

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Certiorari to Anderson County

J. Cordell Maddox, Circuit Court Judge

DONNIE RAY GIBSON,

PETITIONER

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO 2018-000694

APPENDIX

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STATE OF SOUTH CAROLINA)	IN THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON)	THE COURT OF GENERAL SESSIONS
)	2009-GS-04-02046
STATE OF SOUTH CAROLINA,)	
)	
PLAINTIFF,)	
)	
VERSUS)	
)	
)	
DON RAY GIBSON,)	
)	
DATE: DECEMBER 12-14, 2011	
DEFENDANT.)	ANDERSON, SOUTH CAROLINA

TRIAL TRANSCRIPT

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

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1 JURY VOIR DIRE

2 THE COURT: Mr. McElhannon, is the Defense ready to
3 proceed?

4 MR. MCELHANNON: We are, Your Honor.

5 THE COURT: Mr. Campbell, will you call your case,
6 please?

7 MR. CAMPBELL: Yes, sir. Your Honor, the State is ready
8 on indictment 2009-GS-04-2046, The State versus Don Ray
9 Gibson. He has been indicted for assault and battery with
10 intent to kill, possession of a weapon during the commission
11 of a violent crime. I understand there is to be a trial.

12 THE COURT: Thank you, sir.

13 (Mr. Campbell hands document to Judge McIntosh)

14 THE COURT: Do you agree, Mr. McElhannon, that this is a
15 trial?

16 MR. MCELHANNON: It is, Your Honor.

17 THE COURT: Ladies and gentlemen of the jury, we are
18 about to start a jury selection for a criminal case. What we
19 are going to do, just so you know where we are, we will pick
20 this jury, I will send the jury that we pick back to the jury
21 room for certain things to do and then Judge Maddox will come
22 back in here after me and pick a civil matter.

23 But as you heard, this case is The State versus Don Ray
24 Gibson, charged with assault and battery with intent to kill
25 and possession of a weapon during the commission of a violent

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1 crime. I'll tell each and every one of you, the fact that
2 this person has been indicted is not evidence nor does it
3 raise a presumption of guilt. This is just a charging
4 mechanism by which the State brings defendants up before
5 their peers, such as yourselves, for a determination of their
6 guilt or innocence.

7 Now, ladies and gentlemen, there will be two different
8 procedures to follow in picking a jury. In criminal cases,
9 like right now, if your jury number is called, what you will
10 do is step here between the clerk and my court reporter over
11 here on my right, you will face the State and Defense tables
12 and a decision will be made at that point as to whether or
13 not you will be selected to serve on this particular jury. If
14 you are not, you will go back to your seat. I will ask,
15 though, if you are called, if you have any personal
16 belongings out there, that you gather them and bring them
17 with you in case you are selected.

18 In the other case that a jury will be selected on, it
19 will be a lot more confidential. You will have a jury sheet
20 sent to the lawyers. They will strike your name by using a
21 number on a sheet. You will not know if you have been
22 stricken from the civil case. Certainly, you will know if you
23 have been selected to serve on that jury.

24 With that being said, Mister Clerk -- oh, let me remind
25 everybody, you are still under oath at this point, but I need

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1 to go over a few questions before we begin the jury
2 selection.

3 VOIR DIRE

4 The first question is this: Is anybody related by blood
5 or marriage to Don Ray Gibson or Damon Marcengill? Is anyone
6 related or have you ever been related by blood or marriage to
7 Don Ray Gibson or Damon Marcengill? If you, will you please
8 stand. (No one stands)

9 Has anyone ever had a close personal or social
10 relationship with either Don Ray Gibson or Damon Marcengill?
11 If so, would you please stand. (No one stands)

12 Ladies and gentlemen, if you cannot hear me, raise your
13 hand, too, and I will be glad to repeat things, if needed.
14 This is a list of potential witnesses that may appear in this
15 case. It contains the names of twenty potential witnesses. I
16 will read all of them before I ask you any questions. If you
17 do not hear or cannot understand any of the names that I go
18 over with you, raise your hand and I will repeat the names
19 such that you do.

20 But the list of potential witnesses are as follows: Rob
21 Gebing, Anderson County Sheriff's office; Tommy Clamp,
22 Anderson County Sheriff's office; Lilly Gallman, SLED; Tommy
23 Johnson, Anderson County Sheriff's office; Nathan Mitchell,
24 Anderson County Sheriff's office; Mike Baskin; Rusty Ables,
25 Anderson County Sheriff's office; Ricky Scott, Anderson

1 County Sheriff's office; Toby Jordan, Anderson County
2 Sheriff's office; Dwayne McElrath, Anderson County Sheriff's
3 office; Eric Todd Hutchins, Anderson County Sheriff's office;
4 Jason Marcengill; Labriska Christopher; Samuel Joe Fisher;
5 Ralph Gesell; Brittany Ann Rhodes; Peggy Sue Rhodes; Shane
6 Steven Rhodes; Julie Denise Whitfield; and Walton Wooten.

7 First, did everyone catch all the names? If you didn't,
8 raise your hand. (No one raises their hand) Ladies and
9 gentlemen, has anyone ever been related by blood or marriage
10 to any of the folks that I just read out to you? If so, would
11 you please stand. (No one stands)

12 Has anyone had a close personal or social relationship
13 with any of the potential witnesses that I just read out to
14 you? If so, would you please stand. (No one stands)

15 Is that all the witnesses from all parties? Is that
16 correct?

17 MR. CAMPBELL: It is, from the State, Your Honor.

18 THE COURT: Okay. Mr. McElhannon, would you stand up and
19 introduce yourself and your client.

20 MR. MCELHANNON: I'm Scott McElhannon. I practice law
21 here in Anderson. This is my client, Don Ray Gibson.

22 THE COURT: Thank you, sir. Mr. Campbell.

23 MR. CAMPBELL: My name is Rame Campbell. I, along with
24 Josh Allen, both work for Solicitor Chrissy Adams. We will be
25 trying this case for the State.

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1 THE COURT: All right, ladies and gentlemen, has any
2 member of the jury panel ever been represented by any of
3 these attorneys or any members of their firm? If so, would
4 you please stand. (No one stands)

5 Has any member of the jury panel ever been related by
6 blood or marriage to any of these attorneys involved in this
7 case or any members of their firm? If so, would you please
8 stand. Okay, sir, would you please give me your juror number?

9 MR. PEARSON: One ten.

10 THE COURT: One ten?

11 MR. PEARSON: Yes.

12 THE COURT: Do you have your juror card with you?

13 MR. PEARSON: Yes, sir.

14 THE COURT: Would you please pass it to the bailiff?

15 (Bailiff hands document to Judge McIntosh)

16 THE COURT: Okay. That's juror number 116.

17 MR. PEARSON: I'm sorry.

18 THE COURT: That's okay. You are Mr. Phillips?

19 MR. PEARSON: Pearson.

20 THE COURT: Pearson. Okay, well, I can't read either, it
21 appears. Who, of these potential witnesses, have you had a
22 close personal relationship with?

23 MR. PEARSON: Not any of the witnesses, but my sister-in-
24 law, Pam Seay, she works in the Solicitor's office.

25 THE COURT: Works in the Solicitor's office? Would the

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1 fact that your sister-in-law -- where does she work, first of
2 all?

3 MR. PEARSON: Now, that I'm not real sure of. It's not
4 real clear to me.

5 THE COURT: Do you know if she is assigned to any
6 particular attorney?

7 MR. PEARSON: No, sir.

8 THE COURT: Okay. Would the fact that your sister-in-law
9 is employed by the Solicitor's office in this county prevent
10 you from listening to evidence that is produced in this case
11 and making your decision solely based on evidence presented
12 in this case and no other?

13 MR. PEARSON: No, sir.

14 THE COURT: Could you be fair and impartial to both the
15 Defendant and to the State in this matter?

16 MR. PEARSON: Yes, sir.

17 THE COURT: Any additional voir dire from the State?

18 MR. CAMPBELL: No, Your Honor.

19 THE COURT: From the Defense?

20 MR. MCELHANNON: No, Your Honor.

21 THE COURT: Thank you, sir. Anyone else? (No one stands)
22 Has any member of the jury panel formed or expressed an
23 opinion about the case of The State versus Don Ray Gibson? If
24 so, would you please stand. (No one stands)

25 Is anyone on the jury panel aware of any bias or

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1 prejudice that they may have in this case against the
2 Defendant or the State in this matter? If so, would you
3 please stand. (No one stands)

4 Is there any member of the jury panel that was a member
5 of the grand jury that issued the indictment in this matter?
6 If so, would you please stand. (No one stands)

7 Is there any member of the jury panel who is a member of
8 or a contributor to any group which has as its primary
9 concern the promotion of law enforcement or victims' rights?
10 These groups would include, but not necessarily be limited
11 to, MADD, SADD, or CAVE? If you are a member or a contributor
12 to these groups or any other group that has as their primary
13 purpose the promotion of law enforcement or victims' rights,
14 would you please stand. Ma'am, would you give me your juror
15 number?

16 MS. DEMINO: Forty-three.

17 THE COURT: Forty-two?

18 MS. DEMINO: Forty-three.

19 THE COURT: Okay. You are Demino?

20 MS. DEMINO: Demino.

21 THE COURT: I'm sorry. I butcher names all the time.
22 Would you mind telling us what group you are a contributor
23 to?

24 MS. DEMINO: MADD.

25 THE COURT: MADD. Would the fact that -- are you a

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1 current contributor to that group?

2 MS. DEMINO: Yes.

3 THE COURT: Would the fact that you contribute to MADD
4 prevent you from listening to the facts and testimony
5 presented in this courtroom in making your decision unbiased
6 to the Defendant or the State in this matter, just on the
7 facts of this case and for no other reason?

8 MS. DEMINO: No, sir.

9 THE COURT: Could you be fair and impartial to the
10 Defendant and to the State?

11 MS. DEMINO: Yes, sir.

12 THE COURT: Any additional voir dire from the State?

13 MR. CAMPBELL: No, Your Honor.

14 THE COURT: From the Defense?

15 MR. MCELHANNON: No, Your Honor.

16 THE COURT: All right. Thank you, Ms. Demino. Anyone
17 else? Does any member of the jury panel know of any reason,
18 whatsoever, why he or she should not be selected to serve as
19 a juror in this case with particular emphasis being placed on
20 your ability to be fair and impartial to both the Defendant
21 in this matter and to the State in this matter? If you know
22 of any reason, whatsoever, why you should not be selected,
23 would you please stand. (No one stands)

24 Any additional voir dire from the State?

25 MR. CAMPBELL: No, Your Honor.

1 THE COURT: From the Defense?

2 MR. MCELHANNON: No, Your Honor.

3 THE COURT: Are you ready to strike a jury?

4 MR. CAMPBELL: Yes, Your Honor.

5 MR. MCELHANNON: Yes, sir.

6 THE COURT: Do you both agree it's five and five?

7 MR. CAMPBELL: Yes, sir.

8 THE COURT: Would one alternate suit the State?

9 MR. CAMPBELL: Yes, Your Honor.

10 THE COURT: The Defense?

11 MR. MCELHANNON: Yes, Your Honor.

12 THE COURT: As I told you, ladies and gentlemen of the
13 jury panel, if your name is called, I'll ask that you pick up
14 your personal belongings and come forward and stand between
15 my court reporter and the clerk in this matter. Are you
16 ready, Mr. Clerk, or do you need a minute?

17 CLERK OF COURT: We've got to print it out. (Brief break)

18 JURY SELECTION

19 Ladies and gentlemen, as I call out your name, I would
20 ask that you come right here and face the audience, please.
21 Juror #106, James M. Moore.

22 (Whereupon, James Moore, a black male, comes forward)

23 CLERK OF COURT: What say you for the State?

24 MR. CAMPBELL: Please present Mr. Moore.

25 CLERK OF COURT: What say you for the Defense?

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1 MR. MCELHANNON: Please seat the juror.

2 CLERK OF COURT: That way, please, sir. Juror #49, Roy W.
3 Estridge.

4 (Whereupon, Roy Estridge, a white male, comes forward)

5 CLERK OF COURT: What say you for the State?

6 MR. CAMPBELL: Please present Mr. Estridge.

7 CLERK OF COURT: What say you for the Defense?

8 MR. MCELHANNON: Please seat the juror.

9 CLERK OF COURT: That way, please, sir. Juror #33,
10 Christina M. Coker.

11 (Whereupon, Christina Coker, a white female, comes forward)

12 CLERK OF COURT: What say you for the State?

13 MR. CAMPBELL: Please present Ms. Coker.

14 CLERK OF COURT: What say you for the Defense?

15 MR. MCELHANNON: Please excuse Ms. Coker.

16 CLERK OF COURT: Thank you. Have a seat back in the
17 audience. Juror #40, Ruth E. Daughenbaugh.

18 (Whereupon, Ruth Daughenbaugh, a white female, comes forward)

19 CLERK OF COURT: What say you for the State?

20 MR. CAMPBELL: Please present Ms. Daughenbaugh.

21 CLERK OF COURT: What say you for the Defense?

22 MR. MCELHANNON: Please seat the juror.

23 CLERK OF COURT: Have a seat, please, ma'am. Juror #22,
24 William J. Burns.

25 (Whereupon, William Burns, a white male, comes forward)

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1 CLERK OF COURT: What say you for the State?

2 MR. CAMPBELL: Please present Mr. Burns.

3 CLERK OF COURT: What say you for the Defense?

4 MR. MCELHANNON: Please excuse Mr. Burns.

5 CLERK OF COURT: Juror #94, Daniel C. Long.

6 (Whereupon, Daniel Long, a white male, comes forward)

7 CLERK OF COURT: What say you for the State?

8 MR. CAMPBELL: Present Mr. Long.

9 CLERK OF COURT: What say you for the Defense?

10 MR. MCELHANNON: Please seat the juror.

11 CLERK OF COURT: Juror #138, Denise A. Slater.

12 (Whereupon, Denise Slater, a white female, comes forward)

13 CLERK OF COURT: What say you for the State?

14 MR. CAMPBELL: Present Ms. Slater.

15 CLERK OF COURT: What say you for the Defense?

16 MR. MCELHANNON: Please seat the juror.

17 CLERK OF COURT: Juror #87, Debbie A. Keasler.

18 (Whereupon, Debbie Keasler, a white female, comes forward)

19 CLERK OF COURT: What say you for the State?

20 MR. CAMPBELL: Present Ms. Keasler.

21 CLERK OF COURT: What say you for the Defense?

22 MR. MCELHANNON: Please seat Ms. Keasler.

23 CLERK OF COURT: That way, please, ma'am. Juror #137,

24 Michael H. Simmons.

25 (Whereupon, Michael Simmons, a white male, comes forward)

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1 CLERK OF COURT: What say you for the State?

2 MR. CAMPBELL: Present Mr. Simmons.

3 CLERK OF COURT: What say you for the Defense?

4 MR. MCELHANNON: Please excuse Mr. Simmons.

5 CLERK OF COURT: Have a seat, please, sir. Juror #26,
6 Jason L. Campbell.

7 (Whereupon, Jason Campbell, a white male, comes forward)

8 CLERK OF COURT: What say you for the State?

9 MR. CAMPBELL: Present Mr. Campbell.

10 CLERK OF COURT: What say you for the Defense?

11 MR. MCELHANNON: Please seat Mr. Campbell.

12 CLERK OF COURT: Have a seat, please, sir. Juror #1,
13 Ronald W. Allen.

14 (Whereupon, Ronald Allen, a white male, comes forward)

15 CLERK OF COURT: What say you for the Defense?

16 MR. CAMPBELL: Present Mr. Allen.

17 CLERK OF COURT: What say you for the Defense?

18 MR. MCELHANNON: Please excuse Mr. Allen.

19 CLERK OF COURT: Please have a seat back in the audience.

20 Mr. McElhannon, that's four strikes. Juror #164, James R.
21 Wentling.

22 (Whereupon, James Wentling, a white male, comes forward)

23 CLERK OF COURT: What say you for the State?

24 MR. CAMPBELL: You said #164?

25 CLERK OF COURT: Yes, sir.

1 MR. CAMPBELL: Present Mr. Wentling.

2 CLERK OF COURT: What say you for the Defense?

3 MR. MCELHANNON: Please seat the juror.

4 CLERK OF COURT: Juror #171, Regena A. Wilson.

5 (Whereupon, Regena Wilson, white female, comes forward)

6 CLERK OF COURT: What say you for the State?

7 MR. CAMPBELL: Please present Ms. Wilson.

8 CLERK OF COURT: What say you for the Defense?

9 MR. MCELHANNON: Please seat Ms. Wilson.

10 CLERK OF COURT: Juror #45, Glenda M. Dixon.

11 (Whereupon, Glenda Dixon, a white female, comes forward)

12 CLERK OF COURT: What say you for the State?

13 MR. CAMPBELL: Present Ms. Dixon.

14 CLERK OF COURT: What say you for the Defense?

15 MR. MCELHANNON: Please seat Ms. Dixon.

16 CLERK OF COURT: Juror #99, Lisa D. McCombs.

17 (Whereupon, Lisa McCombs, a white female, comes forward)

18 CLERK OF COURT: What say you for the State?

19 MR. CAMPBELL: Present Ms. McCombs.

20 CLERK OF COURT: What say you for the Defense?

21 MR. MCELHANNON: Please excuse the juror.

22 CLERK OF COURT: You may return to your seat. Your Honor,
23 that's all the strikes for the Defendant. Juror #141, Timothy
24 C. Smith.

25 (Whereupon, Timothy Smith, a white male, comes forward)

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1 CLERK OF COURT: What say you for the State?

2 MR. CAMPBELL: Please excuse Mr. Smith.

3 CLERK OF COURT: Juror #64, Dennis M. Greer.

4 (Whereupon, Dennis Greer, a white male, comes forward)

5 CLERK OF COURT: What say you for the State?

6 MR. CAMPBELL: Present Mr. Greer.

7 CLERK OF COURT: Have a seat over there, please, sir.

8 Juror #6, Jacob D. Baskin.

9 (Whereupon, Jacob Baskin, a white male, comes forward)

10 CLERK OF COURT: What say you for the State?

11 MR. CAMPBELL: Present Mr. Baskin.

12 CLERK OF COURT: Have a seat, please, sir.

13 CLERK OF COURT: Have a seat in the jury box. Your Honor,
14 that is twelve jurors.

15 THE COURT: Alternates. The Defense gets two strikes, the
16 State gets one.

17 CLERK OF COURT: Juror #124, Norman L. Powell.

18 (Whereupon, Norman Powell, a white male, comes forward)

19 CLERK OF COURT: What say you for the State?

20 MR. CAMPBELL: Present Mr. Powell.

21 CLERK OF COURT: What say you for the Defense?

22 MR. MCELHANNON: Please seat Mr. Powell.

23 CLERK OF COURT: That way, Mr. Powell. One alternate,
24 Your Honor.

25 THE COURT: Thank you, sir. Ladies and gentlemen of the

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1 jury panel who have not been selected, I'm going to ask that
2 you wait around for just one minute. I'm going to excuse this
3 jury for one second. You will have about a ten minute break
4 in just a few minutes. Ladies and gentlemen of this jury, I'm
5 going to ask that you follow Buck back to the jury room, that
6 you select a person to serve as your foreperson. You don't
7 have to be unanimous in that selection, just by a simple
8 majority. The only prohibition is that Mr. Powell, where are
9 you? (Raises hand) You are not allowed to serve as
10 foreperson, but you are allowed to vote on who you would like
11 to be foreperson of this jury. At this time, if you would
12 just follow Buck back to the jury room, please.

13 (Trial jury out at 11:35 AM)

14 THE COURT: Any motion from the State as to the jury
15 selection process?

16 MR. CAMPBELL: No, Your Honor.

17 THE COURT: From the Defense?

18 MR. MCELHANNON: No, Your Honor.

19 THE COURT: Ladies and gentlemen of the panel, I'm going
20 to go ahead and let you recess now. I would imagine that you
21 will get at least a ten to fifteen minute break. If you would
22 check with the bailiffs after about ten minutes and they will
23 let you back in. If you would go out at this time and just
24 not leave the fourth floor, please. Thank you.

25 (Jury panel out at 11:36 AM)

1 THE COURT: Mr. Campbell, would you raise your hand?

2 (Juror complies) I'm sure Buck has told you this, but if you
3 would, throughout the course of this trial, each time we come
4 in and out of the courtroom, if you would remain in that seat
5 and also, Mr. Powell, if you would remain in that seat.

6 MR. POWELL: Yes, sir.

7 THE COURT: Ladies and gentlemen, what I'm going to do
8 because of administrative matters and other juries to be
9 picked, we are going to dismiss you and ask that you return
10 at 1:30 to be in your jury room and we will start the trial
11 at that point in time. You can go to lunch on your own.
12 Let me remind you that you are not to speak with one
13 another about this case. You are not to speak to anyone else
14 about this case. I will give you instructions about that when
15 we begin trial. Needless to say, just do not begin to discuss
16 anything or any aspect of this case until such time as I give
17 you instruction to do so. With that being said, I'm going to
18 dismiss you until 1:30 at this point in time. If you will
19 follow Buck out, please.

20 (Jury out at 11:42 AM)

21 THE COURT: Gentlemen, we will be in recess until 1:30.
22 The Defendant will remain in custody. Thank you.

23 (Lunch Break)

24 AFTERNOON - DECEMBER 12, 2011

25 THE COURT: Are there any witnesses in the courtroom that

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1 are here for the trial of Don Ray Gibson, any witnesses
2 subpoenaed or asked to be here on behalf of the State, other
3 than the investigating officer? Mr. Gebing, were you the
4 investigating officer?

5 MR. GEBING: Yes, sir.

6 THE COURT: All right. I'm going to ask that you step out
7 into the lobby (speaking to witnesses in audience) and not to
8 return to the courtroom until you have been summoned to
9 testify. Would you check to make sure we've got all of them,
10 please? (Speaking to Solicitor Campbell. He complies) It's my
11 understanding that you've marked exhibits. Is that right?

12 MR. CAMPBELL: Yes, sir. We've marked photographs. We
13 may add a couple tomorrow, but that's pretty much the
14 evidence we will have to deal with today.

15 MR. MCELHANNON: I'll try to find the two photographs,
16 Your Honor, that I would like to put into evidence, Your
17 Honor, that are not in their group.

18 THE COURT: Okay.

19 MR. MCELHANNON: That's all I will have.

20 THE COURT: Do you need a minute?

21 (Two photographs are marked as Defendant's #1 and #2)

22 (Jury in at 2:05 PM)

23 INTRODUCTORY REMARKS BY THE COURT

24 THE COURT: Mr. Campbell, ladies and gentlemen of the
25 jury, thank you for your patience. Sometimes we have multiple

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1 courts running and we have delays and that's what happened
2 today. Thank you for your patience. I hope you had a good
3 lunch.

4 We are about to begin the case of The State versus Don
5 Ray Gibson, who is indicted for assault and battery with
6 intent to kill and also possession of a weapon during the
7 commission of a violent crime. Before we get started, I would
8 like to make a few introductory statements. This is not the
9 law. At the end of the case I will charge you on what the law
10 is and you will be required to apply the facts as you find
11 them to be.

12 I don't know if any of you have ever been involved with
13 the criminal justice system or the court system. I would
14 imagine, though, that each and every one of you have watched
15 a TV show or movie that purports to reflect what it's like
16 inside of a courtroom. Let me dispel that to each and every
17 one of you right now. Court is not entertainment, it's
18 different from the movies and TV in that trials do not happen
19 in five minute vignettes and clips. Trials are often very
20 slow, very methodical, and they are very deliberate. The
21 reason being, they are one of the fundamental aspects of our
22 democracy. Trials are a search for the truth and to make sure
23 that justice is done.

24 Now, you see these attorneys here in the courtroom. They
25 are advocates for their client. They have a sworn duty to

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1 zealously advocate their position with respect to their side
2 of the case. That being said and done, they are also officers
3 of the court. What that means is, you can reasonably expect
4 these attorneys to be fair, reasonable, competent, and
5 ethical in their dealings with one another, the witnesses,
6 and the Court, throughout this case.

7 Now, in just a minute, you will take an oath and in that
8 oath, you will swear to be impartial and unbiased in trying
9 to reach a fair and just verdict in this case. That means
10 that these attorneys, parties, and witnesses have a right to
11 expect that you will be fair, that you will be impartial and
12 that you will be ethical in your dealings with this matter.

13 Again, what I'm telling you now is not the law that you
14 will apply in this case. It's just general instructions for
15 your thoughts during this trial. At the end of this case, I
16 will instruct you on the law that you will apply during this
17 matter.

