 494, 500 (2005). The true test of the sufficiency of an indictment is not whether it could be made more definite and certain; rather, the court must look at the indictment with a practical eye in view of all the surrounding circumstances. *Id.* The sufficiency of the indictment is determined by whether: (1) the offense charged is stated with sufficient certainty and particularity to enable a court to know what judgment to pronounce, and the defendant to know what he or she is called upon to answer and whether he or she may plead an acquittal or conviction thereon, and (2) whether it apprises the defendant of the elements of the offense that are intended to be charged. *Id.*; see also State v. Baker, 2010 WL 2472172,*2 (S.C. App. 2010).

On its face, an indictment referencing the specific code section allegedly violated sufficiently apprises the defendant of the crime for which he is being prosecuted. See State v. Crenshaw, 274 S.C. 475, 266 S.E.2d 61, 62 (1980). “While the court should focus primarily on charging language in the body of the indictment, a caption or title which is consistent with the language in the body of the indictment may be considered in conjunction with the body in determining the sufficiency of the indictment as a whole.” State v. Means,

367 S.C. 374, 626 S.E.2d 348, 354 (2006).

Causing physical harm or injury to a person's own household member, or offering or attempting to cause such harm or injury, constitutes CDV in South Carolina. S.C. Code §16-25-20 (Supp. 2009). A person who violates §16-25-20 with a deadly weapon, or causes serious bodily injury to the victim, is guilty of CDVHAN. S.C. Code §16-25-65(A) (Supp. 2009). Thus, CDVHAN incorporates the elements of CDV, with the additional element of a deadly weapon or serious bodily injury.

Both the caption and body of the indictment at issue in this case specifically referenced S.C. Code §16-25-65, and the caption also specifically indicated the offense charged was CDVHAN. The body of the indictment alleged the victim was a household member, Golston caused or attempted to cause physical harm to her by striking her with closed fists and a wooden log, and using a hatchet to create further fear of imminent peril; specifically, he hit the victim "an undetermined amount of times with closed fists and a **wooden log** approximately 18" in length and 3" in diameter and used a **hatchet** to rub on the victim's arms and threaten her." (Indictment No. 2009-GS-32-5027; R., pp. 233-234) (emphasis added). Clearly a wooden log and a hatchet constitute deadly weapons when used to inflict or threaten injury.

Considered as a whole, the indictment was more than sufficient to put Golston on notice he was charged with CDVHAN. Therefore, the circuit court properly allowed the case to proceed on that charge.

II. The circuit court did not abuse its discretion in admitting the hatchet found by officers when they entered a structure to search for Appellant and place him under arrest pursuant to a valid arrest warrant.

Golston also contends the circuit court erred in admitting the hatchet Deputy Merckle found between two mattresses lying on the floor of what the officers believed was an abandoned structure in which Golston was hiding. Even assuming Golston had a recognizable expectation of privacy in the dilapidated structure, the officers reasonably believed he was inside, they entered to execute a valid arrest warrant, and discovered the hatchet while searching places where he could hide.

The admissibility of evidence is within the sound discretion of the trial judge, and the appellate court is limited to determining whether the trial court abused its discretion. State v. White, 382 S.C. 265, 676 S.E.2d 684, 686 (2009) (trial court's decision to admit or exclude testimony will not be reversed absent a prejudicial abuse of discretion); State v. Price, 368 S.C. 494, 629 S.E.2d 363, 365 (2006) (same); State v. Rice, 375 S.C. 302, 652 S.E.2d 409, 415 (Ct. App. 2007). An abuse of discretion occurs when the ruling is based on an error of law, or a factual conclusion without evidentiary support. Fields v. Regional Med. Ctr. Orangeburg, 363 S.C. 19, 609 S.E.2d 506, 509 (2005); Rice, 652 S.E.2d at 415. On appeal from a motion to suppress evidence based on Fourth Amendment grounds, appellate court review is limited to determining whether any evidence supports the circuit court's decision. State v. Bowman, 366 S.C. 485, 623 S.E.2d 378, 386 (2005); State v. Moore, 377 S.C. 299, 659 S.E.2d 256, 259 (Ct. App. 2008).

As a threshold matter, Golston did not have a reasonable expectation of privacy in a dilapidated building, with open doors, knocked out windows and huge holes in the roof.