18 In just a minute, I'm going to give the foreperson the
19 opportunity to query each one of the jurors and decide
20 whether or not you would like to take notes during this
21 trial. You can take notes if you want to. You do not have to
22 take notes if you do not want to. However, if you do decide
23 that you want to take notes during these proceedings, you may
24 be allowed to do so, but I'll tell you that each person is
25 able to take notes differently. Some people's notes may be

1 more complete than others and just because the fact that
2 somebody has something in their notes doesn't mean it will
3 control over somebody's memory who did not take notes of the
4 proceedings.

5 Also, an important part of being a juror is that you
6 look at a witness' demeanor and sometimes, if you are taking
7 notes and you look down, you miss the person's visceral
8 reaction to the testimony and you may miss a valuable part of
9 the testimony. But be thinking about what it is you want to
10 do in this matter.

11 I told you earlier and I will tell you again, the fact
12 that Mr. Gibson, over here, has been indicted and charged
13 with these charges is not a presumption of guilt, it does not
14 rise to a presumption. It does not give an inference of
15 guilt. These documents, this indictment, (holds up document)
16 is only the charging mechanism by which the State of South
17 Carolina brings defendants before jurors such as yourselves
18 for a determination of whether or not they are guilty or
19 innocent. In fact, in this case, the Defendant has pled not
20 guilty to all charges, therefore, that puts the burden of the
21 State of South Carolina to prove each and every element of
22 both the charges pending against this Defendant, beyond a
23 reasonable doubt. It will be up to you, it will be your duty
24 at the end of this case, to decide whether or not the State
25 has proven its case with respect to either of these charges.

1 As jurors, your purpose is to find facts. In the
2 vernacular of the law, we say that you are the judges of the
3 facts. In other words, you will make your determination of
4 what the facts are and what inferences you are going to give
5 to those facts based on the evidence and testimony you hear
6 in this courtroom and in this courtroom, alone. You are not
7 to be influenced by opinions you may have had coming in here.
8 You may not be influenced by any comments or anything that
9 you may observe while court is not in session. That means you
10 will make your determination solely based on what you hear in
11 this courtroom.

12 Now, it is important during this trial, and I do not
13 believe this is going to be an extraordinarily long trial,
14 but it is important that you pay close attention to what
15 these attorneys say, what the witnesses say, and what I tell
16 you throughout the course of this trial, because when it
17 comes time for you to start making your findings of fact, if
18 you've not paid attention, you will have a difficult time
19 doing that. If you have paid attention, you won't have a
20 difficult time doing that and you will have done your duty.

21 In addition, let me tell you that, normally, you cannot
22 correct an incorrect finding of fact on appeal contrary to
23 what people believe. Now, if I make a mistake of law here,
24 those can be corrected, but incorrect findings of fact are
25 typically not correctable on appeal.

1 Throughout this case and any other case that I have been
2 involved with since being on the bench or when I was
3 practicing law, there will be objections raised by these
4 lawyers. That is a part of their jobs in carrying out their
5 duty of zealously representing their clients. A lot of times
6 I will send you out of the courtroom. If, during those
7 periods, or during lunch breaks or overnight, you are
8 excused, you may not speak about this case with anyone.
9 Believe it or not, that means, even during breaks in this
10 case, you can't speak with your fellow jurors about this
11 case, you can't speak with your spouses or respective others,
12 children, or friends. You can't speak with them by indirect
13 methods of communications, you can't text them, email them,
14 or talk to them on the phone, or have face-to-face and the
15 reason is kind of obvious. We want you to make your decisions
16 on the facts of this case based solely from what you hear and
17 you see in this courtroom uninfluenced by any outside
18 influence and in order to do that, we do not need you to be
19 communicating with one another or anyone else.

20 Our chief justice, Chief Justice Jean Toal, of the South
21 Carolina Supreme Court, has instructed all trial judges to
22 instruct the juries that they cannot engage in what is
23 called, "Independent Jury Research". What that simply means
24 is, if you see a person or a party, a court official, that
25 you'd like to learn more about or you have an issue that you

1 hear about in court that you'd like to look up or you have an
2 issue that you think may be helpful during the course of this
3 trial, you cannot go out and do independent research on the
4 computer or through some other means. It's the same thing as
5 I told you before, we want your decision to be based solely
6 on the facts and evidence presented here in this courtroom
7 and by applying the law as I give it to you at the end of
8 this case uninfluenced by any outside influences. That being
9 said, at the end of this case you are free to look up any and
10 all persons or issues or things that you'd like to.

11 Now, in every case in this state, there are five parts.
12 I tell you this because I like you to know, generally, where
13 you are in the course of these proceedings. In just a minute
14 there will be an opening statement or statements. Then, there
15 will be the presentations of the evidence. There will be
16 closing arguments of the attorneys. I will then charge you on
17 the law and then the case will be given to you for your
18 deliberations. I doubt all that will take place today. In
19 fact, I'm pretty confident it won't, but it's just so you
20 will typically know where you are in this particular case.

21 Now, in just a minute, the Solicitor will make his
22 opening statement. What he says is not sworn testimony. It is
23 designed to tell you what this case is about or what he
24 intends this case is about, but again, he's not a sworn
25 witness. He's an advocate for his client. Likewise, this

1 Defendant may, but is not required, to make an opening
2 statement. If they choose to make an opening statement,
3 again, that is not evidence. It is only these attorney's
4 contention of what this case is about. That is not to
5 minimize it because it is important and it is helpful to you,
6 but I want you to understand what is evidence and what is not
7 evidence. Evidence in this case will be any testimony or
8 exhibits received in this courtroom and potentially any other
9 stipulations that may be admitted in this courtroom. All the
10 other parts of this case, the arguments of the attorneys, are
11 just designed to help you understand what you are doing.

12 Again, from time to time, these attorneys can, and will,
13 make objections. You are not to consider the fact that an
14 objection has been raised. You are not to consider my ruling
15 on that objection to the extent I let you stay in here and
16 listen to my ruling on it. That is just a part of the
17 process. So, during breaks and when you are not deliberating
18 on the case, you can't even talk about the fact that one
19 lawyer or the other has objected or my rulings on the case.
20 That's just a part of the process.

21 With that being said, I'm going to ask that you go back
22 to your jury room. Mr. Foreperson, query your jury on who
23 wants to have paper and pads. I need to inquire of these
24 attorneys whether I said anything I shouldn't have or forgot
25 to say something that I should have, then we will get you

1 back in for opening statements. If you will go back right
2 now, please, sir.

3 (Jury out at 2:17 PM)

4 THE COURT: Any additions or exceptions from the State?

5 MR. CAMPBELL: No, Your Honor.

6 THE COURT: From the Defense?

7 MR. MCELHANNON: No, Your Honor. Your Honor, I will say I
8 am probably going to waive my opening for strategic purposes.

9 THE COURT: Okay. Are you going to waive it or make that
10 determination whether you want to do it ---

11 MR. MCELHANNON: I'll waive it at the end of the State's
12 opening, Your Honor.

13 THE COURT: Okay. Guys, do y'all need a break or are you
14 ready to roll?

15 MR. CAMPBELL: Ready.

16 THE COURT: Are you ready?

17 MR. MCELHANNON: Ready, Your Honor.

18 NOTE FROM JUROR:

19 (Juror is brought into the courtroom at 2:18 PM)

20 THE COURT: Have a seat, Mr. Greer. Let me ask you
21 something, please, sir. Earlier today, I asked very
22 explicitly whether any juror had any physical or mental
23 condition that would prevent them from sitting as a juror and
24 you did not respond.

25 MR. GREER: Right.

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1 THE COURT: Now, I have received a note which purports to
2 be from the jury foreperson, apparently, at your request,
3 that you asked to be dismissed because of a severe case of
4 claustrophobia.

5 MR. GREER: Yes, sir.

6 THE COURT: Have you had this condition prior to today?

7 MR. GREER: Yes, sir.

8 THE COURT: Then, could you explain to me why you did not
9 tell me you had this condition prior to your juror selection?

10 MR. GREER: Yes, sir. I felt obligated to serve in any
11 capacity that I could. I thought that I could sit in here and
12 in this larger courtroom, it was not as bad. It's an anxiety
13 thing that comes over you and I have not had it in a long
14 period.

15 THE COURT: I'm certainly not trying to embarrass you.

16 MR. GREER: I understand. It started sitting in that room
17 and it continued as I got in here and I'm not thinking as
18 clear as I should and right this second it's not as bad, but
19 a while ago I just felt like ---

20 THE COURT: Well, I did notice some reaction on your
21 part.

22 MR. GREER: I apologize.

23 THE COURT: Let me ask you this: Is there anything that
24 we could do to accommodate you if you began to feel
25 claustrophobic such that you could participate and -- would

1 you -- what is that? (Noise in the courthouse. Judge McIntosh
2 asks the bailiff to investigate and get them to stop the
3 noise) Is there anything that we could do, Mr. Greer, to
4 accommodate you in the event you had this attack?

5 MR. GREER: It's all about when the doors and everything
6 closes. It's just like putting a bag over your head.
7 Sometimes, I mean, I have a problem, but knowing I'm
8 restrained and can't go and come out of a door or something.

9 THE COURT: Okay.

10 MR. GREER: I'm very sorry.

11 THE COURT: That's all right. Listen, I understand.

12 MR. GREER: That's one reason that, up to this point, I
13 felt good, I came in, and I thought I could do it.

14 THE COURT: I'm going to ask that you go back to your
15 jury room real quick and then we will get you back in just
16 one minute. Okay, sir?

17 (Juror leaves the courtroom)

18 THE COURT: All right. This is on the record.

19 MR. CAMPBELL: There's a larger room.

20 THE COURT: Any additional questions of him that you want
21 to ask?

22 MR. MCELHANNON: No, Your Honor, not from the Defense.

23 THE COURT: All right. Are you saying there is a bigger
24 jury room?

25 MR. CAMPBELL: There's a grand jury room. It is tiny back

1 there.

2 THE COURT: Ask Mr. Greer to come back one more time,
3 please.

4 (Mr. Greer re-enters the courtroom)

5 THE COURT: A suggestion was raised, Mr. Greer. What we
6 are trying to do is come up with some way to accommodate you
7 so you can participate. If we placed you in the grand jury
8 room with the other jurors, which is a bigger room, would
9 that potentially alleviate your problem such that when you
10 are in the courtroom it wouldn't be a problem, but back there
11 you would have a bigger space to stay in? Do you think that
12 would help you?

13 MR. GREER: That would help. The problem is when you are
14 confined to a smaller room.

15 THE COURT: Right. And that's what I'm saying, instead of
16 a small room back there, we can move you to another room. Not
17 just you, but the jury, obviously.

18 MR. GREER: I don't want to inconvenience anyone.

19 THE COURT: It's not an inconvenience and, you know,
20 actually, Reena, would you step out and show him that room
21 before you answer that, so you can have a look at it and see?

22 MR. GREER: Thank you. (Mr. Greer complies and returns to
23 the courtroom)

24 THE COURT: Do you think that would help you out, Mr.
25 Greer?

1 MR. GREER: Well, I'd do better.

2 THE COURT: I'm really not trying to put you on the spot,
3 but at this stage, we are kind of on the spot ourselves
4 because we only picked one alternate, but that being said, I
5 don't want you to participate unless you feel like you are
6 fully capable of listening to all the testimony and evidence
7 and giving quality time towards this case.

8 MR. GREER: I'm not comfortable in here, sir. I'm sorry.

9 THE COURT: Thank you. I'm certainly not trying to beat
10 you up and I'm not trying to embarrass you. I'm going to
11 excuse you. Do we have a number for him to call in?

12 CLERK OF COURT: Yes, sir, Your Honor.

13 THE COURT: If you'd call in Tuesday after six o'clock.
14 Thank you, sir. If you have any personal belongings in the
15 jury room, would you go in, Ms. Pearly, and get them. You are
16 excused for the day.

17 MR. GREER: I'm sorry. Thank you.

18 THE COURT: I know the State didn't want to excuse the
19 juror, but I don't know what else to do when they start
20 saying, "I can't participate", so subject to the State's and
21 the Defense's objection, I dismissed him and we are going
22 with twelve and if we get less than twelve, we'll just have
23 to do it again.

24 MR. MCELHANNON: The Defense does not object, Your Honor.
25 I know he would not have been able to pay attention if he's

1 uncomfortable.

2 THE COURT: Very good. After she lets him go, would you
3 bring the jury in, please.

4 (Jury in at 2:28 PM)

5 THE COURT: Ladies and gentlemen, I've excused a juror
6 just for medical reasons and that means that our alternate is
7 no longer an alternate and you will be participating as any
8 other juror in this matter.

9 The last note that I got from the jury, or our
10 foreperson, indicated, if I read it correctly, that one juror
11 wanted a note pad. Is that correct?

12 MR. CAMPBELL: Yes, sir.

13 THE COURT: All right. Would you pass that pad and pen
14 over there, please?

15 CLERK OF COURT: Yes, sir.

16 THE COURT: Mr. Campbell, ladies and gentlemen of the
17 jury, I don't want this to be an endurance contest for you,
18 so if at any time you need to take a break prior to me
19 designating a break, raise your hand or elbow your foreperson
20 and we will take care of it. If you need a drink; water,
21 coffee, a soft drink, I will let you bring them in here if
22 you'd like. I know that Ms. Pearly fusses at me if I do that,
23 but you know, if I'm up here having a drink or water or
24 coffee, it's not fair for me to not let you have the same
25 prerogative.

1 With that being said and done, we are about to begin
2 this trial. I will ask that you stand so the clerk can
3 administer the oath, please.

4 (Oath administered to the jury by the Clerk of Court)

5 THE COURT: All right. Opening statement, Mr. Campbell?

6 SOLICITOR CAMPBELL: Your Honor, Mr. Allen will be
7 opening.

8 THE COURT: Mr. Allen.

9 SOLICITOR ALLEN: Thank you, Your Honor.

10 OPENING STATEMENT BY SOLICITOR ALLEN

11 Ladies and gentlemen of the jury, this is your classic
12 case of revenge, of someone being done wrong and thinking
13 someone should pay.

14 On April 26th of '09, in the early morning hours, this
15 man right here (indicating), Don Ray Gibson -- he's known as
16 Donnie and so I will refer to him throughout the rest of the
17 day as Donnie or throughout the rest of the trial -- was at
18 Hog Tail's bar, which many of you are probably familiar with.
19 It's in Sandy Springs on the left as you pass Michelin, right
20 there with a pond in the back right off the side of the road.
21 That's where they were the night this took place.

22 He's inside. He has a few words with another patron of
23 the bar and, apparently, those words exchanged got heated,
24 and as a result, one of the employees of the bar kicked
25 Donnie out and told him not to come back that night.

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1 Well, like I mentioned earlier, Donnie thought somebody
2 had done him wrong and somebody was going to pay that night
3 for what they had done. So Donnie proceeds to drive all the
4 way back to the Belton-Honea Path area to pick up his nephew.
5 It's about 19 miles, approximately a thirty minute drive, to
6 get all the way down there. Donnie got him a weapon, an
7 approximate twelve-inch knife, which you will see during the
8 course of this trial. He also picked up his nephew who lives
9 with him. By most people's standards, Donnie isn't a real big
10 guy. His nephew that lives with him is 6'4", 250,
11 approximately.

12 He picks him up. They drive thirty minutes back to
13 Hog Tails. By now, we are talking about an hour to an
14 hour-and-a-half. He drives back up to Sandy Springs and walks
15 into the bar, but this time he knows he's been kicked out. He
16 and his nephew know that he'd been kicked out and so they
17 sneak around the back to confront this gentleman that he had
18 an argument with earlier that night.

19 They go around back. They finally find the gentleman
20 that he had had the heated exchange with earlier and, of
21 course, again, some heated words were exchanged and the
22 evidence is going to show, ladies and gentlemen, that he
23 pulls out this knife that he's brought with him out of his
24 back pocket, cuts the victim across the neck and up the face.
25 You will see that.

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1 And multiple people were on the scene. You will hear
2 from several witnesses about words that were said by Donnie
3 that night, threatening words like, "Somebody is going to pay
4 for this." "Somebody's going to get out tonight." Things
5 along those lines. You will hear about that from numerous
6 witnesses.

7 So, what the evidence will show you and what the State
8 believes happened is that Donnie Gibson went out of his way
9 to go all the way back home with the intent to return with
10 another person with weapons to find this gentleman who had
11 done him wrong earlier the night and that guy was going to
12 pay.

13 The State asks you to review the evidence, the evidence
14 that you will see throughout this trial, look at it carefully
15 and render a verdict that you can say confidently speaks the
16 truth. Thank you.

17 THE COURT: Thank you, sir. Mr. McElhannon, does the
18 Defense wish to have an opening statement at this moment?

19 MR. MCELHANNON: We are going to waive it at this time,
20 Your Honor.

21 THE COURT: Thank you, sir. Would you call your first
22 witness, Mr. Campbell?

23 MR. CAMPBELL: Your Honor, the State calls Peggy Sue
24 Coley.

25 (After being duly sworn by the Clerk of Court,

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1 PEGGY SUE RHODES COLEY testified as follows:)

2 CLERK OF COURT: Please have a seat in the witness stand
3 and if you would, please, state your full name for the record
4 and spell your last name.

5 MS. COLEY: Peggy Sue Coley.

6 DIRECT EXAMINATION

7 BY MR. CAMPBELL:

8 Q Ms. Coley, back in April of 2009, your last name was
9 Rhodes?

10 A Yes.

11 Q And were you at the Hog Tails bar on April 26, 2009?

12 A Yes.

13 Q Who were you at the bar with?

14 A Damon Marcengill.

15 Q And how did you know Damon?

16 A He was my boyfriend at the time.

17 Q Now, are you two still together?

18 A No.

19 Q Now, approximately, what time did you go to the bar that
20 night?

21 A Nine forty-five, ten o'clock, I think.

22 Q Was anything going on that night at the bar?

23 A A band. Hanging out.

24 Q And Hog Tails bar, is that a place that you went to
25 regularly?

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1 A Yes.

2 Q Back in April of '09, on April 26th of '09, how was the
3 weather? Do you recall?

4 A Decent. Clear.

5 Q Was it hot, cold, warm? Do you recall?

6 A I don't remember.

7 Q Now, did you know Donnie Ray Gibson?

8 A No.

9 Q Never met him before?

10 A No.

11 Q And on that night, did you have an occasion to talk to
12 him?

13 A Yes.

14 Q What, if anything, did y'all talk about?

15 A Just like when you first get to know somebody; our
16 names, you know, where do you live at, what do you do
17 for a living. That sort of thing.

18 Q And what did he tell you?

19 A That he did construction.

20 Q Was he by himself that night?

21 A Yeah, he was by himself.

22 Q And when he told you about being in construction, what
23 did you tell him?

24 A I wanted to know what kind of construction because Damon
25 was out of work and I thought maybe they could get

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1 together to figure out if they could go to work together
2 or something like that.

3 Q Did you eventually introduce Damon to him?

4 A Yes.

5 Q After that, did you stick around and listen to them talk
6 together?

7 A No. I went to the bar to get drinks.

8 Q When you got back, what, if anything, did you observe?

9 A Before I even got back, I turned around and there was a
10 bunch of commotion going on over there at the table. I
11 had no idea what was going on.

12 Q Who was the commotion going on between?

13 A Damon and Donnie.

14 Q And what happened as a result of that?

15 A Donnie was escorted out, out of the bar.

16 Q Did you go outside when they escorted him out?

17 A No.

18 Q You stayed inside the bar?

19 A Yes.

20 Q Did you ever find out what the argument was about, if
21 you know?

22 A Something about a knife was pulled out. I have no idea,
23 really.

24 Q After Mr. Gibson left, did you stay at the bar or did
25 you go home?

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1 A I stayed.

2 Q Anything later that night happen?

3 A I was inside the building. Some commotion happened
4 outside the building.

5 Q As a result of that, what happened?

6 A Damon and Jason and -- there was an altercation out
7 there and they got cut up.

8 Q Did you see Damon, where he was cut?

9 A After they brought him in, yeah. He was cut on his side
10 and his arm and his neck and his face.

11 Q Was he bleeding pretty bad?

12 A Yeah.

13 Q As a result of that, was he taken to the hospital?

14 A Yeah.

15 Q Do you know how he went?

16 A He flew. They had to fly him.

17 Q And did you go to the hospital, yourself?

18 A After. After I got released. I had to wait to make a
19 statement.

20 Q So, you had to wait to talk to law enforcement?

21 A Yes.

22 Q And do you recall how long he was in the hospital for?

23 A A couple days. I don't remember.

24 Q And you saw him after he was released from the hospital.
25 Is that right?

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1 A Yeah.

2 Q Do you know what type stitches or staples?

3 A Staples.

4 Q A lot of them?

5 A I don't remember.

6 Q Do you see Donnie Ray Gibson in the courtroom today?

7 A Yes.

8 Q Is this the man you talked to on the night of April 26,
9 2009?

10 A Yes.

11 MR. CAMPBELL: Let the record reflect that she is
12 indicating Mr. Gibson in this case.

13 THE COURT: The record so reflects.

14 Q I have no further questions. Please answer any questions
15 Mr. McElhannon may have.

16 THE COURT: Cross exam?

17 CROSS EXAMINATION

18 BY MR. MCELHANNON:

19 Q Ms. Coley?

20 A Coley. Yes.

21 Q C-O-L-E-Y?

22 A Yes.

23 Q Ms. Coley, do you remember giving a statement that night
24 to law enforcement?

25 A Yes.

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1 Q Have you seen your statement lately?

2 A Yeah. I read it before I came in here.

3 Q Okay. On direct examination, I believe you just said
4 that when you went to the bar to get a drink or to get
5 drinks, that you saw or that my client, Mr. Gibson, and
6 Damon were arguing. Is that correct?

7 A I just -- it happened so quick. I turned around for just
8 a brief second, because I turned back around to get the
9 beers that were on the counter. It was that quick.

10 Q And Mr. Campbell asked you, "Do you know what that was
11 about?", and I think you said something about a knife
12 was pulled out?

13 A I really don't know.

14 Q But didn't you just testify to that?

15 A Yes, I did.

16 Q But you don't know if a knife was pulled out or ---

17 A No, that's what I said, I don't know.

18 Q You just made that up, I guess. And in your statement
19 you said that Donnie, they made Donnie leave. You were
20 talking about leaving Hog Tails. Right?

21 A Yes.

22 Q And then the next sentence in your statement was, "He
23 was gone maybe ten or fifteen minutes."

24 A I was drunk. I don't know.

25 Q Well, let me ask you this, and I appreciate your being

CROSS EXAMINATION OF PEGGY SUE COLEY BY MR. MCELHANNON 44

1 honest about that. There were probably a lot of drunk
2 people at Hog Tails that night, don't you think?

3 A I don't know. I can only talk about myself. I have no
4 clue.

5 Q A lot of drinking going on out there?

6 A Some people drink, some people don't. I have no idea,
7 sir.

8 Q So, basically, you don't remember anything about a knife
9 being pulled out in the first altercation inside?

10 A No.

11 Q You just said that. Okay. You were not on the back deck
12 when the second altercation went down?

13 A No.

14 Q So, you don't know what happened out there, either?

15 A No, sir.

16 MR. MCELHANNON: No further questions.

17 THE COURT: Redirect?

18 MR. CAMPBELL: May the witness be excused?

19 THE COURT: Any objection to her being excused?

20 MR. MCELHANNON: No objection.

21 THE COURT: Thank you, ma'am. You may step down. Call
22 your next witness.

23 MR. CAMPBELL: We call Tommy Clamp.

24 (After being duly sworn by the Clerk of Court,

25 **TOMMY CLAMP** testified as follows:)

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DIRECT EXAMINATION OF TOMMY CLAMP BY MR. CAMPBELL

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1 CLERK OF COURT: Please have a seat. If you would, state
2 your full name for the record and spell your last.

3 SERGEANT CLAMP: My name is John Thomas Clamp, Jr. My
4 last name is spelled C-L-A-M-P.

DIRECT EXAMINATION

5
6 BY MR. CAMPBELL:

7 Q Mr. Clamp, you obviously work for the Anderson County
8 Sheriff's office.

9 A Yes, sir.

10 Q And in what capacity or position do you work there in?

11 A Deputy Sheriff, ranked as Sergeant. Assigned to the
12 crime scene and evidence division.

13 Q Were you a sergeant over evidence back in 2009 on the
14 night we are talking about?

15 A That's correct.

16 Q As a part of your duties, are you the evidence custodian
17 of all the evidence collected in cases that are being
18 conducted or investigated by the Anderson County
19 Sheriff's office?

20 A Yes, sir.

21 Q And in this case, did you take into custody all the
22 evidence that was processed from different officers
23 regarding the case of The State versus Donnie Ray
24 Gibson?

25 A Yes, sir.

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DIRECT EXAMINATION OF TOMMY CLAMP BY MR. CAMPBELL

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1 Q And that evidence, some of which is down here in these
2 boxes, you brought to court today?

3 A That's correct.

4 Q And has all this evidence been in your custody and
5 control since April 26th, 2009?

6 A Yes, sir.

7 Q Has any of it left your possession?

8 A Other than to be transported for analysis and brought to
9 court, no.

10 Q When you say, "Transported for analysis," where are you
11 referring to it going to?

12 A That would be the state lab of the South Carolina Law
13 Enforcement Division.

14 Q And other than that, you brought all the evidence you
15 have in this case to the courtroom today. Is that
16 correct?

17 A Yes, sir.

18 Q And has any of it been changed, altered, or tampered
19 with while it was in your possession?

20 A No, sir.

21 Q Other than what SLED has?

22 A Correct.

23 MR. CAMPBELL: Your Honor, I have no further questions
24 for Mr. Clamp. We had to take him out of order because he had
25 a prior engagement.

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 THE COURT: All right. Mr. McElhannon?

2 MR. MCELHANNON: No questions, Your Honor.

3 THE COURT: May he be excused?

4 MR. CAMPBELL: Yes, sir.

5 THE COURT: Thank you, Mr. Clamp.

6 MR. CLAMP: Thank you, Judge.

7 THE COURT: Call your next witness, please, sir.

8 MR. CAMPBELL: The State calls Julie Whitfield.

9 (After being duly sworn by the Clerk of Court,

10 JULIE WHITFIELD testified as follows:)

11 CLERK OF COURT: Please have a seat right there in the
12 witness chair. If you would, please, state your full name for
13 the record and spell your last name.

14 MS. WHITFIELD: Julie Denise Whitfield, W-H-I-T-F-I-E-L-D.

15 DIRECT EXAMINATION

16 BY MR. CAMPBELL:

17 Q Ms. Whitfield, where do you live?

18 A I'm sorry?

19 Q Do you live here in Anderson County?

20 A I do, yes, sir.

21 Q And are you currently employed?

22 A Yes, sir.

23 Q Where do you work?

24 A Hog Tails bar.

25 Q And you were employed on April 26, 2009 at Hog Tails

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 bar?

2 A Yes, sir.

3 Q And what position did you work there as?

4 A Bartender, door person, all of them.

5 Q And as a part of your job, did you serve drinks?

6 A Yes, sir.

7 Q Did you also serve food?

8 A Yes, sir.

9 Q And you'll have to speak up.

10 A Yes, sir.

11 Q We have to take everything down. I know you are a little
12 nervous. Now, how long had you worked there then?

13 A About two -- since it opened. About two years now, I
14 think.

15 Q I've got to get this out. This year you were convicted
16 of possession of methamphetamine. Is that right?

17 A Yes, sir.

18 Q And you are currently on probation for that?

19 A Yes, sir.

20 Q Now, were you working on the night of April 26th of
21 2009, the night that Damon Marcengill was cut?

22 A Yes, sir.

23 Q Do you recall that night?

24 A Yes, sir.

25 Q Now, Damon, was he a regular customer that came to the

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 bar?

2 A Yes, sir.

3 Q Did you see him that night?

4 A Yes, sir.

5 Q Had he been drinking that night?

6 A Yes, sir.

7 Q Now, did you know Donnie Ray Gibson?

8 A No, sir.

9 Q Had you ever seen him before?

10 A No, sir.

11 Q And so, he wasn't a regular customer?

12 A No, sir.

13 Q Now, besides yourself, were there any other bartenders
14 that worked there or were you the main bartender?

15 A No, sir. We had several.

16 Q Now on this night, do you recall what was going on at
17 the bar? Any type of function?

18 A I don't recall there being a function or not.

19 Q Do you recall there being a band there that night?

20 A Oh. Yes, sir. We had one every Saturday night.

21 Q Every Saturday night?

22 A Yes, sir.

23 Q And this was not any other out of the ordinary Saturday,
24 it was just like every other Saturday night. Is that
25 right?

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 A Yes, sir.

2 Q Now, in the bar, inside the saloon there, did you see an
3 altercation or a fight break out between Damon
4 Marcengill and Donnie Ray Gibson?

5 A Yes, sir. Well, not a fight, I guess. An altercation.
6 Just an altercation.

7 Q Were there punches thrown or anything like that?

8 A No, sir.

9 Q So, it was more verbal? Basically, yah-yahing back and
10 forth at one another?

11 A Yes, sir.

12 Q Now, were you close enough to know what was being said?
13 Could you hear it?

14 A I don't recall.

15 Q As a result of this little altercation taking place,
16 what happened?

17 A Me and Joe asked -- well, first, we said, you know,
18 y'all separate and they kept yah-yahing at each other
19 and so we asked Donnie, I think is his name, to leave,
20 and we walked him out the front door to the side where
21 he had parked and he got in his vehicle and left.

22 Q And how was he acting since he was asked to leave? Was
23 he happy about it?

24 A He was irritated.

25 Q And why wasn't Damon asked to leave?

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 A He was a regular. You know, you learn people what they
2 will do, you know, how they react to things and he was,
3 you know, once you learn once you separate them and one
4 or the other one is gone, then it's over, you know. So,
5 Damon was fine after, you know, they weren't where they
6 could see each other anymore.

7 Q And after this, everything returned back to normal?

8 A Yes, sir.

9 Q And was Damon still, did Damon stay at the bar or did he
10 leave?

11 A He stayed.

12 Q Now, later that night, did you have an occasion to see
13 Mr. Donnie Ray Gibson again?

14 A I did.

15 Q Is he in the courtroom today?

16 A Yes, sir.

17 Q Is this the individual? (Indicating) You were looking
18 over in that direction.

19 A Yes, sir.

20 MR. CAMPBELL: Let the record reflect the witness
21 indicated the Defendant, Mr. Donnie Ray Gibson.

22 THE COURT: Record so reflects.

23 Q Ms. Whitfield, when was the next time you saw him?

24 A The band was going to take a break and a pretty good
25 amount of people went out a side door where we had a

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 deck and a pond and so I went out the side door and I
2 saw Donnie and a much larger man coming up the side in
3 the back and that was the next time I saw him.

4 Q And what, if anything, happened or transpired -- well,
5 first of all, was Mr. Gibson even allowed to come back?

6 A Not for that night. He was, you know -- he could have
7 come back the next day, but once you are ejected that
8 night, you know, you can't come back until the next day.

9 Q Now, after he left the first time, did you ever see him
10 come back through the front door later that night?

11 A No, sir.

12 Q So, the next time you saw him was outside on the back
13 porch.

14 A Right.

15 Q Now, was Damon already out there on the back porch?

16 A He was.

17 Q And what transpired and took place after that?

18 A Him and the other guy came up the steps and we have
19 those large spools for tables and he walked straight up
20 to Damon and he said, "You know, you were big with your
21 brother here earlier, we'll see what you can do now that
22 I went and got my brother with me," and he reached and
23 slashed him.

24 Q Did you see him slash him?

25 A Yes, sir.

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 Q And do you know what he slashed him with?

2 A A large knife.

3 Q At this point, when Damon was slashed with a knife, what
4 was going on at that point in time? What happened next?

5 A I kind of went around back to the same side door and
6 grabbed the phone to call 911.

7 Q So you were the individual that called 911?

8 A Yes, sir.

9 Q And as a result of calling 911, did you also provide
10 dispatch with any information with regard to this case?

11 A I did.

12 Q What did you do?

13 A I just told her what had occurred and that's when I
14 realized, as I was on the phone with her, I realized
15 they were allowing them to leave. They were letting them
16 out and were going to allow them to leave so I went and
17 followed them out to the parking lot to try to get their
18 tag number and description of the vehicle they were in.

19 Q Do you recall what type vehicle it was?

20 A I believe it was a truck, maybe a Ford truck, I think.

21 Q But you gave dispatch their tag number. Is that right?

22 A I did.

23 Q After that, did you stay at the bar and wait until law
24 enforcement got there?

25 A Yes, sir. We weren't allowed to leave. I think we were

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 there twenty-eight hours total.

2 Q You hadn't gone to sleep at that point in time?

3 A No, sir.

4 Q And after the second fight took place on the back, was
5 the knife given to you?

6 A Yes, sir.

7 Q Who gave it to you?

8 A A patron walked in with it and Walter, Walt, he took it
9 from him and gave it to me and I took it behind the bar
10 until the police arrived and I turned it over to the
11 cops.

12 Q Now, you witnessed Damon getting cut. Is that right?

13 A Yes, sir.

14 Q And when he was, when you saw Mr. Gibson with a knife
15 and slash at him, did you see Damon get hit with it, cut
16 with it?

17 A Yes, sir.

18 Q And where did he get cut at?

19 A This area right here. (Indicating)

20 Q On the face and neck area?

21 A Uh-huh.

22 Q Did Damon, at any point, did he have a knife or a weapon
23 or a gun or anything like that on him?

24 A No, sir.

25 Q Did he try to defend himself with any type of weapon?

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 Did Damon try to defend himself?

2 A With a weapon?

3 Q Yes.

4 A Oh, no, sir. I mean they were fighting with their fists,
5 but there were no other weapons.

6 Q So, the only weapon you saw was the one Mr. Gibson had?

7 A Yes, sir.

8 Q Did Mr. Marcengill, Damon Marcengill, was there a lot of
9 blood?

10 A Yes, sir. It was.

11 Q After the fight took place outside, did y'all bring him
12 inside?

13 A Yeah.

14 Q Where did y'all place him or take him to?

15 A We laid him on a pool table and we had to hold him, hold
16 the wound together because he had lost a lot of blood. A
17 lot.

18 Q Was the pool table damaged?

19 A Yes, sir.

20 Q Did y'all have to get rid of it or...

21 A We got it re-covered.

22 Q Now, do you recall, Ms. Whitfield, which side of the
23 face he got cut on, either the right side or the left
24 side?

25 A I believe it was the right.

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 Q And do you recall giving a statement back in 2009? Is
2 that right?

3 A Yes, sir.

4 Q And in your statement, you said that the big guy was the
5 one that actually did the cutting. Is that right?

6 A That's what I read in the statement.

7 Q And your testimony today is that the little guy, Mr.
8 Gibson, was the one that actually did the cutting.

9 A Yeah.

10 Q So, the statement that you wrote back then was not
11 correct, as you recall?

12 A No, sir.

13 Q And why is that?

14 A I mis-spoke. I was tired, you know. The whole situation
15 and being in the middle of it. I've worked in bars a
16 long time but I've never seen anything like that, that
17 I've been a part of. You know, an occasional fight here
18 and there, you know how to handle them and separate them
19 and it was over, but, you know, these guys were really
20 hurt.

21 Q Was this something out of the ordinary?

22 A It was.

23 Q Did you expect anything like this to ever happen?

24 A No, sir.

25 Q At the Hog Tail's bar, had y'all had a lot of incidents

DIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 where you had a lot of fights that you had to call law
2 enforcement?

3 A No, sir.

4 Q When you saw Mr. Gibson the second time and he came back
5 around to the back porch, do you recall how he was
6 dressed?

7 A I do.

8 Q And how was that?

9 A He had on a leather coat and a stocking hat.

10 Q Do you recall what the temperature was that night?

11 A It was warm.

12 Q When you say warm, was it long-sleeved weather warm or
13 short-sleeved weather warm?

14 A Short-sleeved.

15 Q And at any point, did it appear to you that Damon
16 provoked the second incident, the second fight out on
17 the back porch?

18 A No, sir.

19 Q And you don't know what went on to provoke the first
20 incident inside, do you?

21 A I do not.

22 Q Ms. Whitfield, I want to hand you this, what has been
23 marked as State's Exhibit #55. I want to show you, if
24 you can look at this. Does that appear to be the knife
25 that was handed to you, State's Exhibit #55, on April

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1 26th of 2009?

2 A Yes, sir.

3 Q It wasn't a little knife that you saw, was it? It was
4 this one right here.

5 A Yes, sir.

6 Q And I think you testified that Mr. Walter Wooten gave
7 this to you?

8 A He did.

9 Q And after that you gave it to law enforcement?

10 A I did.

11 Q Now, you mentioned that you saw two guys, Mr. Gibson and
12 another guy on the back porch, is that right? A larger
13 guy?

14 A Yes, sir.

15 Q Did you ever see that individual come through the front
16 door?

17 A No, sir.

18 Q Did you see him earlier in the bar that night?

19 A No, sir.

20 Q And after the second incident, did you see these two
21 individuals leave together?

22 A Yes, sir.

23 Q I have no further questions. Please answer any questions
24 Mr. McElhannon may have.

25 THE COURT: Cross examination?

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CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 MR. MCELHANNON: Thank you, Your Honor.

2 CROSS EXAMINATION

3 BY MR. MCELHANNON:

4 Q Ms. Whitfield, you gave a statement to law enforcement
5 on April 26th, 2009, the day of this incident. Correct?

6 A Yes, sir.

7 Q And now, some two-and-a-half years later, basically,
8 everything identifying the perpetrator in this has now
9 changed. Is that what you are telling me?

10 A No, sir.

11 Q Okay. Let's go through your statement. You said,
12 "Earlier in the night, before 12:00, there was a fight
13 in the bar between Damon Marcengill and some guy who I
14 don't know. It carried out into the parking lot and
15 people broke it up. The stranger was made to leave" --
16 by stranger, you mean my client, Mr. Gibson, right?

17 A I did not know him.

18 Q But what I'm saying is, that's who you were talking
19 about, the stranger.

20 A Yes, sir.

21 Q "And Damon was told he'd have to leave, too, if he
22 didn't act right. Damon settled down and was fine after
23 that. The stranger that was thrown out was wearing a
24 white tee shirt with some kind of print and bluejeans.
25 He got into a white truck, a smaller truck, maybe an

CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 S-10." Now, you are describing Mr. Gibson. "That guy was
2 older, maybe 45 to 50, with short gray hair, a small
3 mustache, and some facial hair to the face, blue eyes,
4 maybe 5'10" and built small." That's pretty descriptive,
5 wouldn't you say?

6 A (Nods head)

7 Q "And later, I was inside and the back door was open and
8 I saw the guy we'd kicked out earlier coming up the back
9 steps." Now, you meant Mr. Gibson, right?

10 A Yes, sir.

11 Q "He was walking up the steps and was being followed by
12 another guy." By that other guy, I think you meant a
13 bigger individual?

14 A Much larger.

15 Q Much larger.

16 MR. CAMPBELL: Your Honor, could I ask that she have a
17 copy of her statement?

18 THE COURT: Yes, sir. Do you have a problem with that?

19 MR. MCELHANNON: No, sir. (Hands a document to the
20 witness)

21 Q Actually, what I'm going to ask you now that you have
22 that statement in front of you is that you actually read
23 it instead of my reading it and I'll stop you at a
24 certain point.

25 A Where are you pointing me at?

CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 Q Do you see where it says, "Damon and Jason"?

2 A I do.

3 Q Start right there.

4 A "Damon and Jason Marcengill were out on the porch. When
5 they came up the steps, I went out and told the guy he
6 couldn't come back here tonight. Joe was right behind
7 me. When the guy came up the steps, he was right there
8 at Damon. Damon stepped from behind the table and that
9 first guy hit Damon and then the second guy pulled a
10 knife and slashed Damon across the neck."

11 Q Okay. Let's stop right there. Mr. Gibson was first up
12 the steps and followed by another guy. You said that
13 first guy, which would have been Donnie Gibson, hit
14 Damon and then the second guy pulled a knife and slashed
15 Damon across the neck. Isn't that what you said?

16 A Evidently.

17 Q You can go ahead, starting right there where I stopped
18 you.

19 A "It looked like something out of a movie. Damon went
20 down immediately. There was a bunch of people moving to
21 break it up and that guy was just swinging it at whoever
22 came his way. Jason came from across the porch and the
23 second guy cut him, too."

24 Q Okay. Stop right there. Jason Marcengill, Damon's
25 brother, came from across the porch and the second guy

CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 cut him, too. Implying that he had cut Damon first and
2 then now he cut Jason. Is that correct?

3 A That's the way it read.

4 Q Okay. Go ahead from there.

5 A A bunch of people were trying to restrain the two guys,
6 more so the one that had the knife than the older man.
7 Walt got the ---

8 Q Stop, stop right there. A bunch of people tried to
9 restrain both my client and the bigger guy, but you say
10 they were more trying to restrain the one that had the
11 knife than the older man. Correct?

12 A Right.

13 Q Okay. Go ahead.

14 A Walt got the knife away from him and handed it to me and
15 I took it behind the bar. I went inside to get the phone
16 and a bunch of people had the second guy pinned down. I
17 was coming back with the dispatcher on the phone and saw
18 that they'd let the guy up and he took off running. I
19 followed him and climbed the wall. When I got to the
20 parking lot, I saw the second guy near the pole in the
21 lot. The older guy was kind of disoriented and was about
22 near the trailer out front. The second guy was hollering
23 to the older guy where the "f" you going. He went and
24 got the older guy and brought him to this truck holding
25 his arm the whole way. He put the older guy in the

CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 passenger seat, pulled out, and turned left. He'd been
2 parked back up from the road. The second guy was driving
3 an older black Ford Ranger with gray interior. I read
4 the tag off to the dispatcher. It was like, [REDACTED]. I
5 remember telling her "A" like "Abraham". They went up 76
6 towards Clemson. The second guy was about 6 foot, slim,
7 baldheaded, between 40 and 45, physically younger than
8 the first guy we'd thrown out."

9 Q Okay. Stop right there. So, there again, you are now
10 identifying the second guy and throughout your
11 statement, you called him the second guy and then you
12 qualify that even further by saying the first guy was
13 the one we'd thrown out. Correct?

14 A Correct.

15 Q So, there was no doubt you were talking about the first
16 guy and the second guy as you described them. Correct?

17 A Correct.

18 Q Okay. Go ahead and finish your statement.

19 A "The older man was wearing a baseball cap and the bald
20 guy had on a stocking cap. Both of them were out back on
21 the porch. Both showed up wearing leather jackets, which
22 was odd because of how warm it was. Some people carried
23 Damon inside and put him on the pool table. I bagged up
24 the knife in some rubber gloves from the kitchen and
25 gave it to a plainclothes detective. He'd shown me his

CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 badge before I gave it to him.

2 Q And that's the end of your statement. Correct?

3 A Correct.

4 Q Now, I think you just stated under direct examination
5 that Mr. Gibson was wearing a leather jacket and
6 stocking cap. Is that what you said?

7 A Yes.

8 Q But in your statement you said that the older man, Mr.
9 Gibson, was wearing a baseball cap and the bald guy had
10 on a stocking cap. Right?

11 A That's what it said.

12 Q So, basically, your entire statement given on that
13 night, which your recollection would have been clearer
14 that night than two-and-a-half years later, wouldn't it
15 be?

16 A I guess. Yes, sir.

17 Q Throughout that, you said, basically, and the jury's
18 heard it, that the guy that y'all kicked out which was
19 the smaller guy, the first guy up the stairs, is not the
20 one that had the knife. It was the second guy up the
21 stairs that cut Damon and Jason Marcengill. That's what
22 you said that night. Correct?

23 A That's the way it was worded. Yes, sir.

24 Q And you signed it. Correct? As your true statement?

25 A (Looks at document) I did.

CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 Q You received a copy of that, correct? Back then?

2 A I did.

3 Q And in the last two-and-a-half years you haven't come
4 and said, "Well, I need to change my statement, because
5 that's not right," to law enforcement?

6 A No, sir.

7 Q I believe as Mr. Campbell brought out on direct exam,
8 you -- were you convicted of possession of meth?

9 A Yes, sir.

10 Q Are you on probation for that now?

11 A Yes, sir.

12 Q And you were the bartender back then at Hog Tails?

13 A I did a lot of different jobs.

14 Q A lot of different jobs.

15 A A lot.

16 Q On a typical night when there was a band, was there a
17 lot of drinking going on?

18 A A lot of drinking. Sure, it's a bar.

19 Q And you know that night, you were familiar with Damon.
20 You said that you knew his demeanor and all that.

21 A Yeah.

22 Q Did, was he intoxicated that night?

23 A He'd been drinking. I wouldn't say he was intoxicated,
24 but he'd been drinking. He'd probably been there a
25 while.

CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON

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1 Q And did you see him after -- so you were out on the back
2 deck during the altercation?

3 A Except for when I went in to get the phone.

4 Q Okay. Did you see five, six, seven guys beating on
5 Donnie Gibson?

6 A Yes, sir.

7 Q They beat him up pretty bad, didn't they?

8 A Sure did.

9 Q As a matter of fact, that's why, when you went over the
10 wall looking for him, did he seem disoriented or dazed
11 to you?

12 A Yes, he did.

13 Q Was he bleeding?

14 A Yes, he was.

15 Q From the face, the hands or ---

16 A Yes, sir.

17 Q --- everywhere? I believe you said the bigger guy, the
18 second guy, he had to get him by the arm and lead him to
19 the truck.

20 A Yes, sir.

21 Q You didn't see anyone else with weapons that night?

22 A No, sir.

23 Q Did you have a chance to look around the bar after it
24 was vacated, when the police were there?

25 A Sure. I'm the one who helped clean up.

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1 Q Did you see any other weapons, a knife or anything,
2 other than that big knife?

3 A No, sir.

4 Q You didn't?

5 A (Shakes head)

6 Q I'll share with you what has been marked as State's
7 Exhibit #19. Can you describe what that is? (Hands
8 document to witness)

9 A A knife.

10 Q And is it the knife that you put behind the bar?

11 A (Shakes head) No, sir.

12 Q What type of knife does it look like? A folding knife?

13 A Yes, sir.

14 Q With a black handle?

15 A Yes, sir.

16 Q Is the blade out on it?

17 A Yes, sir.

18 Q Where does it appear to be?

19 A Maybe on the deck.

20 Q Laying on the rail of the deck?

21 A Yes, sir.

22 Q Thank you. So, apparently, there were other people with
23 knives and blades drawn that night. Correct?

24 A I guess so.

25 MR. MCELHANNON: That's all the questions that I have at

REDIRECT EXAMINATION OF JULIE WHITFIELD BY MR. CAMPBELL

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1 this time, Your Honor.

2 THE COURT: Redirect?

3 MR. CAMPBELL: Yes, sir.

4 REDIRECT EXAMINATION

5 BY MR. CAMPBELL:

6 Q Ms. Whitfield, now, you testified on direct exam that
7 you had worked about twenty-eight hours by the time you
8 gave your written statement?

9 A Yes, sir.

10 Q And went through something that was traumatic?

11 A Yes, sir.

12 Q Because in your statement, you said it looked like
13 something out of a movie.

14 A Yes, sir.

15 Q And when you gave your statement to law enforcement
16 officers, that's what you thought you saw that night. Is
17 that right?

18 A Yes, sir.

19 Q In fact, you signed your name to it. You didn't deny it.
20 In fact, on direct exam, you admitted you thought you
21 got it wrong. Is that right?

22 A Right.

23 Q And since you've had time to reflect on it two-and-a-
24 half years, has your opinion changed from what you saw
25 that night?

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1 A Yes, sir. I mean, I said, in the statement I said the
2 bigger guy did the slashing and -- I mean, I don't know
3 why I said, I don't know why I said it was the bigger
4 guy.

5 Q But you meant the smaller guy. Is that right?

6 A Right.

7 Q In fact, when I spoke to you I pointed that out to you.
8 Is that right?

9 A Yes, sir.

10 MR. MCELHANNON: Objection, Your Honor. Leading.

11 THE COURT: Just re-phrase your question, please.

12 Q Now, how many people did you see with a knife or a
13 weapon?

14 A Just him. I didn't see anybody else with a weapon.

15 Q When you refer to "just him", you are referring to Mr.
16 Gibson. Is that right?

17 A Yes, sir.

18 Q And this knife that Mr. McElhannon has shown you in
19 State's Exhibit #19, (places it on large screen) --
20 State's Exhibit #19, is that the picture behind you? Is
21 that it, that you were shown?

22 A Yes, sir.

23 Q You never saw that knife, had you?

24 A No, sir.

25 Q In fact, when you talked about you helped clean up the

RE-CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON 70

1 scene, is this after law enforcement had gone through
2 and processed it?

3 A Yes, sir.

4 Q So, it was only after they had done their job that you
5 went back and cleaned up. Is that right?

6 A We just sat and waited until they cleared it and then
7 they told us we could start to clean up so we started to
8 clean up, but I never saw that knife.