(TT, pp. 49-52, 71-72, 192-195, 202-203, State's Exhibits 3 through 8 [Photographs]; R., pp. 20-23, 42-43, 134-137, 144-145). See Matter of Bazen, 275 S.C. 436, 272 S.E.2d 178 (1980) (defendant did not have a reasonable expectation of privacy in an open garage). There was evidence he stayed in different places, did not keep his belongings in the structure, and had basically lived with the victim for some time. (TT, pp. 120-122, 236-239; R., pp. 78-). Therefore, Golston had essentially abandoned the structure, and he did not have an expectation of privacy therein. See California v. Greenwood, 486 U.S. 35 (1988) (abandoned property has no protection from either the search or seizure provisions of the Fourth Amendment); State v. Dupree, 319 S.C. 454, 462 S.E.2d 279, 281 (1995) (same).

Even if Golston had an expectation of privacy in the structure, the police entered to execute a valid arrest warrant, and they could lawfully search any place in the structure where Golston might be hiding. A valid arrest warrant implicitly grants police limited authority to enter a suspect's residence when there is reason to believe the suspect is within. State v. Loftin, 276 S.C. 48, 275 S.E.2d 575 (1981) (citing Payton v. New York, 445 U.S. 573[(1980)]). "The lawfulness of entry into a private residence by law enforcement officers rests solely upon the information possessed by the officers at the time entry is effected." State v. Asbury, 328 S.C. 187, 493 S.E.2d 349, 351 (1997) (Officers' entry into residence was lawful because they had reason to believe defendant was there based on information from a neighbor that he left early in the morning, they arrived at the residence just after daybreak, a light was on inside and the kitchen window was open.); see also United States v. Lauter, 57 F.3d 212 (2d Cir.1995) (Officers had reason to believe defendant was in his apartment based on a tip that he moved into the windowless apartment during the weekend,

he was unemployed, and he typically slept late.).

The officers in this case had ample reason to believe Golston might be in the structure. Witnesses saw Golston go in the direction of the structure, and the police dog tracked Golston directly to its open back door. Deputy Merckle testified he looked between the mattresses because he knew from experience that people hide under mattresses.² (TT, p. 52; R., p. 23). Thus, there was ample reason to believe Golston might be inside the house when officers got there, their entry into the house and search of places he might be hiding was proper, and the circuit court did not abuse its discretion in admitting the hatchet as evidence.

²Golston contends the officer could not have reasonably believed he was hiding under the mattress because there was "no hump or bump which might indicate a person was there." Given the dilapidated condition of the structure, there could well have been a hole in the floor or the bottom mattress in which Golston could hide without having a visible "hump or bump" in the top mattress

III. The circuit court properly refused to give a jury charge on criminal domestic violence because the evidence presented at trial did not support such a charge.

Golston also contends the circuit court erred in denying his request for a jury charge on CDV as a lesser included offense. As the circuit court found, the evidence presented at trial did not support a CDV jury charge.

The trial court is required to charge the law as determined from the evidence presented at trial, and should give any charge supported by the evidence. State v. Gourdine, 322 S.C. 396, 398, 472 S.E.2d 241 (1996); State v. Gates, 269 S.C. 557, 561, 238 S.E.2d 680, 681 (1977); State v. Brown, 362 S.C. 258, 607 S.E.2d 93, 95 (Ct. App. 2004). A jury charge that does not fit the facts of the case may confuse the jury. State v. Blurton, 352 S.C. 203, 573 S.E.2d 802, 804 (2002). The trial court's refusal to give a requested charge must be both erroneous and prejudicial to warrant reversal, and failure to give requested jury charges is not prejudicial error where the charges given afford the proper test for determining the issues. State v. Burkhardt, 350 S.C. 252, 565 S.E.2d 298, 303-304 (2002).