9 Q So, when you saw this picture, that's the first time
10 you'd seen it?

11 A Yes, sir.

12 Q In fact, you weren't even allowed outside in the back
13 out there, were you? Were you allowed to go back there?

14 A No, sir.

15 Q And did it appear to you, Mr. Gibson, the shorter guy,
16 that he came back for a reason?

17 MR. MCELHANNON: Objection, Your Honor. That's asking for
18 speculation.

19 THE COURT: I'll sustain that.

20 SOLICITOR: CAMPBELL: I have no further questions. Answer
21 any questions on re-cross that Mr. McElhannon may have.

22 RE-CROSS EXAMINATION

23 BY MR. MCELHANNON:

24 Q So, Ms. Whitfield, there again, not to beat a dead
25 horse, but you just stated on re-direct that you don't

RE-CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON 71

1 know why you said that back on the 26th of April, 2009,
2 about the second guy being the one to cut everybody.

3 Right?

4 A Yes, sir.

5 Q But you were very specific about details on the big guy,
6 little guy, second guy, first guy, older guy, the guy we
7 kicked out, so you were pretty clear that night. Weren't
8 you?

9 A Yes, sir.

10 Q And it's just since you've met with the prosecutor on
11 the case that now you ---

12 MR. CAMPBELL: I'm going to object to anything relevant
13 to that, saying that I'm trying to change her story.

14 MR. MCELHANNON: Your Honor, I'm ---

15 THE COURT: Just one -- stop. It's a good time to take an
16 afternoon break. Just go back to your jury room and take
17 about ten minutes. If you need anything, just let the bailiff
18 know and we'll bring you back in a few minutes.

19 (Jury out at 3:22 PM)

20 THE COURT: All right. State your objection, please, Mr.
21 Campbell.

22 MR. CAMPBELL: Your Honor, I'm going to object to any
23 reference that the State is attempting to change her story.
24 There is nothing ---

25 THE COURT: Now, what rule of evidence does that come

RE-CROSS EXAMINATION OF JULIE WHITFIELD BY MR. MCELHANNON 72

1 under?

2 MR. CAMPBELL: That I'm not lying or getting her to
3 change. That's not what we are doing.

4 THE COURT: I understand that. I understand. I'm going to
5 overrule. I think he has the right to explore that on cross
6 examination.

7 MR. MCELHANNON: And I was going to say, Your Honor, I
8 believe Mr. Campbell opened that door because he even said, I
9 believe, on direct that, in fact, only after you met with me
10 did you realize you were talking about the smaller guy.

11 THE COURT: Well, I don't necessarily think that would
12 open the door, but I think he has a right, within reason, to
13 explore when she corrected her story. That being said, I'm
14 going to let you step down. (Speaking to the witness) You may
15 not speak to anyone about your testimony and then we'll bring
16 you back up here in a few minutes. We'll be in recess about
17 fifteen minutes.

18 (Brief break)

19 THE COURT: Just over the break, we had a request from a
20 juror to call, to check on her daughter to see if her mother
21 could pick her up. I told her to go ahead and do that. I will
22 make that request a Court's exhibit.

23 (Whereupon, a note from the jury is marked as Court's
24 Exhibit #2)

25 THE COURT: Before we proceed, is there anything from the

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1 State?

2 MR. CAMPBELL: No, Your Honor.

3 THE COURT: From the Defense?

4 MR. MCELHANNON: No, Your Honor.

5 THE COURT: Bring the jury in, please.

6 Jury in at

7 THE COURT: Ladies and gentlemen of the jury, did you get
8 your phone calls made and the things you needed to do?

9 (Jurors nod) Again, if you need anything, just pass the word
10 and we will make sure we take care of it. Okay, sir?

11 MR. CAMPBELL: Yes, sir. Thank you.

12 THE COURT: All right. Are you ready to proceed, Mr.
13 Campbell?

14 MR. CAMPBELL: Yes, sir.

15 THE COURT: Mr. McElhannon?

16 MR. MCELHANNON: Yes, Your Honor.

17 THE COURT: All right.

18 (Ms. Whitfield returns to the witness stand)

19 THE COURT: You are still under oath, okay?

20 MS. WHITFIELD: Yes, sir.

21 MR. MCELHANNON: Your Honor, I believe I'm through with
22 this witness.

23 THE COURT: Okay. May she be excused?

24 MR. CAMPBELL: Yes, sir, Your Honor.

25 THE COURT: Okay. Thank you, ma'am. (Witness leaves the

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1 witness stand) Next witness, please.

2 MR. CAMPBELL: The State calls Richard Scott.

3 (After being duly sworn by the Clerk of Court,

4 RICHARD SCOTT testified as follows:)

5 CLERK OF COURT: Please have a seat in the witness chair
6 and if you would, please state your full name for the record
7 and spell your last name.

8 MR. SCOTT: I'm Richard Douglas Scott. S-C-O-T-T.

9 DIRECT EXAMINATION

10 BY MR. CAMPBELL:

11 Q Mr. Scott, do you work for the Anderson County Sheriff's
12 office?

13 A Yes, sir.

14 Q And you were working for the Sheriff's office on April
15 29, 2009?

16 A Yes, sir.

17 Q On that night, did you have an occasion on that night to
18 go to Hog Tail's bar?

19 A Yes, sir.

20 Q And how did that come about?

21 A I was with Lieutenant Bond and we were up the road a
22 little ways and dispatch called us to Hog Tail's and
23 there was a stabbing or a cut or a fight. It was at Hog
24 Tail's just after Michelin Boulevard right at the
25 Michelin plant. Me and Lieutenant Bond took off

DIRECT EXAMINATION OF RICHARD SCOTT BY MR. CAMPBELL

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1 together. I was in -- we was in two separate cars and
2 that's when we arrived on scene.

3 Q And this is in Anderson County. Is that correct?

4 A Yes. It's in Anderson county, yes, sir.

5 Q And were you one of the first officers to arrive on the
6 scene?

7 A Yes, sir.

8 Q And at that point in time when you got there, what did
9 you first observe?

10 A When I got there, people were, you know, they looked
11 like they were frightened, they were scared. Some people
12 were hollering saying there was some guy in here cut
13 real bad. We went inside to secure the area. Once we got
14 inside, I seen one guy laying on the pool table. He had
15 a lot of blood coming from his neck area. You had people
16 there with towels on his neck to keep him from bleeding.
17 They also said there was another guy in the rear of the
18 bar in the kitchen area on the floor. He was also cut or
19 stabbed, I think, around the stomach area. He was
20 bleeding and they were trying to render aid to both of
21 them, the subjects, when we got there. We tried to
22 secure the area, to keep everybody there. Some people
23 were trying to leave. We had to make them stay for
24 witnesses or anything like that. They said both people,
25 both suspects had already left when we got there.

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1 Q So, the suspects were not on scene when you arrived?

2 A No, sir.

3 Q And what's the purpose of why you didn't want people to
4 leave?

5 A We try to keep anybody that might have been a witness
6 that seen what happened. That's why we didn't let
7 everybody leave. They had a band there that night and a
8 big crowd there and so we were trying to secure the
9 whole scene to keep anybody from leaving because we
10 needed all the witnesses we could find to talk to, to
11 see if they seen anything or heard anything while they
12 were there.

13 Q When you say, "secure the scene", what process do you go
14 through?

15 A We go around and make sure everybody stays inside the
16 bar. We don't let nobody leave. We don't let nobody get
17 in their cars or nothing to leave. We don't let nobody
18 take anything out. We keep everything there. We search
19 the back of it, the outside, go all the way through it
20 to make sure there is no more victims in there, make
21 sure there are no more suspects that may be hiding.
22 Since it's such a small bar, it didn't take too long to
23 get through the whole area to look at it. That's the way
24 you secure the scene to make sure it's safe.

25 Q After you observed what you saw, were you able to

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1 determine where this fight took place?

2 A By walking around looking, we determined the fight took
3 place on the outside. They've got a back deck on the
4 outside and that's where all the blood and everything
5 that we seen, all the blood was back there at the back
6 and they were saying that's where the fight took place
7 at and you could see where the scuffle was, I mean, you
8 could see the blood and everything on the back porch,
9 the back patio.

10 Q Now, how long have you been working as law enforcement
11 in Anderson County?

12 A I've been with Anderson County three years and law
13 enforcement since 1988.

14 Q Have you ever had the occasion or been called to Hog
15 Tail's bar?

16 A No, sir. I haven't. That's the first time since I've
17 been with Anderson County. Since it's the County and not
18 the City, I've always worked with Anderson City. That's
19 the first time I've ever had to go to Hog Tails and the
20 first time I've heard a call to go out to Hog Tails was
21 that night.

22 Q So, it's not a very violent place?

23 A No, sir.

24 Q Now, did you, at any point, try to render aid to either
25 of the victims in this case?

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1 A When we got there, they had already patrons or people
2 already there, they were rendering aid. We couldn't have
3 done anything else than what they were doing. They were
4 putting pressure on one guy's neck trying to keep it
5 from bleeding and the other one, they put pressure on, I
6 think it was, his stomach area to keep it from bleeding
7 so, pretty much, they were doing everything that we
8 could do, but we are not EMS certified or anything,
9 techs or anything, so they were doing, pretty much,
10 everything that we could do.

11 Q And was EMS on the way?

12 A Yes, sir.

13 Q They had already been called?

14 A Yes, sir. They had been called by dispatch and they were
15 in route.

16 Q Now, while you were there, did you take any statements
17 from people?

18 A I did take statements from people. The ones, the
19 statements that I did take from people, they stated they
20 did not see anything, that it had happened outside on
21 the back deck and that they were all inside, the ones I
22 took.

23 Q Now, besides taking statements, did you attempt to
24 collect any evidence?

25 A I did collect a knife that was given to me, to me and

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1 Deputy Toby Jordan. He was off duty. He happened to be
2 listening to his radio and so he responded also and he
3 got there about the same time we did. We got a knife
4 from a lady inside the bar that she said was used in,
5 that she said the suspect did use in this incident.

6 Q I'm going to show you what's been marked State's Exhibit
7 #55. Could you please identify this, sir?

8 A Yes. Oh, yeah. That was -- yeah. That was the knife that
9 I remember the little carved -- it had a little carved
10 handle on it and I remember it being big. So, yes.

11 Q And this is the knife that you received behind the bar
12 from the bartender?

13 A Yes, sir.

14 Q And what did you do when you received this knife?

15 A It had, like, blood on it or it appeared to be blood
16 anyway. So, we got a ball bag, back in ball bags -- I
17 went and put it in a paper bag. When I put it in a paper
18 bag, it went right through the bottom. That's when I
19 thought that thing was sharp and so I put it in a double
20 paper bag. That's how sharp it is. I didn't drop it in
21 there, I just set it in and it went straight to the
22 bottom, but it looked like it had blood and stuff on it
23 and so we secured it with the ball bag and the food
24 paper bag and put it in my car and then I transported it
25 to the Sheriff's office where I put it properly into

1 evidence.

2 Q Which is where Tommy Clamp takes over?

3 A Yes. That's when I gave it to him. Yes.

4 Q Now, when you receive an item such a this -- Your Honor,
5 I'm going to move this item, #55, into evidence.

6 THE COURT: Any objection?

7 MR. MCELHANNON: No objection, Your Honor.

8 THE COURT: Admitted, without objection.

9 (Whereupon, a knife is admitted into evidence as State's
10 Exhibit #55, without objection)

11 Q Now, after you receive an item such as this, you
12 indicated there was blood on it. Do you think SLED tries
13 to reserve the blood on the item?

14 A I didn't want to -- I didn't touch the knife with my
15 bare hands or nothing. We used, like, the plastic bag
16 and put it in a paper bag so that it wouldn't, so
17 nothing would be contaminated on it. That's what he told
18 me to put it into, was a plastic bag. The evidence guy
19 was there. Since I had it in my custody, since I had it
20 in my control, he wanted me to put it properly into
21 evidence and so that's what I did and I put it in paper
22 bags.

23 Q And due to several people handling this item, is there a
24 possibility that it could be another type of blood or
25 some of this evidence been rubbed off?

CROSS EXAMINATION OF RICHARD SCOTT BY MR. MCELHANNON 81

1 A I would say, yes, probably could have with people
2 handling it. Yes, sir. I know I didn't touch the knife
3 itself, I touched the plastic.

4 Q It had already been handled by other people?

5 A Yes, sir.

6 MR. CAMPBELL: I have no further questions. Answer any
7 questions Mr. McElhannon might have.

8 THE COURT: Cross examination?

9 MR. MCELHANNON: Thank you, Your Honor.

10 CROSS EXAMINATION

11 BY MR. MCELHANNON

12 Q Just one thing, a minor thing, just to keep the record
13 clear. I believe Mr. Campbell asked you if you were
14 dispatched to Hog Tails on April 29th, 2009, and I
15 believe the actual date was April 26th, 2009.

16 A Yes, sir. I don't have my paper with me, but, yes, sir.

17 Q You say all the statements you took, any -- guess they
18 weren't witnesses because you say they didn't really see
19 anything and they said, basically, "I didn't see
20 anything, I was inside."

21 A Yes, sir.

22 Q How many people would you say you took statements from
23 like that?

24 A At least, I would say, anywhere from eight to ten,
25 between eight and ten, maybe twelve.

CROSS EXAMINATION OF RICHARD SCOTT BY MR. MCELHANNON

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1 Q Were there any other officers there doing the same
2 thing?

3 A Yes, sir.

4 Q So, there would have been more than twelve ---

5 A Yes, sir.

6 Q --- other people in the bar that said they didn't see
7 anything?

8 A There probably were, yes, sir. I don't know. I just know
9 the ones I took statements from said that they didn't
10 see anything. Yes, sir.

11 Q You took the knife, double bagged it in a paper bag and
12 then took it to the Sheriff's office?

13 A Yes, sir, I did.

14 Q And you say it appeared to have blood or something on
15 it?

16 A It appeared to be like some stains, like blood stains on
17 the knife. To me, it did.

18 Q So, it wasn't wiped clean, is what I'm getting at. It
19 had something on it.

20 A Yes, sir. I don't think it was wiped clean, no, sir.

21 Q And after you took that knife to the Sheriff's office
22 and put it into evidence, you put it, I guess, into the
23 custody of Officer Clamp? Is that who you left it with?

24 A I turned it over to Property and Evidence. I...

25 Q And Officer Clamp is in charge of that. Right?

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1 A Yes, sir. Yes, sir.

2 Q And was that the ---

3 A That's the last thing I had anything to do with it.

4 Q That's all you had to do with this case?

5 A Yes, sir.

6 MR. MCELHANNON: Nothing further, Your Honor.

7 THE COURT: Redirect?

8 MR. CAMPBELL: No, Your Honor.

9 THE COURT: May Officer Scott be excused?

10 MR. CAMPBELL: Yes, sir, Your Honor.

11 THE COURT: All right. Thank you, sir. Call your next
12 witness, please.

13 MR. CAMPBELL: The State calls Walt Wooten.

14 (After being duly sworn by the Clerk of Court,
15 WALTON WOOTEN testified as follows:)

16 CLERK OF COURT: If you would, please state your name for
17 the record and spell your last name.

18 MR. WOOTEN: Walton Julius Wooten, III. W-O-O-T-E-N.

19 Direct Examination

20 by MR. CAMPBELL:

21 Q Mr. Wooten, where do you currently live?

22 A Atlanta, Georgia.

23 Q And you go by Walton, Walt? What do you go by?

24 A Walt will be fine.

25 Q Sir?

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1 A Walt.

2 Q And how long have you lived in Atlanta?

3 A About six months now, sir.

4 Q Are you currently working?

5 A No.

6 Q And what are you doing there?

7 A I'm attending Georgia Tech, in grad school.

8 Q And what are you studying?

9 A Medical physics.

10 Q Now, since you are in grad school, did you graduate from
11 a university?

12 A Clemson University, in May of 2011.

13 Q And what did you graduate there with?

14 A Biophysics.

15 Q And prior to this did you have previous military
16 service?

17 A Marine Corps, from '01 to '03.

18 Q Now, so in 2009, in April of 2009, you were attending
19 Clemson University?

20 A Correct.

21 Q And do you recall on April 26th of 2009, going to Hog
22 Tails bar?

23 A I do.

24 Q Here in Anderson County?

25 A Yes, sir.

DIRECT EXAMINATION OF WALTON WOOTEN BY MR. CAMPBELL

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1 Q And what was the purpose of why did you go there that
2 night?

3 A My girlfriend, at the time, was working there.

4 Q Okay.

5 A Just to go provide safety, I guess.

6 Q And do you recall about what time you got there that
7 night?

8 A I'm not certain. It was in the evening.

9 Q Was the band already playing?

10 A Yes, sir.

11 Q Now, when you got there -- well, first, let me step
12 back. Do you know Damon Marcengill?

13 A I do now.

14 Q Did you know him then?

15 A I did not.

16 Q Did you know anyone by the name of Donnie Ray Gibson?

17 A No, I did not.

18 Q Now, while you were in the bar, did you have an occasion
19 to witness a fight take place?

20 A I believe that was about the first one I'd seen there.

21 Q Did you see one that night?

22 A Yes, sir.

23 Q Was it inside the bar or outside the bar?

24 A Outside.

25 Q Was it on the back deck?

DIRECT EXAMINATION OF WALTON WOOTEN BY MR. CAMPBELL

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1 A Yes, sir.

2 Q And from where you observed this fight, was it light so
3 you could see?

4 A I could see, yes.

5 Q And what did you see take place?

6 A There were two individuals in black leather jackets and
7 black jeans. They were kind of sitting on the railing of
8 the back patio and then there were two other individuals
9 in front of them, Damon and Jason. They were, I guess,
10 arguing a little bit and I sort of was to the left of
11 Damon and to the right of the smaller individual in the
12 black leather jacket and at one point he reached into
13 his jacket and I was close enough that I saw his arm and
14 it seemed like the argument was escalating so I stepped
15 back and after that point, I turned around and walked
16 away, like a few steps, and I turned back around and saw
17 him swinging a knife to Damon's neck.

18 Q When you say you saw "him", who were you referring to?

19 A The smaller gentleman in the black leather jacket.

20 Q Is he in the courtroom today?

21 A Yes, he is.

22 Q Could you please identify him? This gentleman right
23 here, (indicating) you saw him swing the knife?

24 A Yes, sir.

25 Q Now, when you say you were close, how close were you?

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1 A Three feet.

2 Q So, you were as close as -- tell me where to stop, how
3 close you were.

4 A Right there.

5 Q Right there?

6 A Yes, sir.

7 Q So, you were this far from them and you were able to see
8 the fight take place?

9 A Correct.

10 Q Now, when this fight was going on, at any point, did you
11 see Damon Marcengill pull out a knife or a gun or any
12 other type of weapon?

13 A I did not see that, but that was not where my attention
14 was resting.

15 Q But the only knife you saw was wielded by Mr. Gibson?

16 A Correct.

17 Q Now, when you took this knife away, describe how that
18 took place.

19 A Should I get up to do that?

20 Q Sure.

21 A (Witness stands in witness box) Pretty much, the
22 individual, I was able to get behind him and ---

23 Q You can use me.

24 A (Demonstrating on Solicitor Campbell. Witness stands
25 behind Mr. Campbell) I was able to get behind him like

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1 this and took him down to the ground.

2 Q And what hand did he have the knife in?

3 A Left hand.

4 Q And did you see -- did the knife eventually drop to the
5 ground?

6 A Correct.

7 Q And you retrieved the knife off the ground?

8 A Correct.

9 Q Do you recall this individual, Mr. Gibson, say anything
10 to you when this was taking place, when you were de-
11 arming him?

12 A No, sir. I did say to him, "I'm not trying to hurt you,
13 but I want that knife." And at that point, he took his
14 hands and put them on his stomach showing, like, he
15 didn't have it in his possession anymore.

16 Q So, he didn't initially give it up willingly, you had to
17 take it away from him?

18 A Correct.

19 Q And then at this point, did he calm down any?

20 A He was pretty calm whenever I left, yes. As soon as I
21 got the knife off of him, I went back into the bar.

22 Q So, you picked the knife up and went straight into the
23 bar?

24 A Correct.

25 Q So, did you see anything that took place after you

DIRECT EXAMINATION OF WALTON WOOTEN BY MR. CAMPBELL

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1 walked off the deck into the bar?

2 A No.

3 Q And what did you do with the knife?

4 A I gave it to someone that was working and told them to
5 put it in the back.

6 Q Was it a person at the bar?

7 A Correct. They were behind the bar.

8 Q Now, at any point did you see Mr. Gibson slash at Mr.
9 Marcengill?

10 A That's correct.

11 Q And where did he hit him? Did he cut him?

12 A Correct.

13 Q And where did he cut him at?

14 A Down at the neck.

15 Q Which side? Do you recall?

16 A His left side.

17 Q Did he cut him anywhere else?

18 A I mean, I saw him hack two to three times and that's all
19 I remember, really. I believe that was about it.

20 Q Was he coming up with the knife or down with the knife?

21 A He was coming down with the slash.

22 Q Now, during this altercation or after this altercation
23 when you were taking the knife away, did you, yourself,
24 also get injured?

25 A Correct.

DIRECT EXAMINATION OF WALTON WOOTEN BY MR. CAMPBELL

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1 Q Did you report this injury?

2 A No.

3 Q How were you injured?

4 A I was stabbed in the left knee.

5 Q And what were you stabbed by?

6 A The knife that I took, the machete. It was pearl handled
7 and pretty long. When I cupped it in my palm, it came up
8 to, approximately, here. (Indicating)

9 Q Sir, I'm sorry. I didn't hear you.

10 A The size of it, when I cupped it in my palm, when I got
11 the handle in my palm, it came to, approximately, right
12 here.

13 Q So, it wasn't a small pocket knife?

14 A Correct.

15 Q I'm going to show you what has been marked as State's
16 Exhibit #55. Can you please identify it, sir?

17 A Yes. That's the weapon that I got.

18 Q This is the knife that you took off Mr. Gibson on the
19 night of April 26th, 2009?

20 A Correct.

21 Q And you are referring to the pearl handle, you are
22 talking about the white color?

23 A Yes.

24 Q And you also, yourself, was cut with this knife?

25 A Correct.

CROSS EXAMINATION OF WALTON WOOTEN BY MR. MCELHANNON 91

1 Q But you didn't report that, did you?

2 A No, sir.

3 Q That you were cut with this knife.

4 A Correct.

5 Q But you didn't report that, did you?

6 A No.

7 Q Did you have to seek medical attention or treatment?

8 A No, sir.

9 Q Now, you said you got cut on your knee. Were you wearing
10 long pants?

11 A No, sir. I was wearing shorts.

12 Q Was it warm that night?

13 A Yes, sir.

14 Q And when you saw, when you walked out on the back deck
15 and you saw the argument taking place, did you see who
16 was instigating it or provoking it?

17 A I could not tell.

18 Q It has already started by the time you got outside?

19 A Correct.

20 Q Mr. Wooten, that's all the questions I have. Please
21 answer any questions Mr. McElhannon might have.

22 A Yes, sir.

23 CROSS EXAMINATION

24 BY MR. MCELHANNON:

25 Q Mr. Wooten, you just testified, I think, that you were,

CROSS EXAMINATION OF WALTON WOOTEN BY MR. MCELHANNON 92

1 basically, three feet away from my client, Mr. Gibson,
2 and Mr. Marcengill?

3 A That's correct.

4 Q Okay. And you saw Mr. Gibson slashing with this knife,
5 like this? (Indicating)

6 A Correct.

7 Q Do you remember the size discrepancy between Mr.
8 Marcengill and Mr. Gibson?

9 A You are referring to the size of the two gentlemen?

10 Q Yes.

11 A Damon was bigger, a good bit bigger.

12 Q Six or eight inches taller?

13 A I'm not sure about height-wise or, like, body-size.

14 Q And you went behind Mr. Gibson and told him to drop the
15 knife and he dropped it?

16 A I got -- I didn't go behind him. He, like, presented his
17 back and that's when I got a hold of his arms.

18 Q Well, when did they start beating the fool out of Mr.
19 Gibson?

20 A I'm not sure. I didn't witness that.

21 Q So, you'd already taken a knife from him and went inside
22 with it and he had not been beaten up at that time?

23 A I don't believe so. I really can't comment due to the
24 fact that my attention was solely focused on the knife
25 and I wanted to get the deadly weapon out of the fight.

CROSS EXAMINATION OF WALTON WOOTEN BY MR. MCELHANNON 93

- 1 Q Did you see Mr. Gibson bleeding at all that night? Eye,
2 hands...
- 3 A I did not.
- 4 Q So, at that time when you took the knife from him, he
5 physically appeared fine to you?
- 6 A I was behind him and we were on the ground.
- 7 Q Was he on the ground?
- 8 A Correct.
- 9 Q I mean, I thought you said he was standing up and you
10 told him to drop the knife and he dropped it.
- 11 A No. Whenever we were standing -- whenever I had his
12 arms, I took him down to the ground.
- 13 Q So you took Mr. Gibson down to the ground?
- 14 A Correct.
- 15 Q And at that time, you didn't see anybody kicking him?
- 16 A No.
- 17 Q Beating him?
- 18 A No, sir.
- 19 Q And I believe you said that two individuals you saw had
20 on black leather jackets and both of them had on black
21 beanies?
- 22 A Correct.
- 23 Q Black stocking caps?
- 24 A They are called black stocking caps, I guess.
- 25 Q So, you didn't see Mr. Gibson with a baseball cap on?

REDIRECT EXAMINATION OF WALTON WOOTEN BY MR. CAMPBELL

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1 A No, sir.

2 Q Did you see other weapons that night on the deck?

3 A No, I did not.

4 Q You did not?

5 A No, sir.

6 Q Did you observe -- did you know Damon Marcengill?

7 A Not at that time, sir.

8 Q Did you observe anything on his belt?

9 A No, sir.

10 Q A knife sheath or anything like that?

11 A No, sir.

12 Q And you didn't see another knife laying on the deck ---

13 A No, sir.

14 Q --- with the blade open?

15 A I did not, sir.

16 Q Did you see a larger guy, a larger fellow involved in a
17 fight out there at the same time?

18 A Yes, sir, but I wasn't really paying attention to it.
19 Like I said, I was focused on what I thought was the
20 imminent threat.

21 Q That's all the questions I have.

22 THE COURT: Redirect?

23 MR. CAMPBELL: Just a couple.

24 REDIRECT EXAMINATION

25 BY MR. CAMPBELL:

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

REDIRECT EXAMINATION OF WALTON WOOTEN BY MR. CAMPBELL 95

1 Q Now, Mr. Wooten, prior to this, did you know Damon or
2 Jason Marcengill?

3 A No, sir.

4 Q Have you talked to them since then?

5 A A couple of times at the bar, sir.

6 Q Did y'all even discuss this case?

7 A No, sir.

8 Q And could all of this been avoided?

9 MR. MCELHANNON: Objection, Your Honor. Speculation. How
10 could he know if it could be avoided if he didn't know what
11 it was about?

12 THE COURT: I sustain the objection.

13 MR. CAMPBELL: No further questions.

14 THE COURT: May this witness be excused?

15 MR. CAMPBELL: Yes, sir.

16 MR. MCELHANNON: Yes, sir.

17 THE COURT: Thank you, sir.

18 MR. WOOTEN: Thank you, sir. (Witness leaves the stand)

19 MR. CAMPBELL: Your Honor, the State calls Jason
20 Marcengill.

21 (After being duly sworn by the Clerk of Court,
22 JASON MARCENGILL testified as follows:)

23 CLERK OF COURT: Please have a seat in the witness chair.
24 If you would, please, state your full name for the record and
25 spell your last.

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL

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1 MR. JASON MARCENGILL: Jason Matthew Marcengill.

2 M-A-R-C-E-N-G-I-L-L.

3 DIRECT EXAMINATION

4 BY MR. CAMPBELL:

5 Q Mr. Marcengill, how old are you?

6 A I'm thirty-eight.

7 Q And where do you work?

8 A Reflections Auto Glass.

9 Q That's over in Walhalla?

10 A Yes, sir.

11 Q Is that in Anderson County?

12 A Yes, sir.

13 Q Is that where you live?

14 A No, sir. I live in Pendleton.

15 Q Now, you're Damon Marcengill's brother?

16 A Yes, sir.

17 Q Older brother or younger brother?

18 A Younger brother.

19 Q How much younger?

20 A Four years.

21 Q Now, on April 26th of 2009, did you go to Hog Tails bar?

22 A Yes, sir.

23 Q Do you recall what night that was?

24 A No. It's been so long ago.

25 Q Now, do you recall about what time you got there?

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL

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- 1 A Probably around 7:00, maybe 8:00.
- 2 Q Had the band already started playing?
- 3 A No.
- 4 Q Who did you go there with?
- 5 A It was me, if I can remember right, it was me and my
- 6 brother.
- 7 Q And had you worked that day?
- 8 A Yes, sir.
- 9 Q So, you and your brother go to the bar. When you got
- 10 there did you, at some point, witness Damon in some sort
- 11 of verbal altercation with an individual?
- 12 A Well, somebody come up and told me they were getting
- 13 into a verbal altercation and then I walked over there.
- 14 Q Okay. When they were getting into a verbal altercation,
- 15 where was it, inside the bar or outside the bar?
- 16 A Inside the bar.
- 17 Q And where were you at that point in time?
- 18 A I was inside the bar.
- 19 Q But you didn't see, initially, what started it?
- 20 A No.
- 21 Q As a result of being told this, what, if anything, did
- 22 you do?
- 23 A I just walked over there and they were arguing back and
- 24 forth and I just reached over and pushed him back and
- 25 told him he just needed to stop.

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL

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1 Q And what were they arguing about? Do you know?

2 A I have no idea.

3 Q A drunk argument?

4 A Probably so.

5 Q And had Damon been drinking?

6 A Yes, sir.

7 Q And did you know the individual he was arguing with?

8 A I didn't know him. At the time I didn't know him.

9 Q Is he in the courtroom today?

10 A Yes, sir.

11 Q Where is he?

12 A Right there. (Indicating)

13 Q Seated next to Mr. McElhannon?

14 A Yes, sir.

15 MR. CAMPBELL: Your Honor, let the record reflect he is
16 referring to Mr. Gibson.

17 THE COURT: Let the record so reflect.

18 Q Now, did you know Mr. Gibson?

19 A Not at all.

20 Q Had you met him before that day?

21 A No, sir.

22 Q So, you didn't have any problems with him or anything
23 like that?

24 A No, sir.

25 Q Now, when this fight was going on, why did you have to

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL

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1 jump in between them?

2 A Because it was my brother, just to be honest.

3 Q Had anyone, either one of them, started punching each
4 other at that point in time?

5 A No. That's what I was trying to prevent.

6 Q And did you hit him or did you just push him back?

7 A I just pushed him back.

8 Q And after this, what happened? Did he stick around or
9 did he leave?

10 A They took him, they escorted him outside and then he
11 left as far as I know.

12 Q When you say "they", who are you referring to?

13 A Joe and Allen.

14 Q Who is Joe?

15 A Joe is just a friend of mine.

16 Q Was he working in the bar that night?

17 A I can't recall if he was working. I think he was just
18 there.

19 Q When Mr. Gibson left at this time, did he leave through
20 the front door or did they ask him to leave through the
21 back door?

22 A He went through the front door.

23 Q But you didn't see him get in his vehicle and leave, did
24 you?

25 A No, sir.

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL 100

1 Q Now, at some point later that night, did you see him
2 again?

3 A Yes, sir.

4 Q And where was that?

5 A Well, I had actually went out to the truck. I was
6 feeling bad that night and I went to sleep and they came
7 out and told me that they had -- he had come back and
8 brought somebody with him and that they were out on the
9 back deck arguing with my brother.

10 Q As a result of that, did you go to the back deck?

11 A Yes, sir.

12 Q And did you go around the side or did you go through the
13 front door?

14 A I went through the front door.

15 Q And when you got to the back, what did you observe or
16 see?

17 A Well, when I stepped outside, all I -- Donnie and Damon
18 were arguing and Scott was standing right at the steps
19 coming up on the back deck where they had come around
20 the fence and came up.

21 Q And how were they dressed? Do you recall?

22 A In -- I remember Scott more than anybody, but he was
23 dressed in all leather.

24 Q And do you recall if Mr. Gibson was dressed in all
25 leather, too?

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL 101

1 A No, sir. I really don't recall.

2 Q And how long after this, after the first altercation,
3 was it when he showed back up? Do you recall?

4 A It had to be a couple of hours, I'd say.

5 Q And he wasn't asked to come back that night, was he?

6 A No, sir.

7 Q And when he came around to the back deck, did it appear
8 to you he was looking for trouble?

9 A Yes, sir.

10 MR. MCELHANNON: Objection, Your Honor. Speculation.

11 THE COURT: Sustained.

12 Q So, he wasn't by himself. He had someone with him. Is
13 that right?

14 A Yes, sir.

15 Q And when you walked out there did you have any type of
16 words with any one of them?

17 A When I walked out, from what I recall, I said, "This is
18 some kind of misunderstanding. Y'all just need to
19 leave," and Scott Hamilton said, "We ain't leaving and
20 can't nobody make us leave."

21 Q After that, what took place?

22 A Just a fight broke out.

23 Q Were you involved in the fight?

24 A Yes, sir.

25 Q What was your role or part in it?

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL 102

- 1 A Well, my part in it was just Mr. Hamilton. Me and him
2 fought and I was cut in the process of all that.
- 3 Q And you say you were cut, did you have a knife on you?
- 4 A No, sir.
- 5 Q Did you see your brother get into a fight?
- 6 A I seen him arguing is all I seen and then I was more
7 focused on protecting myself at the time.
- 8 Q And Mr. Hamilton who you are talking about, is he a
9 bigger guy or a smaller guy than Mr. Gibson?
- 10 A He was a bigger guy.
- 11 Q Was he a lot bigger?
- 12 A Yeah, lots bigger.
- 13 Q And so, you and him were fighting. Is that right?
- 14 A Yes, sir.
- 15 Q And as a result of this, did you receive any type of
16 injuries?
- 17 A Yes, sir. I was stabbed twice and cut twice.
- 18 Q Did you have to seek medical attention from this?
- 19 A Yes, sir.
- 20 Q Where did you go to get help?
- 21 A Anderson.
- 22 Q And how were you transported there?
- 23 A In an ambulance.
- 24 Q So, they came to Hog Tails. You didn't drive down to
25 meet them or anything like that?

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL 103

1 A No, sir.

2 Q Did you see your brother that night with a knife?

3 A No, sir.

4 Q And when they were arguing, had you walked out or did
5 you see your brother, Damon Marcengill, whether or not
6 he had a knife or any other type of weapon out?

7 A No, sir. Not that I recall.

8 Q Now, did you witness, at any point, the fight between
9 him and Mr. Gibson?

10 A No, sir.

11 Q At any point, did you hear anybody try to defuse the
12 situation to just back off?

13 A To tell you the truth, I just don't recall. It all
14 happened so fast. It was just...

15 Q And you received stitches that night?

16 A Staples.

17 Q Staples?

18 A Yes, sir.

19 Q Where did you receive them at?

20 A I received them in my neck and my arm and across my back
21 and then in my forearm.

22 Q Now, when this fight was going on, when you were
23 fighting Mr. Scotty Hamilton, is it possible that he
24 could have cut your brother?

25 MR. MCELHANNON: Objection, Your Honor. Speculation.

DIRECT EXAMINATION OF JASON MARCENGILL BY MR. CAMPBELL 104

1 MR. CAMPBELL: Your Honor it's not that ---

2 THE COURT: Just one second. You need to lay further
3 foundation before you ask that question. I sustain the
4 objection as asked.

5 Q Now, the whole time, you were fighting Mr. Hamilton. Is
6 that right?

7 A Yes, sir.

8 Q At any point, did Mr. Hamilton and you break up from
9 your fight?

10 A We were pulled apart a couple of times.

11 Q At any point, did Mr. Hamilton have the opportunity to
12 assault your brother?

13 A I reckon he had an opportunity to.

14 Q And when would that have been?

15 A Just in the middle of the fight. Like I said, it was all
16 just a -- I mean, it was just a big fight.

17 Q Did you see the knife that cut you?

18 A No, sir.

19 Q Now, Mr. Hamilton, Scott Hamilton that you are referring
20 to, did you see him earlier in the night?

21 A No, sir.

22 Q So, he came with Mr. Gibson on the back deck?

23 A Yes, sir.

24 Q I have no further questions, Mr. Marcengill. Please
25 answer any questions Mr. McElhannon may have.

CROSS EXAMINATION OF JASON MARCENGILL BY MR. MCELHANNON 105

1 THE COURT: Cross exam?

2 MR. MCELHANNON: Thank you, Your Honor.

3 CROSS EXAMINATION

4 BY MR. MCELHANNON:

5 Q Mr. Marcengill, you gave a statement that night.

6 Correct?

7 A Yes, sir.

8 Q Or the next day, the 27th. It happened on the 26th, you
9 gave the statement on the 27th.

10 A Yes, sir.

11 Q And in your statement, you say that you called the
12 second guy the big guy. Is that Mr. Hamilton that you
13 are talking about?

14 A Yes, sir.

15 Q So he was the second guy on the deck?

16 A Yes, sir.

17 Q And basically, you told the big guy, you told him, "This
18 shit needs to stop right now." And he looked at you and
19 told you he was going to cut you?

20 A Yes, sir.

21 Q The big guy, Mr. Hamilton.

22 A Yes, sir.

23 Q Now, you say in your statement that you never actually
24 saw the guy with a knife, but he was the only person you
25 fought.

CROSS EXAMINATION OF JASON MARCENGILL BY MR. MCELHANNON 106

- 1 A Yes, sir.
- 2 Q So you are talking about Scotty Hamilton?
- 3 A Yes, sir.
- 4 Q Not Donnie Ray, Mr. Gibson.
- 5 A Yes, sir.
- 6 Q And you go on further to state that, "He's the only
7 person who could have cut me."
- 8 A Yes, sir.
- 9 Q You're talking again about Mr. Hamilton?
- 10 A Yes, sir.
- 11 Q When all this went down, did you ever see numerous
12 people beat Mr. Gibson up?
- 13 A No, sir.
- 14 Q You never saw anybody assault him?
- 15 A No, sir. I did not.
- 16 Q Did you see him after the fight?
- 17 A No, sir.
- 18 Q So, you don't know whether he had blood all over his
19 face and hands and if his hands were cut?
- 20 A No, sir.
- 21 Q You didn't see who cut your brother, Damon?
- 22 A No, sir. I didn't.
- 23 Q Yet, on direct exam, you just said Scotty Hamilton, in
24 your opinion, could have had an opportunity to cut him?
- 25 A It's possible.

CROSS EXAMINATION OF JASON MARCENGILL BY MR. MCELHANNON 107

1 Q And you never saw anybody strike Mr. Gibson?

2 A No, sir. I did not.

3 Q Is your brother -- y'all are close, apparently, if y'all
4 went there together that night and hang out together
5 some. Does he carry a knife?

6 A Not all the time. I mean, mostly, at work.

7 Q I mean, does he wear a sheaf, a knife sheaf on his belt?

8 A No, not that I recall.

9 MR. MCELHANNON: No further questions.

10 THE COURT: Redirect?

11 MR. CAMPBELL: No, Your Honor.

12 THE COURT: May this witness be excused?

13 MR. CAMPBELL: Yes, sir.

14 THE COURT: Any objection, Mr. McElhannon?

15 MR. MCELHANNON: No objection, Your Honor.

16 THE COURT: Thank you, sir. You may be excused. May I see
17 the attorneys up here, please.

18 (Brief bench conference off the record)

19 THE COURT: Would you call your next witness, please?

20 MR. CAMPBELL: Your Honor, the State would call Damon
21 Marcengill.

22 (After being duly sworn by the Clerk of Court,

23 **DAMON MARCENGILL** testified as follows:)

24 CLERK OF COURT: If you would please, state your name for
25 the record and spell your last name.

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 108

1 MR. DAMON MARCENGILL: Damon Marcengill.

2 M-A-R-C-E-N-G-I-L-L.

3 DIRECT EXAMINATION

4 BY MR. CAMPBELL:

5 Q Mr. Marcengill, how old are you?

6 A Forty-three.

7 Q Where are you employed?

8 A I'm laid off.

9 Q And what kind of work had you been doing?

10 A Construction.

11 Q And back in April of 2009, what kind of work were you
12 doing?

13 A Construction.

14 Q Now, back then, you were dating Peggy Rhodes?

15 A Yes, sir.

16 Q And do you recall going to Hog Tails bar that night?

17 A Yes, I do.

18 Q That was the night of April 26, 2009.

19 A (Nods head)

20 Q And who did you go to the bar with that night? Do you
21 recall?

22 A My girlfriend, Peggy.

23 Q And did you meet your brother out there?

24 A Yeah.

25 Q And your brother is Jason Marcengill that just walked

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 109

1 out of here. Is that right?

2 A Yes, sir.

3 Q In fact, you are his older brother?

4 A Yes, sir.

5 Q Now, do you recall, had you worked that day?

6 A Yes, sir. No, no, no. I didn't. That was Saturday. I
7 didn't work.

8 Q So, you were off that day.

9 A Uh-huh.

10 Q Do you recall what time you went up to the bar?

11 A I'd say somewhere between 9:00 and 10:00, around that
12 time.

13 Q And safe to say you had some drinks while you were up
14 there?

15 A Oh, yeah.

16 Q More than you should have?

17 A Probably.

18 Q And do you recall meeting an individual by the name of
19 Don Ray or Donnie Ray Gibson?

20 A No, I don't.

21 Q And while you were there, didn't you get into some kind
22 of verbal altercation with an individual?

23 A I walked up to a table to talk to a guy and the next
24 thing I know, there was a big commotion and they made
25 him leave. That's about all I can tell you about that.

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 110

1 Q But you don't recall what was said between you two or
2 anything about it?

3 A I don't recall ever speaking to him.

4 Q But it's my understanding, you were pretty drunk,
5 wasted?

6 A Uh-huh.

7 Q And this individual was made to leave. Is that right?

8 A Yes.

9 Q Now, later that night, did you get into another type of
10 altercation or a fight?

11 A Yeah. He walked up to me outside and brought up what
12 happened earlier that night and I told him that it was
13 water under the bridge, you know, and what happened in
14 there was over with and he kept on and somewhere along
15 that time my brother walked out there and something was
16 said to my brother and then the big guy jumped on my
17 brother and Mr. Gibson started toward them and I stepped
18 in front of him and that's when me and him got into our
19 altercation.

20 Q Sir?

21 A That's when we had our altercation. He started toward my
22 brother and that other guy when they started.

23 Q Was your brother involved in the first altercation that
24 night? Do you recall?

25 A I think it was my brother and one other guy that made

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 111

1 him leave. As far as I know, that's all he done was told
2 him to leave.

3 Q And so when this second altercation occurred, it was out
4 back on the porch?

5 A Yes, sir.

6 Q At any point, did you get hurt?

7 A Yeah, I got cut. I got cut three times.

8 Q And where did you get cut?

9 A I got cut on the side here. (Indicating) That was the
10 first one. At some time during the fight I got cut here
11 and then here. (Indicating)

12 Q Do you recall who cut you?

13 A Mr. Gibson.

14 Q Is he in the courtroom today?

15 A Right there. (Indicating)

16 Q Is that the man who cut you?

17 A Uh-huh.

18 Q Are you sure that's the man or was it the other guy, the
19 larger guy?

20 A I'm sure it was him, because he's the one that I got
21 into the altercation with. The other guy was fighting my
22 brother behind me.

23 Q Did you have any type of weapon on you that night?

24 A I had a knife, but it was just, I didn't pull it or
25 anything. I don't even know what happened to it.

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 112

1 Q Did you even have time to react before you got cut?

2 A No. The first time he cut, I seen him swing something
3 and I jumped back and that's about the only thing I can
4 tell you that I saw, but I didn't see a knife. I never
5 saw a knife. The only other thing was, I felt something
6 hit me here (Indicating) and I pulled away from it.

7 Q As a result of that, did you lose a lot of blood?

8 A Yes, sir.

9 Q What happened to you?

10 A Well, I guess I had to be airlifted to Greenville
11 Hospital and when they got me there, they operated and
12 put stitches and staples in and there were some inside
13 here (Indicating) and outside. I was stapled across here
14 and I had to have a blood transfusion and I was in the
15 hospital about two days.

16 Q They operated on you immediately?

17 A Yes, sir.

18 Q How life threatening was this?

19 A I guess pretty life threatening, because they airlifted
20 me to Greenville and took me straight into the operating
21 room from what I can remember. I remember coming off the
22 helicopter onto a stainless steel table and they took me
23 straight in.

24 Q Did -- so during this fight when you were cut, did you
25 pull your knife out?

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 113

- 1 A No, sir.
- 2 Q What kind of knife did you have? Do you recall?
- 3 A It was just a little, like, knife for fishing. It was in
- 4 a little small sheath and I put it on out of habit most
- 5 of the time because I used it at work a lot.
- 6 Q And it's a fixed blade, not a folding knife?
- 7 A Yeah, it was a fixed blade.
- 8 Q Now, prior to this night when you got in a fight with
- 9 Mr. Gibson, had you ever seen him before?
- 10 A Not that I can recall.
- 11 Q Have you seen him since then?
- 12 A No, sir.
- 13 Q Mr. Marcengill, I'm going to show you what's been marked
- 14 as State's Exhibits #25-32. Could you please take a look
- 15 at these, sir, and identify them? First of all, is that
- 16 you in the pictures?
- 17 A Yes, sir. That's where I got cut on the nose.
- 18 Q Well, first, take a look through all of them a second.
- 19 Do these pictures fairly and accurately represent you,
- 20 the injuries that you received on or about the night of
- 21 April 26th, 2009?
- 22 A Yes, sir.
- 23 Q Were these taken after you got out of the hospital?
- 24 A No. There's one when I was in the hospital there. Most
- 25 of these were taken after I got home.

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 114

1 Q Okay.

2 MR. CAMPBELL: Your Honor, could I have the witness step
3 off the stand? The monitor isn't working where he can see it.

4 THE COURT: Yes, sir.

5 MR. CAMPBELL: We can publish the photos above on the
6 screen and get him to explain as we go.

7 THE COURT: Yes, sir. You may step down.

8 Q Mr. Marcengill, I just want you to explain to the jury
9 what these photos indicate or show. This is State's
10 Exhibit #25. Could you please identify what this is,
11 sir?

12 A Yes. It's the injury to my nose from the knife. I assume
13 it's from a knife.

14 Q This is State's Exhibit #26, and this is taken, where?

15 A At the Greenville Hospital.

16 Q And what is this indicating?

17 A The injury to my arm.

18 Q State's Exhibit #27.

19 A That's taken at my home and that's the same injury to my
20 arm.

21 Q These were taken by Detective Gebing?

22 A Yes.

23 Q Twenty-eight.

24 A That's the injury to my neck and face. It was taken at
25 home.

DIRECT EXAMINATION OF DAMON MARCENGILL BY MR. CAMPBELL 115

1 Q Twenty-nine, I think is another close-up of your nose.

2 A Yes, sir.

3 Q State's Exhibit #30.

4 A That's the injury to my side. It was taken at home.

5 Q Thirty-two is just a close up of that?

6 A It's just a close up of the same.

7 Q That looks like tape on your side?

8 A Yes. That's where they had it taped up.

9 Q And thirty-one is another one of your arm?

10 A Yes, sir. That's of my arm.

11 Q If you could please take the stand, Mr. Marcengill.

12 (Witness complies) Now, do you recall when this was
13 taking place, were you dressed like you are dressed
14 today with a short sleeved shirt?

15 A Probably. And blue jeans, a belt, boots, tee shirt. Most
16 of the time, that's the way I'm dressed.

17 Q Do you recall how the other two individuals were
18 dressed?

19 A When they walked back up on the porch is the only time I
20 really looked at them and they both had leather on,
21 zipped all the way up. I think one of them had a black
22 ski cap on, a toboggan cap.

23 Q And when they walked up and going towards your brother,
24 do you feel like you provoked this attack on yourself?
25 Did you bring it on yourself?

CROSS EXAMINATION OF DAMON MARCENGILL BY MR. MCELHANNON 116

1 A No, sir.

2 Q Did you even say anything to him?

3 A When he came up and started talking to me outside, I
4 just told him, you know, whatever it was inside was over
5 with, water under the bridge. That's about all I said to
6 him and my brother walked out, something was said, the
7 other guy lunged at my brother and then he started
8 towards my brother and I got in front of him.

9 Q But you weren't looking for a fight, were you?

10 A No, sir.

11 Q You never expected this to happen, did you, when you
12 went there?

13 A No, sir.

14 Q I have no further questions. Answer any questions Mr.
15 McElhannon may have.

16 CROSS EXAMINATION

17 BY MR. MCELHANNON:

18 Q Mr. Marcengill, I believe you gave a statement to law
19 enforcement on April 30th, about three or four days
20 after the accident. I guess, it was after you got
21 treated.

22 A Yeah.

23 Q Do you remember that? And basically, the first part of
24 your statement, in fact, in the first sentence, "I was
25 at Hog Tails and I don't remember the first

CROSS EXAMINATION OF DAMON MARCENGILL BY MR. MCELHANNON 117

1 altercation."

2 A No, I don't remember the first altercation except for
3 what I said. I walked up to talk to him, but I never did
4 say anything to him and then it was a big commotion and
5 then they made him leave. That's basically all I
6 remember.

7 Q That was inside?

8 A Yes, sir. That was inside.

9 Q And is it true, based on what you just testified to in
10 direct exam, you don't remember the first altercation
11 because you were wasted?