An indictment for a greater offense gives the trial court jurisdiction to charge and convict a defendant of any lesser included offense, but a lesser included offense jury charge is required only when the evidence warrants such an instruction. State v. Moultrie, 273 S.C. 532, 257 S.E.2d 730, 731 (1979) ("[a]n instruction should not be given unless justified by the evidence."); State v. Mitchell, 362 S.C. 289, 608 S.E.2d 140, 143 (Ct. App. 2005). In determining whether the evidence requires a lesser included offense charge, the trial court views the facts in a light most favorable to the defendant, and is required to charge a lesser included offense only if there is evidence from which the jury could infer the defendant

committed the lesser offense rather than the greater. State v. Byrd, 323 S.C. 319, 474 S.E.2d 430, 431 (1996); State v. Drafts, 288 S.C. 30, 340 S.E.2d 784, 785 (1986); State v. Hernandez, 386 S.C. 655, 690 S.E.2d 582, 585 (Ct. App. 2010). The mere contention the jury might accept the State's evidence in part and reject it in part is insufficient to satisfy the requirement of some evidence tending to show the defendant was only guilty of the lesser offense. State v. Geiger, 370 S.C. 600, 635 S.E.2d 669, 674 (Ct. App. 2006)

In addressing Golston's request for a charge on CDV and/or simple assault and battery, the circuit court specifically found the evidence presented did not support a charge on either offense. As viewed by the court, the victim's testimony indicated Golston beat her repeatedly and inflicted serious bodily injury; but Golston claimed he only hit the victim after her unprovoked attack on him, and therefore, he acted in self-defense and was not guilty of any crime. Golston's argument before the circuit court was the jury could believe only parts of the State's case, and find he was only guilty of the lesser charge. (TT, pp. 307-314; R., pp. 199-206).

Golston contends on appeal the jury could have found he did not use a weapon, or that the victim did not suffer serious bodily injury because she had no broken bones, no cuts requiring stitches, and no "permanent damage to her eye as she said she could see." He also asserts the jury could have disbelieved the victim's testimony that she was afraid he was going to kill her. A cursory review of the evidence reveals the absurdity of these assertions.

The extent of the victim's injuries is undisputed. She testified she was in terrific pain from the beating, and had to crawl inside her house after Golston left her injured on the ground. She could not see well because of the swelling in her face and around her eyes, and

had trouble breathing. (TT, pp. 125-135; R., pp. 83-93). Her account of her injuries was substantiated by the photographs entered as evidence, as well as testimony from the officers who came to the scene, the victim's son, and the trauma nurse who was on duty when the victim was brought into the emergency room by ambulance. (TT, pp. 168-169, 172-173, 187-188, 228-231, 242-248, 252-258, State's Exhibits 11-25 [Photographs]; R., pp. 110-111, 114-115, 129-130, 148-151, 158-164, 168-174). The fact the victim had no broken bones or deep cuts requiring stitches is a blessing, not a loophole for Golston to escape the legal consequences of his actions.

Further, contrary to Golston's assertion, the victim did sustain permanent damage to her eyesight. She testified, without contradiction, that she did not have to wear glasses before the assault. After the assault, however, the only thing the doctors could do to help her remaining sight was to give her glasses, which really did not help. (TT, p. 135; R., p. 93).

In essence, Golston's only argument is the jury might not have believed all of the State's evidence. As discussed above, that contention, standing alone, is not sufficient to justify a lesser included offense charge. Geiger, 635 S.E.2d at 674. The circuit court properly reviewed the evidence, and its determination the evidence presented indicated Golston was either guilty of CDVHAN, or not guilty based on self-defense, is amply supported by the record.

CONCLUSION

Based on the foregoing, Respondent respectfully submits Appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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Attorney General

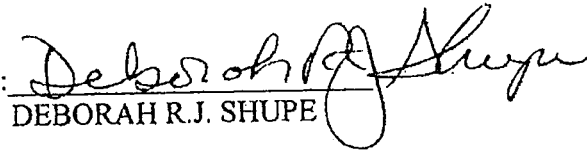
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June 10, 2011

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Lexington County
The Honorable R. Knox McMahon, Circuit Court Judge

THE STATE,

Respondent,

vs.

BENNIE GOLSTON,

Appellant.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Respondent complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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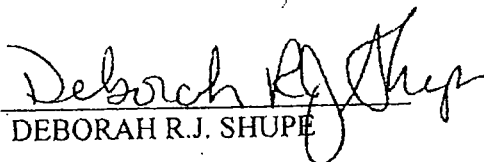
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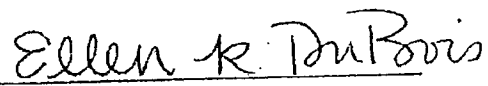
PROOF OF SERVICE

I, Ellen R. DuBois, certify I served the Final Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.

This 10th day of June, 2011.


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