12 A Yes, sir.

13 Q And roughly, an hour-and-a-half later, I guess, from
14 what people are estimating, the second altercation took
15 place on the back deck.

16 A Yes, sir.

17 Q And you continued to drink?

18 A Probably so. And I walked outside to get some fresh air.

19 Q So, you were probably wasted more then than you were
20 inside, at that point, weren't you?

21 A I don't know.

22 Q But you didn't identify in your statement, Mr. Gibson
23 cutting you. Correct?

24 A Yes, sir.

25 Q You did not?

CROSS EXAMINATION OF DAMON MARCENGILL BY MR. MCELHANNON 118

1 A Huh?

2 Q You did not identify him as being ---

3 A Oh, yeah, I did.

4 Q You didn't, did you? You said in your statement, "He was
5 saying something to me and I was telling him whatever
6 happened was water under the bridge ---

7 A Not when the initial contact was made, no. You know,
8 when he first started talking to me, I didn't expect
9 anything to happen. I was just telling him, you know,
10 whatever happened inside was over with.

11 Q Did you stick your hand out to shake his hand?

12 A Not that I can recall.

13 Q You don't remember that? You don't remember grabbing his
14 hand tightly when you were saying it was water under the
15 bridge?

16 A No, sir. I was standing up on the deck with the railing
17 between us when I said that. I was leaning like this on
18 the rail talking to him. I never put my hand out.

19 Q Who beat him up so bad?

20 A I guess I did. I don't know. It was just a big brawl. I
21 don't know. It was over with so fast, I couldn't tell
22 you what happened to be honest with you.

23 Q A lot of people jumping in kicking him and beating on
24 him?

25 A No.

CROSS EXAMINATION OF DAMON MARCENGILL BY MR. MCELHANNON 119

1 Q So, any damage that is shown during this trial to Mr.
2 Gibson, you inflicted all that damage?

3 A I don't know that I did. There were other people out
4 there, but I don't know that they hit him and who
5 didn't. I know I probably hit him a couple of times, but
6 I don't know who else did.

7 Q You don't know what happened to your knife?

8 A No.

9 Q But you did have a knife ---

10 A Yes, I did.

11 Q --- in a sheath on your belt, didn't you?

12 A Yes, sir.

13 Q And you say both of them had leather on but only one of
14 them had on a black stocking cap?

15 A As far as I can remember, yeah.

16 Q Which one had on a stocking cap?

17 A I think Mr. Hamilton.

18 Q The big guy?

19 A Yeah.

20 Q The second guy?

21 A Yeah.

22 MR. MCELHANNON: That's all the questions I have.

23 MR. CAMPBELL: I have no further questions.

24 THE COURT: May this witness be excused?

25 MR. CAMPBELL: Yes, sir.

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 120

1 MR. MCELHANNON: No objection.

2 THE COURT: Thank you, sir. You may be excused. Do you
3 have one more that you can get in?

4 MR. CAMPBELL: Yes, sir.

5 THE COURT: Okay.

6 MR. CAMPBELL: Your Honor, the State calls Ralph Gesell.

7 (After being duly sworn by the Clerk of Court,

8 RALPH GESELL testified as follows:)

9 CLERK OF COURT: Please have a seat in the witness chair
10 and state your name for the record, spelling your last name.

11 MR. GESELL: Ralph Allen Gesell. G-E-S-E-L-L.

12 DIRECT EXAMINATION

13 BY MR. CAMPBELL:

14 Q Mr. Gesell, are you currently employed?

15 A Yes, sir.

16 Q And where do you work?

17 A A TTI at Ryan's Mobile.

18 Q How long have you been working there?

19 A At Ryan's Mobile, a little over ten years.

20 Q And what do you do there?

21 A I'm a mechanic.

22 Q Do you currently live in Anderson?

23 A Yes, sir.

24 Q And who do you live with?

25 A I live with myself and my wife.

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 121

1 Q Now, back in 2000, 2001, you got into a little bit of
2 trouble. Right?

3 A Yes, sir.

4 Q You got convicted or pled guilty to grand larceny and
5 burglary?

6 A Yes, sir.

7 Q Now, do you know Damon and Jason Marcengill?

8 A Yes, I do.

9 Q How do you know them?

10 A I know them from Hog Tails.

11 Q And do you go to Hog Tails a lot?

12 A No, sir. Not no more.

13 Q Now back on April 26th of 2009, did you have an occasion
14 to go up to the bar that night?

15 A I was a bouncer up there.

16 Q Was that a job that you were working?

17 A Yes, sir.

18 Q And what was going on? It was a Saturday night. Right?

19 A Yes, sir.

20 Q And do you recall what was going on that night?

21 A At the beginning of the night, well, about midway
22 through the night, the Defendant right there...

23 Q Mr. Gibson?

24 A Yeah. He had an altercation with Damon and Damon's
25 girlfriend and they got in a little fuss and we made him

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 122

1 leave.

2 Q First, let me step back. Do you recall how long he had
3 been at the bar?

4 A A few hours, maybe.

5 Q I'm sorry?

6 A A few hours, maybe.

7 Q You have to speak up so that everybody can hear you.

8 A A few hours.

9 Q And I'm a little hard of hearing. Did you know him prior
10 to this night?

11 A No.

12 Q It was the first time you'd seen him?

13 A Yes.

14 Q And when he initially came in, did he have to come in
15 through the front door?

16 A Yes.

17 Q And you were working the front door that night?

18 A Yes.

19 Q Now, who else was working as a bouncer that night?

20 A Joe Fisher. Let's see. Joe was working that night. A guy
21 named Willy was working that night. That's about it.

22 Q And since you were working, were you drinking, also?

23 A No, sir. I don't drink.

24 Q This altercation that you saw, it was between Mr. Gibson
25 and you said Damon and his girlfriend?

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 123

1 A Yes.

2 Q Who was his girlfriend?

3 A A lady that was in here earlier. I'm not sure what her
4 name is.

5 Q Do you recall or were you close enough to know what it
6 was about?

7 A Donnie made an advance to Damon's girlfriend. He said
8 something which in turn about started a fight. So,
9 instead of us having a fight in the bar that would run
10 off all our customers, we asked him to leave, which he
11 refused. So, we had to forcefully make him leave and
12 then a few hours later we was all on the back porch
13 talking between bands. We had two bands that night.

14 Q Let me step back. When you made him leave, did you see
15 him get in his vehicle and leave the premises?

16 A No. We made him leave out the door. He tried to come
17 back in. We made him leave again and we locked the door.

18 Q And how did he appear to you? Was he happy about this?

19 A Oh, no, he was mad.

20 Q So, that's the way he left, mad. Right?

21 A Yeah, he left mad.

22 Q And then did you see him later that night?

23 A Yes, I did.

24 Q You were describing that. If you'll please describe it.

25 A Later on that night, the bands were in between playing.

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 124

1 One band, I think Four Hundred was the cover for Super
2 Glue. Between sessions, we all went out on the back deck
3 to smoke cigarettes and talk or whatever and about
4 fifteen minutes after we were out there, Donnie and the
5 other guy -- I don't see him.

6 Q He's not here.

7 A The other guy come walking up through the back entrance
8 through the, they come walking up through the horseshoe
9 pit. We had a horseshoe pit and a set of stairs. Okay.
10 At the front entrance, we've got a main entrance and in
11 the back, you've got to walk around the back, you've got
12 to come through a set of locked gates. You have to open
13 the gates up and then you've got to walk down some
14 stairs past our horseshoe pits and then up on the back
15 deck.

16 Q I'm going to show you what's been marked as State's
17 Exhibits #1-4. Could you please take a look at these and
18 without going through each of them, what do they
19 identify?

20 A The front of the building, the main entrance.

21 Q I'm going to get you to come over here. Are these
22 pictures of Hog Tails bar?

23 A Yes. It is.

24 Q And these fairly and accurately represent what the bar
25 looks like?

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 125

1 A Yes.

2 MR. CAMPBELL: Your Honor, may I have the witness come
3 off the stand so he can talk about what he was describing to
4 the ladies and gentlemen of the jury?

5 THE COURT: Yes, sir.

6 Q If you will please step off a second. I'm going to show
7 you what is marked as State's Exhibit #1. If you could
8 just please tell me, is this the only front entrance to
9 the bar?

10 A Yes, it is. That's the only front entrance.

11 Q And what is this photograph showing?

12 A That's the front of the building. Highway 76 is right
13 directly in front of it. It's like, say, 30 feet from
14 the front of the building.

15 Q And State's Exhibit #2. Is that just showing an overview
16 of the entire bar?

17 A Yes.

18 Q And the wooden area, what is that showing?

19 A That wooden area right there is the dance floor. Inside,
20 there's a dance floor and you've got to go another
21 probably ten foot and then down and around to get to the
22 back side.

23 Q I'll show you State's Exhibit #3. What is this
24 photograph indicating?

25 A That's the back. There's the horseshoe pit I was telling

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 126

1 you about. The stairs there that come down.

2 Q If you would just point out what you are referring to
3 and speak up so everyone can hear you.

4 A There's the stairs they had to come down right here.
5 There's the horseshoe pits they had to walk up. We was
6 all standing about two foot from right here where this
7 bench is you can see. There's another bench that comes
8 along this way and then comes across like this. Well,
9 Damon was standing right here. I was standing over here
10 on the side. There's a bench right here and when they
11 come around Donnie walked up on the deck, walked
12 straight over to Damon and started cussing and started
13 yelling and that's when he hit him with the knife and
14 then Walt took the knife from him and he kept on trying
15 to fight everybody and that's when I took him down.

16 Q This also, State's Exhibit #4, is this showing another
17 version of the back area?

18 A Yes. On this end, this is the bench where we was all at.
19 This is the bench that everybody was at. There is
20 another bench that goes longways across this way. You
21 can't hardly see it in this picture, but Damon was right
22 there in the corner. He had nowhere to go. He couldn't
23 go nowhere.

24 Q And is this right here the pond that's in the back?

25 A Yes. That's the pond right here where this tree is is

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 127

1 where the other gentleman had Jason on the ground and
2 was stabbing him and he had Joe Fisher, which is my
3 father-in-law, had him in a headlock and he was trying
4 to stab him at the time and I took the knife away from
5 him. I'm not sure what the guy's name was.

6 Q If you'll take the stand, please. (Witness returns to
7 witness stand) So, y'all are out on the back deck and
8 there is an intermission between the bands. Is that
9 right?

10 A Yes.

11 Q I'm trying to get an idea of how this transpired. Was
12 Mr. Gibson invited back to the bar that night?

13 A He was actually barred permanently from the bar that
14 night. When he left he was asked to never come back.

15 Q And so, how long after he first left did he come back?
16 Do you recall?

17 A An hour, hour-and-a-half, maybe.

18 Q And the other individual that he was with, had he been
19 at the bar earlier that night?

20 A No.

21 Q Had you ever seen either one of them before?

22 A No.

23 Q And the altercation that took place, was Jason
24 Marcengill also involved?

25 A The first one, no.

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 128

1 Q How about the second one?

2 A Yes. He was involved in the second one.

3 Q And who, in your opinion and from your observation, was
4 this started by the Marcengill brothers or was this Mr.
5 Gibson and ---

6 A It was Mr. Gibson and his partner.

7 Q Were any words said between the two to get them to start
8 the argument?

9 A At which point? At the beginning of the night or...

10 Q The second one.

11 A The second one. He come on the deck with every intention
12 of hurting somebody.

13 MR. MCELHANNON: Objection, Your Honor.

14 THE COURT: I sustain.

15 Q Did you see Damon with a weapon that night?

16 A No.

17 Q Did you see him pull any type of weapon out to attack
18 Mr. Gibson?

19 A No. He never had a chance.

20 Q And so, it happened that fast? He never had a chance to
21 even move?

22 A He didn't have a chance to get out of the corner.

23 Q Did you see Mr. Gibson cut him with a knife?

24 A Yes.

25 Q Do you recall what the knife looked like?

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 129

1 A It was about that long, like, brown handle, long neck. I
2 mean, it was so quick, I didn't get a good look at it.

3 Q It wasn't a short folding pocketknife, was it?

4 A No, it was not a short folding pocketknife.

5 Q I'll show you what has been marked as State's Exhibit
6 #55. Does this appear to be the knife that was used that
7 night?

8 A Yes, it does.

9 Q And when you saw him wielding this knife, how was it
10 taken away from him?

11 A It was ripped from him. Walton, Walt, was actually
12 standing beside Damon when Damon got hit in the neck.
13 Walt grabbed it and took it from him and he just
14 continued to keep on trying to fight and we just, I just
15 kicked him in the face.

16 Q You kicked who in the face?

17 A Mr. Gibson.

18 Q So, he wasn't giving up even after he was disarmed?

19 A No. He was still hitting. He wasn't trying to stop
20 whatsoever. It took, it took me kicking him and three or
21 four other people having to hold him down and I got away
22 to go help Joe.

23 Q So, Joe was still fighting the other guy?

24 A Yeah.

25 Q And neither one of these individuals were backing down

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 130

1 or trying to stop the fight?

2 A The only time Mr. Gibson backed down is when he finally
3 got knocked out.

4 Q Is that what it took to get him to stop fighting?

5 A Yes. That's what happened. I kicked him repeatedly until
6 he just finally stopped fighting and stopped trying to
7 cut people.

8 Q He was pretty tough?

9 A The big guy? Yeah, surprisingly.

10 Q Now, when this was taking place, you saw the one knife.
11 Did you see any other knives being pulled?

12 A Yes. The only other knife I seen pulled was the other, I
13 guess, Defendant, I guess you'd want to say. He was
14 standing adjacent on the ground and had my stepfather,
15 trying to stab him. That knife, I have no idea what
16 happened to it or where it is.

17 Q And that was the bigger guy?

18 A Yes.

19 Q Now, when you were kicking him, was it out of self
20 defense?

21 A Yes.

22 Q And was he just swinging at Damon or swinging at anybody
23 that ---

24 A After he got Damon and we got the knife from him, it was
25 anybody. He was trying to fight his way through to

DIRECT EXAMINATION OF RALPH ALLEN GESELL BY MR. CAMPBELL 131

1 either get away or what, I wasn't giving him a chance to
2 cut me.

3 Q So, you wanted ---

4 A Which he did. I got cut that night, but we didn't file
5 no charges or nothing.

6 Q Where did you get cut?

7 A On my bicep.

8 Q And who were you cut by?

9 A I was actually cut by the other guy.

10 Q Did you also have to fight him?

11 A Yes.

12 Q After you got done with Mr. Gibson here, you went and
13 helped out your father-in-law?

14 A My father-in-law and Jason Marcengill.

15 Q So, that was the time you got cut ---

16 A Yes.

17 Q --- was in that altercation. And you gave a statement
18 regarding what you saw that night. Is that right?

19 A Yes, sir.

20 Q And do you recall anything that Mr. Gibson said to
21 Donnie prior to the second altercation happening?

22 A He told me he was going to kill him.

23 Q So, you recall hearing that?

24 A Yeah, before he left, he told him he was going to kill
25 him.

CROSS EXAMINATION OF RALPH ALLEN GESELL BY MR. MCELHANNON 132

1 Q When you say, "before he left".

2 A Before we kicked him out.

3 Q The first time?

4 A The first time, yeah.

5 Q So, he said he was going to kill him and a couple hours
6 later he comes back.

7 A Which is something, when you're a bouncer at a bar, it's
8 something you deal with when you kick somebody out. They
9 always say, "Well, I'll be back, I'm going to kill you,
10 blah, blah, blah," and we just pass it and let it go
11 because that's just what people, when they are drunk,
12 say.

13 Q You didn't expect this to happen, did you?

14 A No, I did not.

15 Q Now, prior to this, this night had been pretty peaceful
16 except for the first altercation?

17 A Yes, it had.

18 Q I have nothing further. Would you please answer any
19 questions Mr. McElhannon may have.

20 CROSS EXAMINATION

21 BY MR. MCELHANNON:

22 Q Mister, is it Gesell?

23 A Yes.

24 Q You were kicking Mr. Gibson after he was down on the
25 ground, right?

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

CROSS EXAMINATION OF RALPH ALLEN GESELL BY MR. MCELHANNON 133

- 1 A No. He never hit the ground until he was out,
2 unconscious. He was fighting the whole time.
- 3 Q But he didn't have a knife any longer.
- 4 A I didn't know that.
- 5 Q His hands were empty?
- 6 A I wasn't looking at his hands no more, sir.
- 7 Q Did you see blood on his hands?
- 8 A No, sir. It was night. It was dark.
- 9 Q Didn't see any cuts on his fingers or anything like
10 that?
- 11 A No, sir. I didn't inspect his fingers.
- 12 Q Who put the big gash over his eye? Was that when you
13 kicked him ---
- 14 A Possibly.
- 15 Q --- in the face?
- 16 A Possibly.
- 17 Q He wasn't down on the ground when you kicked him in the
18 face?
- 19 A No, he was standing up.
- 20 Q How high can you kick?
- 21 A I was standing on the bench.
- 22 Q So, you had a good angle to kick him in the face.
- 23 A Yes, sir.
- 24 Q But the knife was gone at that time?
- 25 A Yes, sir.

CROSS EXAMINATION OF RALPH ALLEN GESELL BY MR. MCELHANNON 134

1 Q Now, do you remember giving your statement on the 26th
2 of April, 2009?

3 A Yes, sir.

4 Q A part of your statement says that Donnie, who is Mr.
5 Gibson, pulled a pocketknife, brown in color, and
6 stabbed Jason.

7 A No. He never got near Jason. The other guy. I didn't
8 write the statement. An officer wrote the statement. I
9 spoke to the officer and the officer wrote the statement
10 and I initialed it and signed it.

11 Q Did you read it before you signed it?

12 A He read over it to me.

13 Q And he didn't read that part that says that Donnie came
14 up to Damon and stuff began? Donnie pulled a
15 pocketknife, brown in color, and stabbed Jason?

16 A No, sir.

17 Q He didn't read that to you?

18 A No, sir.

19 Q But you signed it anyway?

20 A Yes, sir.

21 Q Damon and Jason are your friends, are they not?

22 A No, sir. They are not.

23 Q They were frequently at Hog Tails, were they not?

24 A Actually, me and Damon, up until that point right there,
25 were not friends at all. We had done been in an

CROSS EXAMINATION OF RALPH ALLEN GESELL BY MR. MCELHANNON 135

1 altercation.

2 Q So, Damon was a fighter?

3 A No. We never got into a fight. We were just in an
4 altercation. We didn't get along.

5 Q Was Damon pretty hotheaded?

6 A I couldn't tell you if he is or not. I don't know him on
7 a personal level.

8 Q But you knew him enough to get into an altercation?

9 A He had, he liked my girlfriend and that's where that
10 came from.

11 Q And you've got convictions for grand larceny and
12 burglary?

13 A Yes, sir.

14 Q So, you say you didn't state this in your statement
15 about Donnie pulling a pocketknife?

16 A It was almost three years ago. I don't remember every
17 detail of the night, just like the scratches you asked
18 me about or the gash above his eye.

19 Q But you made this statement on that night.

20 A Yes, sir.

21 Q So, this was clear in your mind.

22 A The knife was supposed to have been, the pocketknife was
23 supposed to have been on the other guy, not Mr. Gibson.

24 Q Did you ever see any other weapons that night, any other
25 knives?

CROSS EXAMINATION OF RALPH ALLEN GESELL BY MR. MCELHANNON 136

1 A No.

2 Q Didn't see one laying on the back deck?

3 A No.

4 Q Open? Black handled?

5 A No.

6 Q I'll show you what's been marked as State's Exhibit #19.

7 You were the bouncer, right?

8 A Yes.

9 Q You never saw that knife laying on the back deck?

10 A No, sir. I did not, because after the altercation
11 happened, I carried, me and another guy carried Jason in
12 and I had my fingers on his throat until paramedics
13 showed up.

14 Q Okay. There were apparently other people with knives out
15 on that deck. Correct?

16 A It's very possible, yes, sir. Or it could have been the
17 Defendant's knife. I don't know.

18 Q People bring weapons into Hog Tails quite a bit? Guns?

19 A We don't search.

20 Q You don't search?

21 A I can only think of two bars that even search or have
22 metal detectors in Anderson.

23 Q Now, you said the guy who was with Donnie pulled a knife
24 from a sheath and tried to cut Jason.

25 A Yes.

CROSS EXAMINATION OF RALPH ALLEN GESELL BY MR. MCELHANNON 137

1 Q What kind of a sheath? How big was it?

2 A I didn't have a chance to look at it, sir.

3 Q But you were sure that he pulled a knife from a sheath?

4 A If you grab it off your hip you're usually pulling it
5 from a sheath.

6 Q Did you see a sheath on Damon that night on his belt?

7 A No, I didn't. I was not looking at Damon. Damon was
8 already on the ground bleeding.

9 Q So, basically, anything that's going to help Damon on
10 this case is what you are going to testify to?

11 A I'm not trying to help nobody out. I'm stating what
12 happened that night.

13 Q Even though -- let me ask you this: Was Damon, was he
14 drunk?

15 A He'd been drinking. I don't know how many beers he'd
16 been drinking and so I can't say for a fact he was drunk
17 or he was high.

18 Q And you don't know if he started the altercation on the
19 back deck?

20 A I know he didn't start the altercation on the back deck.
21 I was less than two feet from him.

22 Q But you didn't hear what words were exchanged?

23 A When he come up on the back deck there were no words. He
24 come up on the back deck straight to Damon and went to
25 going at it.

CROSS EXAMINATION OF RALPH ALLEN GESELL BY MR. MCELHANNON 138

1 Q You didn't hear Damon say anything like, "It's cool,
2 it's water under the bridge"?

3 A Damon didn't say nothing that I'm aware of.

4 Q But you were able to hear my client, not Damon?

5 A What do you mean?

6 Q You were able to hear my client talking and threatening,
7 but you weren't able to hear Damon?

8 A When he threatened, that was at the beginning of the
9 night before he got kicked out.

10 Q But you say Damon didn't have a chance to say anything?

11 A No.

12 MR. MCELHANNON: No further questions, Your Honor.

13 THE COURT: Redirect? May this witness be excused?

14 MR. CAMPBELL: Yes, sir.

15 THE COURT: Mr. McElhannon?

16 MR. MCELHANNON: Yes, Your Honor.

17 THE COURT: Thank you, sir. All right, Mr. Campbell,
18 ladies and gentlemen of the jury, I'm going to conclude the
19 testimony today and I'm going to excuse you for the evening
20 and remind you that you are not to speak about this case
21 amongst yourselves or anyone else and I will ask you to
22 return to your jury room by 9:30 in the morning. Is there any
23 problem with anyone not making 9:30 in the morning? Very
24 good. Thank you. Have a good evening.

25 (Jury out at 5:00 PM)

1 THE COURT: All right, gentlemen. If there is nothing
2 further, we will be in recess until 9:30 in the morning.
3 Very good.

4 MORNING - DECEMBER 13, 2011

5 THE COURT: Good morning, gentlemen.

6 MR. CAMPBELL: Good morning, Your Honor. I would like to
7 put a stipulation on the record. We are stipulating that they
8 are what they are and we don't really have to lay a
9 foundation for them.

10 THE COURT: So, you are basically stipulating the
11 admissibility. Would you give those exhibit numbers so we are
12 clear on the record, please?

13 MR. CAMPBELL: Exhibits #1-54 for the State.

14 MR. MCELHANNON: And Defense Exhibits #1 and #2.

15 THE COURT: All right. Is that your stipulation?

16 MR. MCELHANNON: Yes, sir.

17 THE COURT: Okay, sir.

18 BAILIFF: The jurors are not all here. We lack one more.

19 THE COURT: All right. Are there any other stipulations,
20 Mr. Campbell or Mr. McElhannon, before we get started this
21 morning?

22 MR. CAMPBELL: The other thing, before Detective Gebing
23 takes the stand, we need to have a Jackson/Denno hearing. The
24 Defendant made two statements in this case. One is, he did an
25 advice of rights and Detective Gebing spoke to him at the

1 Anderson County Detention Center and, basically, all he told
2 him was, I got sucker punched and I don't want to talk to
3 anyone. That's the first one.

4 After he got released on bond, he made three phone calls
5 to Detective Gebing between April 29th and May 1st, 2009.
6 Detective Gebing returned his phone call at his request and
7 recorded a phone conversation. It's about 15 minutes and he
8 basically wanted to take out a lynching warrant and he kind
9 of gave a little bit of his side of the story and that we
10 intend to play. We have redacted that audio if the Court sees
11 fit to allow it. Any mention of being in the Perry
12 Correctional Institute, any mentions of prior criminal
13 history, we've redacted all that. We gave a copy of all that
14 to Mr. McElhannon. We gave him the original to begin with and
15 then went back and redacted what I just said and other stuff
16 that was in it. All references to all prior criminal history
17 has been taken out.

18 THE COURT: Okay.

19 MR. CAMPBELL: And that's the only other issue we really
20 have.

21 THE COURT: Mr. McElhannon, do you feel we need to have a
22 Jackson/Denno hearing?

23 MR. MCELHANNON: No, Your Honor. Actually, I thought
24 about it and I think under the law I believe, to be honest,
25 it would be a waste of the Court's time. My client did

1 re-initiate contact with Officer Gebing and we don't object
2 to that, Your Honor. I don't think it would do any good to
3 have a Jackson/Denno hearing.

4 THE COURT: All right. Do you, and I'm not asking that
5 you do, but I just want to clarify for evidentiary purposes.
6 As far as the redacted version, the claim of authenticity
7 about that, that you would raise, do you admit that it is
8 admissible as far as being redacted, the redacted version?

9 MR. MCELHANNON: The only thing is, Your Honor, I did not
10 get a chance last night to listen to the redacted version
11 that was given to me yesterday. I think it's maybe 15 minutes
12 long or something like that and I can listen to it during the
13 break. I don't think it will be a problem.

14 THE COURT: Okay. Let's do that. Before that happens, let
15 me know. We'll give Mr. McElhannon a chance to listen to that
16 version and he can make a decision.

17 MR. CAMPBELL: Yes, sir, Your Honor, and we will have the
18 opportunity -- Detective Gebing will be my last witness and
19 he should have the opportunity to do that.

20 THE COURT: How many witnesses do you anticipate today?

21 MR. CAMPBELL: Five.

22 THE COURT: Five?

23 MR. CAMPBELL: Yes, sir. I have three lay witnesses,
24 potentially, SLED with DNA, and then Detective Gebing, and
25 that's my case.

1 THE COURT: All right. Mr. McElhannon, from the Defense's
2 perspective, is there anything we need to put on the record
3 other than what we've been over this morning?

4 MR. MCELHANNON: No, Your Honor. The only thing we'll
5 need to take up now or, I don't know, until after the State
6 rests, is whether my client will take the stand or not.

7 THE COURT: Yeah, I'll go over his fifth amendment rights
8 at that point.

9 MR. MCELHANNON: I think the only thing the State may try
10 to do that I will object to, is maybe introducing his prior
11 record if he does take the stand because there are several
12 that are so remote in time that I think it would be more
13 prejudicial than probative.

14 THE COURT: Okay. I tell you what, let's do this. Let's
15 wait until your client, Mr. Gibson, makes a decision whether
16 or not he will, in fact, take the stand and at that point you
17 can renew your motion in limine and I think that would
18 probably be more efficient. Don't you?

19 MR. MCELHANNON: Yes, sir.

20 THE COURT: Is the State ready to proceed?

21 MR. CAMPBELL: Yes, sir.

22 THE COURT: Is the Defense ready to proceed?

23 MR. MCELHANNON: Yes, sir, Your Honor.

24 THE COURT: Bring the jury in, please.

25 (Jury in at 9:45 AM)

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 THE COURT: Good morning, Mr. Campbell and ladies and
2 gentlemen of the jury. I hope you had a nice evening. We are
3 ready to proceed with the testimony at this point. Mr.
4 Campbell?

5 MR. CAMPBELL: Thank you, Your Honor. The State would
6 call Joe Fisher.

7 (After being duly sworn by the Clerk of Court,
8 JOE FISHER testified as follows:)

9 CLERK OF COURT: Please have a seat in the witness chair.
10 If you would, please, state your full name for the record and
11 spell your last.

12 MR. FISHER: Samuel Joseph Fisher. F-I-S-H-E-R.

13 DIRECT EXAMINATION

14 BY MR. CAMPBELL:

15 Q Mr. Fisher, you go by Samuel or Joe?

16 A Joe.

17 Q And where do you live?

18 A [REDACTED]

19 Q Here in Anderson County?

20 A Yes, sir. Anderson, South Carolina.

21 Q Are you married?

22 A Yes.

23 Q Do you work?

24 A Yes.

25 Q Where are you employed?

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 A Applegate Insulation. It's in Eastanollee, Georgia.

2 Q Construction?

3 A We make insulation.

4 Q And at times, have you ever worked at Hog Tails bar?

5 A Yes.

6 Q In what position or capacity?

7 A Bouncer.

8 Q And do you still work there now?

9 A No.

10 Q In April of 2009, were you working there as a bouncer?

11 A Yes.

12 Q Now, the bar, Hog Tails, is in Anderson County. Is that
13 right?

14 A Yes.

15 Q In Sandy Springs?

16 A Yes.

17 Q Is it a bar anybody could go to or is it a private club
18 or is it open to anybody?

19 A It's a private bar.

20 Q And what do you mean by private?

21 A You have to have a membership.

22 Q Is this like a paid membership?

23 A Yes.

24 Q Now, as a part of the activities of the bar, they
25 typically have bands. Is that right?

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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- 1 A Yes.
- 2 Q On Saturday nights?
- 3 A Yes.
- 4 Q On April 26th of 2009, was a band playing that night?
- 5 A Yes. There were two bands.
- 6 Q And were a lot of people there?
- 7 A Yes.
- 8 Q Do you recall how many?
- 9 A We were -- it was pretty packed that night. It was one
10 of the biggest nights we'd had.
- 11 Q And what was your job that night? What were you doing?
- 12 A I was watching the bar, the front door, outside, inside,
13 mainly watching the crowd.
- 14 Q And when people come in, do you have a scanner or
15 anything like that?
- 16 A No.
- 17 Q Does the bar itself, does it have any video cameras?
- 18 A Yes.
- 19 Q How many?
- 20 A Three. I think it's three to be exact.
- 21 Q And on that night, how many were working? Were they all
22 working?
- 23 A They should have all been working.
- 24 Q Now, do you know Damon and Jason Marcengill?
- 25 A Yes.

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 Q How long have you known them?

2 A I've probably known them about five-and-a-half years.

3 Q Did you know Mr. Donnie Ray Gibson?

4 A I have met Donnie Ray Gibson.

5 Q How many times?

6 A I've probably seen Donnie three or four times prior to
7 that night.

8 Q Now, were you present at the bar that night when this
9 first incident took place between Donnie Gibson and
10 Damon Marcengill?

11 A Yes.

12 Q And what, from your perspective and your viewpoint, what
13 did you see or observe?

14 A I was standing over towards the back door of the bar and
15 that way I could, when I'm there, I could see the whole
16 bar from where I was at and I saw them having a
17 conversation. They were sitting at a table towards the
18 front, up towards the pool table and Damon was sitting
19 there, Donnie was sitting there, Peggy was sitting there
20 and another lady was sitting there. They, to me, it just
21 looked like they were all having a nice conversation.
22 Other than that, I saw Jason get up and walk over
23 towards them, towards the end, right before I asked
24 Donnie to leave.

25 Q And what transpired or took place between these

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DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 individuals that caused him to be asked to leave?

2 A I don't know what -- I couldn't hear them. I don't know
3 what was said between them. I just saw Donnie get up out
4 of his chair and he reached towards his back pocket.

5 Q And when he did that, what, if anything, did you do?

6 A I immediately went straight to their table.

7 Q Was anything said between you and them?

8 A No.

9 Q And did you talk to Donnie at that point in time?

10 A At that point in time I didn't say anything to Donnie. I
11 just went over to the table just to try to hear what was
12 going on. I couldn't hear them. The music was loud. I
13 saw Donnie reach for his back pocket. When he reached
14 for his back pocket, I took my left hand and locked it.
15 When he had his hand in his pocket, I locked my hand
16 over his and grabbed his pocket so he couldn't pull it
17 back out. At that time, Jason Marcengill reached out and
18 tried to grab Donnie by the throat and when he did, I
19 smacked Jason's hand and pushed Donnie towards the pool
20 table, which is towards the front door and asked him to
21 leave.

22 Q And when he was reaching for his back pocket, did you
23 see what, if anything, he may have had in there?

24 A I do not know what he had in there, but with my dealings
25 with bars like that, I know what was in his back pocket.

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 There is no other reason to reach in your pocket unless
2 you have some sort of weapon.

3 MR. MCELHANNON: Your Honor, I object. Speculation.

4 THE COURT: Sustained.

5 Q You weren't going to let it escalate any further than it
6 already had?

7 A No.

8 Q At that point, when you escorted him out, did you ask
9 him to leave for that night?

10 A Yes.

11 Q How did he take that?

12 A He said, "That's fine." He said, "I'll leave, but I'll
13 be back, but I'll leave."

14 Q What did you tell him?

15 A I just said, "Great. Just go. Just leave."

16 Q How did he act? Was he upset, okay with it, was he mad?

17 A He was mad. I mean, I'm sure he was mad because...

18 Q Now, at that point, why wasn't Damon asked to leave?

19 A Damon, actually Damon didn't do anything to Donnie for
20 me to ask him to leave, but Shane Rhodes had taken Jason
21 out the back door when I took Donnie out the front door.

22 Q So, basically, at this point y'all are trying to diffuse
23 the situation?

24 A Correct.

25 Q Now, when he was leaving, was he told not to come back

1 that night?

2 A Yes.

3 Q Who told him that?

4 A I did.

5 Q You did. Now, later on, did you have an opportunity to
6 see Mr. Gibson again?

7 A That night?

8 Q Yes, sir.

9 A Well, only when he came back.

10 Q Now, when you say, "came back", what are you referring
11 to?

12 A He, himself and a tall guy, came in the back door of Hog
13 Tails.

14 Q Before we get to that, when you say "him" are you
15 referring to Mr. Gibson seated right here?

16 A Mr. Gibson and the tall guy that he brought back with
17 him.

18 Q And, approximately, how long after this first incident
19 did you see Mr. Gibson come back, time-wise?

20 A Probably fifty minutes to an hour and fifteen minutes.
21 Somewhere in there.

22 Q When you saw him again, did he come back through the
23 front door?

24 A No, he came in the back door.

25 Q How about the big guy? Did he come in through the front

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 door at all?

2 A No. He followed Donnie into the back door.

3 Q When you saw them, how were they dressed?

4 A They both came in in black leather jackets, they were
5 zipped up, and they both had on a stocking cap, not a
6 full face, but just on their head down to about halfway
7 down their forehead.

8 Q Like a beanie?

9 A More than a beanie, but yes.

10 Q And where were you at this point in time when you saw
11 them the second time?

12 A At that point, I was standing about three-quarters of
13 the way down the bar towards where the bathrooms were.
14 Whenever I'm standing there, I can watch the front, the
15 back, the whole bar, from that point of view.

16 Q Was the back door open?

17 A The back door was unlocked.

18 Q Now, when you saw him come up the back, what did you do
19 at that point in time?

20 A I immediately walked over to the bartender and told the
21 bartender she was going to have to I.D. those guys
22 because they did not come in through the front door and
23 I did not know who they were, because I did not
24 recognize Mr. Gibson in that black leather jacket and
25 that hat.

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1 Q So, from your position from where you were, you couldn't
2 tell who was coming in until you got closer?

3 A No. I actually had to walk out back to see who they
4 were.

5 Q And when you walked out back, did you recognize Mr.
6 Gibson at that point in time?

7 A Yes.

8 Q Was he the same person that you asked to leave about an
9 hour prior to that?

10 A Yes.

11 Q Now, when you walked about back, was Damon and Jason
12 Marcengill already on the back porch?

13 A Damon was, not Jason.

14 Q Where was Jason?

15 A Jason was asleep in the truck, in Shane Rhodes' truck.

16 Q Now, was anything said between Mr. Gibson and Damon?

17 A Not that I --

18 Q Or could you hear it?

19 A I did not hear anything being said.

20 Q Now, what did you observe since you couldn't hear
21 anything being said?

22 A When I walked out, I saw who they were and I immediately
23 told Allen Gesell, Ralph Gesell, to go get Jason out of
24 the truck because he was in the first altercation with
25 these guys and he needs to be out here to help settle

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 what's fixin' to go on if anything is going to happen
2 and sure enough, it did.

3 Q Did you confront Mr. Gibson while you were out on the
4 back porch?

5 A Yes.

6 Q And what, if anything, did you tell him?

7 A I told them they needed to leave, that he was already
8 asked to leave that night and not to come back, and what
9 was he doing back.

10 Q And what did it appear to you like what was going on?
11 What was your perspective?

12 A It appeared to me that they had come back to try to jump
13 on somebody, because ---

14 MR. MCELHANNON: Objection. Speculation.

15 THE COURT: Sustained.

16 Q Now, at this point in time, did a confrontation sort of
17 escalate between Mr. Gibson and Damon Marcengill?

18 A No.

19 Q What took place?

20 A When I walked out the back door and I saw Mr. Gibson and
21 the tall guy, he told the tall guy, he said, "There's
22 the guy that held me while the guy hit me inside the
23 bar." And I told Donnie, I said, "Nobody held you and
24 nobody hit you in the bar." I said, "He grabbed your
25 throat and I knocked his hand down." And the big guy was

1 standing behind me and then Shane Rhodes was standing
2 right beside me. Donnie -- the back of the, outside the
3 door, there's a concrete pad from the high side that
4 steps down to a wooden deck. Donnie was down on the
5 bottom side and he was telling Scott, that was the guy
6 that held me while he hit me and I was trying to tell
7 Scott that no, nobody held him. He didn't even get hit.
8 He got grabbed around the throat and I knocked that
9 guy's hand down.

10 Q And then what took place?

11 A At that time, Allen Gesell went to get Jason out of the
12 truck. Jason come barging through the back door and when
13 Jason come out that back door, Donnie's specific words
14 were, "There's that son of a bitch."

15 Q Then, what took place?

16 A At that time, Scott, the tall guy, went around me to
17 start to get in behind Jason. Damon went around Scott.
18 Pretty much, it was Donnie, and Damon was in front of
19 him, and Scott and Jason was on the other side and it
20 was like a wooden round table right there. (Indicating)
21 One was on one side and one was on the other.

22 Q And then what transpired?

23 A At that point, they, Donnie and Damon, had started
24 verbally arguing and Donnie pushed Damon, Damon pushed
25 Donnie back against the handrail and when Donnie come

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1 off the handrail he was like sprung off the handrail and
2 I heard Damon go "Uh", and I heard Shane Rhodes at that
3 point holler, "Knife", and so I hit Donnie and I hit
4 Donnie right in the head right there. (Indicating) But
5 Damon was swinging at Donnie. I swung at Donnie one
6 time. Whenever I swung at Donnie, people started coming
7 out the back door and I immediately turned around and
8 started hollering, "Everybody get back in the back door
9 and lock it. Don't let nobody out this door, because
10 they've got knives."

11 Q Were there any women outside while this was going on?

12 A Yes. Brittany Rhodes was outside and Julie Whitfield was
13 outside.

14 Q And what -- did you attempt to get them out of the way?

15 A I made them go back in the bar.

16 Q And did you see Mr. Gibson with any type of weapon?

17 A I did not.

18 Q Did you see the injuries that Damon Marcengill received?

19 A Yes.

20 Q And what kind of injuries did he receive as a result of
21 this altercation with Mr. Gibson?

22 A He received a cutting on his side and he received a cut
23 on his neck and on his face.

24 Q In your opinion, it was pretty bad?

25 A Yes.

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1 Q Did you see, at any point, Damon Marcengill with a
2 weapon?

3 A No.

4 Q Did you see him have a knife or pull a knife out?

5 A No.

6 Q How about Jason Marcengill? Did you see him pull a knife
7 out?

8 A No.

9 Q At any point during these altercations going on between
10 the Marcengill brothers and Scotty Hamilton and Donnie
11 Gibson, did you ever see at any point, Mr. Hamilton and
12 Damon Marcengill get into it?

13 A No.

14 Q So, the big guy never got into it with Damon?

15 A No.

16 Q At any point, did you hear Mr. Gibson tell you a reason
17 why he came back? Did he give you an explanation?

18 A I did not hear, specifically. Straight to me, talking to
19 me?

20 Q Just ---

21 MR. MCELHANNON: Objection. Hearsay.

22 THE COURT: Just one second. You need to lay further
23 foundation.

24 Q Just exactly what you heard from Mr. Gibson. Did you
25 ever hear through your ears, anything that he said the

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1 reason why he came back?

2 A No.

3 MR. CAMPBELL: Your Honor, may I have this witness -- I
4 want to show him some photographs and I'd like him to step
5 off the stand to explain.

6 THE COURT: Yes, sir.

7 MR. CAMPBELL: Just a minute.

8 Q Mr. Fisher, I want to show you what has been marked
9 State's Exhibits #1, #2, #3, #4, #11 and #18. I'm going
10 to first show you these photographs. If you will please
11 -- are these pictures of Hog Tails bar?

12 A Yes.

13 Q They fairly and accurately represent Hog Tails as it
14 was?

15 A Yes.

16 MR. CAMPBELL: Your Honor, at this time, may I have the
17 witness come off the stand and let him explain in a little
18 bit more detail where everything transpired?

19 THE COURT: Yes, sir.

20 Q Mr. Fisher, if you will just hand those to me and step
21 over here. (Witness complies) I'm going to go over
22 State's Exhibit #1. If you could just tell us what this
23 is, sir. (Showing on large screen in front of jury)

24 A That's the front of Hog Tails bar.

25 Q That's State's Exhibit #1. And #2?

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- 1 A That's just another of the front, of the side entrance.
- 2 Q And this is just a little dance area?
- 3 A That's where the band plays, right there.
- 4 Q In the wooden area?
- 5 A In the wooden area, yes, sir.
- 6 Q State's Exhibit #3.
- 7 A That is the back steps. After you come out the back door
- 8 onto the deck, that's the back steps leading down to the
- 9 horseshoe pit.
- 10 Q And this is #4.
- 11 A That is the back steps coming onto the deck.
- 12 Q You can use this pen here so you can point out what
- 13 you're talking about.
- 14 A This is the back steps coming off of the wooden deck.
- 15 These are the steps leading back up to the parking lot.
- 16 Q So, the steps right here, that we are talking about
- 17 right here, are the same steps in #3 coming off, but a
- 18 different view?
- 19 A Correct.
- 20 Q I'm going to show you what's been marked as State's
- 21 Exhibit #11. What is this showing right here?
- 22 A That is a entrance over to the pond.
- 23 Q And what are these tables showing us?
- 24 A That's actually this part right here with the steps
- 25 going down, this is the top part where the patio is,

1 where I was standing.

2 Q The horseshoe pits are down here?

3 A The horseshoe pits are down there. That's the same set
4 of stairs as in the one you've already showed. That's
5 that set of steps right there.

6 Q So, this is the set of stairs ---

7 A As right there.

8 Q --- as in #3 that show item #11, but this is just at
9 night.

10 A Yes.

11 Q It's showing it at night.

12 A Yes.

13 Q And this is where these round tables were situated that
14 night?

15 A Correct.

16 Q And where exactly, point us to show the jury, where the
17 fights were taking place and also show on the next
18 picture, too.

19 A Donnie Gibson was standing on this side of this round
20 table. Damon Marcengill was standing in front of this
21 table. Jason Marcengill was like right here and Scott
22 was standing right here.

23 A And where were you situated during all this?

24 A I was right behind Damon over here on this side.

25 Q And the back door that comes out would be over here on

DIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 the back side?

2 A Correct.

3 Q I'm showing you State's Exhibit #18. If you can just
4 describe what this is showing. Tell us what this
5 depicts.

6 A Here's where Donnie Gibson was standing.

7 Q Where are the back steps?

8 A The back steps is behind this table, but you can't see
9 them here, going down, but Donnie Gibson was here. Damon
10 Marcengill was standing here. I was standing over here.
11 Scott Hamilton was right there at the steps and Jason
12 was right here on the other side of this round table,
13 which you can't get on the picture.

14 Q And this is the little patio path you are talking about?

15 A The patio is up above that handrail. It steps up four
16 inches.

17 Q Thank you, sir. If you will please take your seat again.
18 (Witness complies) Now, the second altercation that you
19 witnessed, did you see anything that Damon Marcengill
20 did to provoke a fight with Mr. Gibson?

21 MR. MCELHANNON: Your Honor ---

22 A No.

23 MR. MCELHANNON: --- objection. I think that's been asked
24 and answered.

25 THE COURT: Overruled. Go ahead.

CROSS EXAMINATION OF JOE FISHER BY MR. MCELHANNON

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1 Q Please answer the question.

2 A No.

3 Q I have no further questions. Please answer any questions
4 Mr. McElhannon may have.

5 THE COURT: Cross exam?

6 MR. MCELHANNON: Thank you, Your Honor.

7 CROSS EXAMINATION

8 BY MR. MCELHANNON:

9 Q Mr. Fisher, have you discussed your testimony with any
10 of these other witnesses in the case?

11 A Yes.

12 Q Did you do so this morning?

13 A We talked about it this morning.

14 Q Out in the lobby?

15 A Yes.

16 Q Who were you talking to out there?

17 A Shane Rhodes.

18 Q Now, you say the first altercation, which was inside,
19 you saw Donnie go to his back pocket and you grabbed his
20 hand. Is that correct?

21 A Yes.

22 Q You were a bouncer?

23 A Yes.

24 Q So, your job is to diffuse a situation and try to keep
25 everybody safe. Right?

CROSS EXAMINATION OF JOE FISHER BY MR. MCELHANNON

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1 A Correct.

2 Q Did you check Donnie's back pocket?

3 A No.

4 Q Why not?

5 A Why should I?

6 Q He had a weapon.

7 A I didn't say he had a weapon.

8 Q You implied it, didn't you?

9 A I implied it, yes. I imply it to everybody. If anybody
10 is in the bar and a altercation starts and it's happened
11 before and they go to stick their hand in their pocket,
12 I try to not let them pull it out.

13 Q But you don't ever check to see if they have a gun or a
14 knife?

15 A No, sir. I asked him to leave. He left.

16 Q And you said, "First he left and he was calm". Right?

17 A He was calm?

18 Q Yes. When he left?

19 A He wasn't calm, calm, but he wasn't aggravated, either.

20 Q Okay. Under direct exam, at first you said he was calm.
21 You said when he left he was mad. You said two different
22 things in direct exam. Which was it? Was he calm or was
23 he mad?

24 A He wasn't furious, but he wasn't calm, either. He had
25 just gotten kicked out of a bar and asked to leave.

CROSS EXAMINATION OF JOE FISHER BY MR. MCELHANNON

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1 Q You said that Donnie said, "That's fine, but I'll be
2 back".

3 A Correct.

4 Q Did you give a statement on April 26th of 2009?

5 A Yes, sir.

6 Q Have you read that statement?

7 A I tried to.

8 Q Recently?

9 A No.

10 Q Did you read it and sign it that night?

11 A Yes.

12 Q Why didn't you put that in your statement?

13 A For one, it was late. I'd been there since 6:00 that
14 day. There may be a few things that didn't come out then
15 that are coming out now.

16 Q Right. All right. You said in your statement that Donnie
17 pulled a knife, slashed the left side of Damon's face.
18 How did you know that?

19 A Because Shane Rhodes hollered, "Knife", and then I
20 looked up.

21 Q But you didn't see a knife, did you? You testified on
22 direct exam that you never saw a knife.

23 A I never saw his knife, no.

24 Q When this second altercation happened on the back deck,
25 you told Ralph or Allen Gesell to go get Jason?

CROSS EXAMINATION OF JOE FISHER BY MR. MCELHANNON

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1 A Yes, sir.

2 Q Did you not think that was going to cause more trouble,
3 getting another person involved? You were the bouncer.
4 You were supposed to stop fights.

5 A When those two guys came back to the bar that night, for
6 one thing, it was hot. It was warm that night. They come
7 back in leather jackets. They come back with a stocking
8 cap on their heads. Why?

9 Q Why is that reason to go get Jason Marcengill out of a
10 truck?

11 A Because he was in the first altercation with Donnie
12 inside the bar, so that was his problem. My problem is
13 inside the bar, not outside the bar. Once it hits the
14 parking lot, everybody is on their own.

15 Q So, you were going to just let them fight it out on the
16 back deck?

17 A Absolutely. They were grown men.

18 Q Everybody was a grown man, right?

19 A Correct.

20 Q Are you sure both of them had on a stocking cap?

21 A Yes.

22 Q One of them didn't have on a ball cap?

23 A No. They were dressed identical.

24 Q Now, I think you testified a little while ago that,
25 first, you testified that you didn't hear anything being

CROSS EXAMINATION OF JOE FISHER BY MR. MCELHANNON

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1 said and then you said you did hear things being said.

2 Which is it?

3 A What did I say?

4 Q You said that you heard my client say, "There's that son
5 of a bitch".

6 A That was whenever Jason walked out the back door.

7 Q Why isn't that in your statement?

8 A Because it's something I remembered. It's been two-and-
9 a-half years.

10 Q Do you remember more today than you did right after it
11 happened?

12 A No, not really.

13 Q You said in the first altercation inside the door when
14 my client was told to leave that Jason tried to grab him
15 by the throat?

16 A Correct.

17 Q But that's not in your statement, either, is it?

18 A I do not know.

19 Q All you say is, "Donnie reached into his back pocket and
20 I grabbed his hand and then you walked Donnie outside.
21 Talked for a little while. I told Donnie to leave and he
22 left by himself." At no point in your statement that
23 night is that Jason actually attempted to grab Donnie by
24 the throat.

25 A It was a long night. People had just gotten cut. I'd

CROSS EXAMINATION OF JOE FISHER BY MR. MCELHANNON 165

1 been there since 6:00 and there were some things I
2 didn't remember right then whenever I did my statement.

3 Q In the second altercation on the back deck, you say you
4 are the one that struck Donnie, that hit him?

5 A Could you repeat that?

6 Q You say that you are the one that hit Donnie on the back
7 deck. Didn't you just testify to that?

8 A Yes. I hit him somewhere in his head, face, somewhere
9 straight on.

10 Q Did you ever see Ralph, Allen, Mr. Gesell on a bench
11 kick him in the face?

12 A No. I did not. As I said, once I hit Donnie, I turned
13 around and tried to get people that were coming out the
14 back door in the back door.

15 Q Was Mr. Gesell out there, too, though?

16 A Yes.

17 Q Was he standing on a bench or something or was he on the
18 ground or what?

19 A I could not tell you. He walked out. When Jason came
20 through the door, Allen came out the door behind him. I
21 do not know where he went from there.

22 Q You don't know how many people actually physically
23 assaulted Mr. Gibson that night, do you?

24 A No. I would say there were at least three.

25 Q While he was on the ground?

REDIRECT EXAMINATION OF JOE FISHER BY MR. CAMPBELL

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1 A No. He was standing up.

2 Q The whole time?

3 A He was standing up whenever I hit him.

4 Q But you never saw the guy ---

5 A I turned around getting everybody back in the door.

6 Q But you never saw anybody kick him in the face or
7 anything like that?

8 A No.

9 MR. MCELHANNON: That's all the questions I have.

10 THE COURT: Redirect?

11 MR. CAMPBELL: Just a couple.

12 REDIRECT EXAMINATION

13 BY MR. CAMPBELL:

14 Q Mr. Fisher, when you gave a statement on the morning of
15 April 26th, 2009, do you recall, approximately, what
16 time of day it was?

17 A I do not know.

18 Q Was it early in the morning?

19 A It was early in the morning. Yes.

20 Q Did you put every minute detail in there that transpired
21 that you observed that night?

22 A I mean, there's some things like he just said that I
23 missed, but you know, it's been over two years.

24 Q After you've had time to reflect, you recall more
25 details than you put in your statement?

DIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL

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1 A Yes.

2 Q And the details that you recall, are they from your own
3 memory or was it like Mr. McElhannon implied, that you
4 got together with everybody to get your stories
5 straight?

6 A No. That's from my own memory.

7 MR. CAMPBELL: I have no further questions.

8 THE COURT: May this witness be excused?

9 MR. CAMPBELL: Yes, sir.

10 MR. MCELHANNON: No objection.

11 THE COURT: Thank you, sir. You may step down. Call your
12 next witness, please.

13 MR. CAMPBELL: Your Honor, the State calls Shane Rhodes.

14 (After being duly sworn by the Clerk of Court,

15 **SHANE RHODES** testified as follows:)

16 CLERK OF COURT: Have a seat in the witness chair. If you
17 would, please, state your full name for the record and spell
18 your last name.

19 MR. RHODES: Shane Steven Rhodes. R-H-O-D-E-S.

20 DIRECT EXAMINATION

21 BY MR. CAMPBELL:

22 Q Mr. Rhodes, what name do you go by?

23 A Shane.

24 Q And do you live here in Anderson County?

25 A Yes, sir.

DIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL

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1 Q Are you married?

2 A Yes, sir.

3 Q And where do you work?

4 A Keowee Key Utilities.

5 Q How long have you been working there?

6 A About two years.

7 Q And do you know Damon and Jason Marcengill?

8 A Yes, sir.

9 Q How long have you known them?

10 A About fifteen years, sir.

11 Q Did you grow up with them?

12 A I met Jason whenever we were in our teens, pretty much.

13 Q From time to time, would you go to Hog Tails bar?

14 A Yes.

15 Q Now, on April 26th, 2009, did you have an occasion to go
16 there that night?

17 A Yes.

18 Q Do you recall what time of day it was?

19 A When I went there?

20 Q Yes.

21 A It was around, probably, 7:30 or 8:00, I guess.

22 Q What day of the week was it?

23 A It was a Saturday night.

24 Q Was there a band playing that night?

25 A Yes, sir.

DIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL

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1 Q When you got there, did you see Jason and Damon.
2 Marcengill? Were they already there?

3 A I think Jason was already there. I don't think Damon was
4 there yet.

5 Q But eventually, that night, you saw both of them there
6 at the bar?

7 A Oh, yeah.

8 Q You talked to both of them that night?

9 A Oh, yeah.

10 Q Now, do you know Donnie Ray Gibson?

11 A No.

12 Q Never met him before that night?

13 A I had seen him, but I had never met him.

14 Q You've never spoken to him?

15 A No.

16 Q And did you see him at the bar that night?

17 A Yes.

18 Q Do you see him in the courtroom today?

19 A Yes.

20 Q Could you please identify him?

21 A He's right there. (Indicating)

22 Q In the tan shirt?

23 A Yeah.

24 MR. CAMPBELL: Your Honor, just let the record reflect he
25 is referring to the Defendant.

DIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL

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1 THE COURT: The record so reflects.

2 Q Now, prior to that, had you ever seen him in the bar
3 when you were there?

4 A Yeah.

5 Q How many times do you think?

6 A Maybe twice.

7 Q He wasn't a regular? He didn't come around a lot?

8 A Not that I know of.

9 Q Now, that night, did you happen to see anything happen
10 between him and Damon or Jason Marcengill inside the
11 bar?

12 A I didn't see anything happen between him and Damon. I
13 seen what happened between him and Jason after we came
14 inside.

15 Q And when you were inside -- were you also inside the bar
16 when you saw this?

17 A Yeah.

18 Q And about how close to them were you?

19 A Four or five feet.

20 Q And what did you see happen between Mr. Gibson and Jason
21 Marcengill?

22 A Well, when we walked in, Damon and Mr. Gibson were
23 having words back and forth with each other and I seen
24 Jason walk up to him and say, "Y'all quit. Calm down,"
25 and all that and then Mr. Gibson didn't like him trying

DIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL 171

1 to get in the middle of them and told him to stay out of
2 his business and then it kind of escalated from there.
3 He told him, you know, he said, "I told you to stay
4 back," and he was saying, "This is all a
5 misunderstanding. Let's all just back up and calm down.
6 Wait a minute." And then he started getting into it with
7 Jason so ---

8 Q What did Jason do?

9 A And then he told him, "I done told you to get back, big
10 boy. I ain't telling you again." And then he threatened
11 to cut him and then Jason said, "No, you won't," and
12 palmed him in the chest onto the table.

13 Q And was Joe Fisher present when this was going on?

14 A Who?

15 Q Joe Fisher.

16 A Yes, sir.

17 Q As a result of this, was Mr. Gibson asked to leave?

18 A Yes. Joe got Mr. Gibson. Told Jason to let him up. He
19 was holding him and I told Jason to let him go. I took
20 Jason out the back door and Joe was telling Donnie,
21 "Just come on, you need to go," and was heading for the
22 front door.

23 Q Now, did you stay at the bar after that?

24 A Uh-huh.

25 Q Did Jason and Damon Marcengill also stay there?

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1 A Uh-huh.

2 Q When you say "uh-huh", you mean "yes"?

3 A Yes.

4 Q She's taking down everything you say. We need verbal
5 responses.

6 A I'm sorry.

7 Q Now, did you later that night see Mr. Gibson again?

8 A Way later.

9 Q How long after that?

10 A It was hours. It was way late at night. The first band
11 just got finished playing and they usually open up for
12 them and the other one usually doesn't start until
13 around 11:30 or 12:00 or maybe later. It was late. It
14 was really late at night is all I remember.

15 Q But you saw him come back?

16 A Well, I seen him after he done got there.

17 Q And where did you see him at?

18 A Right outside the back door.

19 Q Now, when you saw him, were you already standing outside
20 on the back porch area?

21 A When I first saw him I was looking out the back door and
22 Joe had told me to come in and I was in the bar. I
23 walked over there and he was standing there with Damon
24 and them and I stepped out the back door and seen that
25 it was him and the other guy.

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1 Q So, Joe didn't recognize him to begin with?

2 A I don't think so or either he was trying to confirm who
3 it was.

4 Q When you saw him the second time, how was his
5 appearance?

6 A He had on a cap and he had on a black leather jacket
7 zipped all the way up and he had a guy with him that was
8 dressed with a black hat or beanie or whatever, a
9 stocking hat, and a black leather jacket and it was
10 zipped all the way up. They were dressed out in leather
11 like they were riding or something.

12 Q Like they were what?

13 A Dressed out in leather like they were riding motorcycles
14 or something.

15 Q And it was warm that night?

16 A Oh, yeah. I had on a sleeveless tee shirt.

17 Q When you saw him this second time, he didn't come
18 through the front door, did he?

19 A No.

20 Q How about the other guy that was with him? Did he come
21 through the front door, too?

22 A No.

23 Q At that point, was anything said to them? Did you say
24 anything to him?

25 A No. When we come out, Joe asked -- well, over there, him

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1 and Damon was coming, he was having words with Damon
2 because Damon was out on the back deck.

3 Q Who was having words with Damon?

4 A Donnie.

5 Q Okay.

6 A Then Joe asked him, just told him to leave, there's no
7 sense in this and he asked Donnie, he said, "Look, just
8 leave. There's no use in all this going on," and he
9 asked him to leave a couple of times.

10 Q And then what took place?

11 A Somebody had woke -- Jason was in my truck asleep and
12 somebody had went and woke him up and he come out the
13 back door looking around and we was up on the upper
14 patio and whenever he come out the door, Donnie turned
15 around and when he seen Jason, he said, "There that son
16 of a bitch is." And when he did, the other guy made a
17 bolt for him.

18 Q You are saying it was the big guy he brought with him?

19 A Uh-huh.

20 Q So, the big guy went after Jason.

21 A Yeah. He dove off that patio straight on to him,
22 blindsided him.

23 Q And then did you see what was taking place between Damon
24 Marcengill and Donnie Gibson?

25 A No. When the guy turned around and he made the bolt

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1 straight behind me and dove on Jason and I just, they
2 hit the ground fighting and I went straight over to them
3 to try to break them up and I kind of heard something,
4 but I don't know what was going on between them and
5 whenever I got them separated, they had already moved
6 from the patio towards right there at the doorway out
7 towards the end of the deck towards where the steps go
8 down.

9 Q You say you turned away from Donnie Gibson and ---

10 A Donnie, Damon, and Joe.

11 Q And then what did you see? Did you see the fight at that
12 point in time between Donnie and Damon Marcengill?

13 A Well, if they fought between the time I was breaking
14 them up I didn't see it. When I seen it, they was all
15 just, they were just standing there and I was lifting
16 Scott up and I told them, "Y'all just need to leave,"
17 and then he said, "Okay." And he went over to the deck
18 and he asked Donnie to leave and he was already with
19 Damon still and he said no and then he told Damon, "You
20 don't ever do that to me again. Don't you ever do that
21 again." And then, he gave him a shove --

22 Q You said, "he", who are you referring to?

23 A Donnie gave Damon a shove. Damon give him a big one back
24 and whenever this -- he kind of rocked back on the
25 railing and when he come around, all I seen was his

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1 shirt lay open, but when he come back around like that
2 and I said, "He's got a knife".

3 Q And then what did you see after that?

4 A When he come around with the knife and I hollered,
5 knife, Jason said, "That's my brother." And Damon had
6 been hitting Donnie after he come around he stretched
7 out like that and went into fighting mode and when Jason
8 started towards that way, he fell, somehow, and the
9 other guy gave him a big old kick in the head and when
10 they come up they kind of blocked me off for a second.
11 They went to fighting and when I turned around, Joe went
12 over there and Damon was still fighting with Donnie and
13 then that's when I seen him come up with -- I seen him
14 cut him with the knife right across here. (Indicating)

15 Q And do you how many knives you saw Mr. Gibson with that
16 night?

17 A I don't think -- I think -- I thought the one he used
18 the first time was a -- I never seen it but just a
19 second, but it looked like a regular pocketknife, you
20 know, but the one he came with when he come up to cut
21 Damon, he was choked up on it is all I know. He wasn't
22 holding it by the handle. I could see that he was
23 holding it by the blade.

24 Q Could you tell if the second knife was a big knife?

25 A It looked to be -- all I could see was that he was

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1 choked up, he was holding the blade in his hand, and
2 then you could see it go ahead, but it was down
3 underneath his forearm and I couldn't tell exactly how
4 long it was, but it looked bigger than a regular
5 pocketknife.

6 Q Now, after you saw him come up with this bigger knife
7 that you believe he was choked up on, he had the blade
8 in his hand. Is that right?

9 A Yeah. Uh-huh. It looked like maybe three or maybe four
10 inches sticking out at the end of his hand.

11 Q What did you see after that?

12 A When he cut Damon with it, all of a sudden Damon flopped
13 back like that and he grabbed here and started stumbling
14 towards, you know, falling over and stumbling towards
15 the little bench area that was there and then he turned.
16 I hollered, "Damon", and he turned to me and he still
17 had it in his hand and then I hit him and then I hit him
18 several times until he fell on the ground over there.

19 Q When you say you hit "him", who do you mean?

20 A Donnie.

21 Q Why were you hitting him?

22 A Because he still had that knife. He done cut one man. I
23 didn't know what his intentions were when he looked at
24 me with it.

25 Q You weren't going to give him a chance ---

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1 A I wasn't going to give him the chance to cut me like he
2 just done Damon. So I hit him several times until he hit
3 the ground over there and I heard Joe hollering that he
4 was cutting Jason.

5 Q So he cut the other fellow?

6 A Yeah. He was just saying, he's killing Jason, because
7 they were over behind me over my left shoulder and I
8 turned around and I went over there.

9 Q At any point, did you see the other fellow, Scotty
10 Hamilton, have a fight with Damon Marcengill?

11 A No. He never even was close to Damon except right there
12 when we was first talking. He was straight on Jason the
13 first time and he was straight on Jason the second time.

14 Q So the whole incident was by themselves? They never
15 included Damon or Donnie in that?

16 A Huh-uh.

17 Q Now, when you were, got involved in the fight with Mr.
18 Gibson and saw he had the knife, did you see anybody
19 else jump in and throw a lick or hit Mr. Gibson, too?

20 A The only one I seen was Damon. I mean, Damon was
21 fighting with him pretty hard and that's the only one I
22 seen myself, but I mean, licks.

23 Q This was a big commotion that was going on right in
24 front of ---

25 A Yeah. It erupted and it happened, it was pretty quick.

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1 Q Now, prior to the altercations between Donnie Gibson and
2 Damon Marcengill, what, if anything, did Mr. Gibson say
3 to Donnie? Or excuse me, what, if anything, did Mr.
4 Gibson say to Mr. Marcengill?

5 A Prior?

6 Q Prior to them actually fighting.

7 A Whenever they were first standing there and he was
8 shoving he was just telling him, you know, don't put
9 your hands on me, never touch me no more, which I never
10 seen the touching part, you know, he was saying, because
11 it will be your last, threatening him with killing him
12 or whatever.

13 Q Did he threaten to kill him?

14 A Yeah, he said something about killing him.

15 Q Now, did you see Damon with a weapon at all?

16 A No.

17 Q Did you see him pull out a knife or anything else?

18 A No.

19 Q And from your point of view, did Damon say anything to
20 provoke this second incident?

21 A No. I mean, it all could have been avoided if he had
22 never come back after he left the first time. I mean,
23 whenever Donnie left the first time the only thing hurt
24 was his pride. It hadn't been nothing done to him and he
25 left on his own like he was all right with it. We

DIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL

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1 thought he'd forget about it, pretty much, until he came
2 back.

3 Q And during this whole argument that went on, on the back
4 deck, were you, yourself, injured at all?

5 A Yeah. I was cut on my hand and hurt my hand in the
6 fight.

7 Q Did you report that?

8 A I didn't realize I was cut on my hand because my knuckle
9 was bleeding so bad right there, but they did take
10 pictures of my hand and all.

11 Q But you didn't file a police report or anything like
12 that?

13 A No. Other than the statement we had to give for that
14 night.

15 Q And after the incident, you weren't allowed to -- law
16 enforcement didn't allow you to leave, did they?

17 A No.

18 Q Not until they took a statement from you?

19 A Yeah, not until they took a statement from us and
20 everybody. They kind of made us wait around until they
21 got completely done. It was around 6:30 in the morning
22 before they ever let us leave.

23 Q Mr. Rhodes, that's all the questions I have. Please
24 answer any questions Mr. McElhannon may have.

25 THE COURT: Cross exam?

CROSS EXAMINATION OF SHANE RHODES BY MR. MCELHANNON 181

1 MR. MCELHANNON: Thank you, Your Honor.

2 CROSS EXAMINATION

3 BY MR. MCELHANNON:

4 Q Mr. Rhodes, what's your wife's name?

5 A Brittany.

6 Q Brittany Rhodes?

7 A Uh-huh.

8 Q Is she related to Damon and Jason Marcengill?

9 A Yes, she's their cousin.

10 Q First cousin?

11 A No, not first cousin.

12 Q She's blood related, though?

13 A Yeah.

14 Q You said in the first altercation, you didn't see
15 anything that happened between Donnie and Damon?

16 A No. Just that they was arguing.

17 Q But you saw Jason, though, physically take Donnie to the
18 table?

19 A Uh-huh.

20 Q How did he do that?

21 A With his hand.

22 Q Did you see him grab him by the throat or try to grab
23 him by the throat?

24 A I seen him push him down right there and hold him down
25 like that. (Indicating)

1 Q Was Joe Fisher there?

2 A Yeah.

3 Q Joe Fisher didn't grab Jason's hand and prevent him from
4 physically putting Donnie down?

5 A No. He grabbed Donnie like that and was telling Jason,
6 "let him up, let him up, let him up", and then I made
7 Jason let go of him.

8 Q So, he didn't, physically, when he tried to grab Donnie
9 by the throat, Joe Fisher didn't physically grab Jason's
10 hand to try to stop him from doing it?

11 A No. Not that I seen.

12 Q You heard Donnie say, at that point inside, "I'll cut
13 you."

14 A Yeah.

15 Q Why didn't you put that in your statement on April 28th,
16 2009?

17 A They didn't really ask me that.

18 Q The 26th, I'm sorry. April 26th, 2009. They didn't ask
19 you?

20 A They just told me to give a statement and I told them
21 what I seen and ---

22 Q All you put as far as ---

23 MR. CAMPBELL: Objection, Your Honor. He's still
24 answering the question.

25 MR. MCELHANNON: I'm sorry.

CROSS EXAMINATION OF SHANE RHODES BY MR. MCELHANNON 183

1 THE COURT: Just let him finish. Go ahead.

2 A I told them what I seen and like I told them that night,
3 you know, we was all there until 6:30 in the morning and
4 we was the last ones to go. I remembered a lot more
5 stuff the next day than I did that night.

6 Q All you put about the first altercation in your
7 statement was "earlier tonight something happened
8 between Donnie and Damon".

9 A That's right. I didn't know what happened between Donnie
10 and Damon.

11 Q But you didn't think hearing Donnie say, "I'll cut you",
12 would be important to put in at the time?

13 A I guess I didn't at the time, because ---

14 Q But when Jason ---

15 MR. CAMPBELL: Objection, Your Honor. He's not letting
16 the witness answer his question fully.

17 MR. MCELHANNON: I'm sorry, Your Honor.

18 THE COURT: I know you are not meaning to. Just let him
19 finish.

20 A Would you repeat the question, please?

21 Q If I can remember. Oh, you didn't put anything in about
22 Jason physically assaulting Donnie by putting him down
23 on the table.

24 A No. Whenever he was standing there, I guess I didn't. I
25 mean, if I didn't put it in there, it's not in there. It

1 don't mean it didn't happen.

2 Q And you said when they came back, later, you said it was
3 hours later. Right?

4 A Uh-huh.

5 Q About three or four hours later?

6 A I would guess. I'm not sure. I wasn't timing it.

7 Q You said that Donnie, that both of them had on leather
8 jackets. Right?

9 A Uh-huh.

10 Q Donnie had on a cap?

11 A Uh-huh.

12 Q And the other fellow had on a stocking cap?

13 A Uh-huh.

14 Q Like a baseball cap?

15 A No. Are you talking about him or the other guy? Yeah, he
16 had on a baseball cap.

17 Q Donnie had on a baseball cap?

18 A Yeah.

19 Q And you heard, according to your direct exam today
20 although it's not in your statement taken a couple of
21 years ago, that when Donnie came back up on the porch
22 and saw Damon, he said, "There that son of a bitch is"?

23 A No. I didn't say that. I said he pointed at Jason and
24 said, "There that son of a bitch is." That's what I
25 said.

CROSS EXAMINATION OF SHANE RHODES BY MR. MCELHANNON

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1 Q He pointed at Jason. Have you discussed your testimony
2 with any of the other witnesses in this case?

3 A Over the two-and-a-half years, yeah. Several times.

4 Q Today?

5 A Yeah.

6 Q Out in the lobby?

7 A Yeah.

8 Q Who were you talking to?

9 A Me and Joe.

10 Q You said you saw Donnie with what you thought was a
11 knife.

12 A At which time?

13 Q Well, when ---

14 A I seen him with a knife when he cut him right there.

15 Q I thought the first time you said a pocketknife.

16 A Uh-huh. When he come up, I got a glimpse of the silver
17 and the shirt lay open.

18 Q A pocketknife?

19 A Uh-huh.

20 Q In your statement, though, you don't mention a
21 pocketknife. Do you?

22 A I just said a knife.

23 Q Just one knife.

24 A He had a knife. It could have been the same one.

25 Q And you said, in your statement, Donnie came around with

CROSS EXAMINATION OF SHANE RHODES BY MR. MCELHANNON 186

1 something in his hand. You didn't say a knife back then,
2 did you?

3 A I said he had something in his hand to cut him with.

4 Q Well, you said actually, your words are, "Donnie came on
5 around with something in his hand."

6 A And I said he cut him, didn't I?

7 A No. You don't say that. You go on to say, "Donnie came
8 around with his arm and possibly cut Damon." Possibly.

9 A He cut him. There wasn't no possible to it.

10 Q You weren't looking at Damon's hands, were you?

11 A Uh-huh.

12 Q Damon's hands?

13 A They was in front of him.

14 Q But you weren't looking at them, though, were you? Did
15 you say he had a knife or a weapon or anything?

16 A I didn't see one.

17 Q But you weren't looking at them.

18 A I seen him when he was hitting him with them.

19 Q So, Damon hit Donnie?

20 A Uh-huh.

21 Q Several times?

22 A Uh-huh.

23 Q Did you see anybody else hitting or kicking Donnie?

24 A I didn't see nobody else. No.

25 Q Did you see Walt Wooten back there that night on that

CROSS EXAMINATION OF SHANE RHODES BY MR. MCELHANNON

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1 deck?

2 A I seen him after most of it was over.

3 Q Did you see Walt Wooten somehow taking a knife from
4 Donnie?

5 A No. I seen him holding Donnie on the ground.

6 Q On the ground?

7 A Uh-huh.

8 Q But you didn't see him get Donnie to let the knife go?

9 A Nuh-uh.

10 Q Did you see Donnie get kicked in the face?

11 A No.

12 Q Let me get this straight, were all of y'all taking shots
13 at Donnie one at a time or was it three or four at one
14 time?

15 A No. Whenever Donnie fell down, I didn't see nobody else
16 over there. When Joe said he was cutting Jason, I turned
17 around and the other guy was cutting Jason and I seen
18 him coming up with his knife and going down and I come
19 around there and I was wrestling with him trying to get
20 him, I was fighting with him trying to get him off of
21 Jason and then after I got up from there, that's when I
22 seen Walt laying on the ground with Donnie.

23 Q Did you see Allen Ralph Gesell out there?

24 A Who?

25 Q Allen Ralph Gesell.

REDIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL 188

1 A Yeah, I seen him out there.

2 Q You didn't see him up on a bench?

3 A Huh-uh.

4 Q Kicking Donnie in the face?

5 A No.

6 Q Basically, the last part of your statement that you gave
7 back then was a fight broke out and it was all a blur.
8 Is that right?

9 A It all happened really fast.

10 Q Let me ask you this, was a lot of drinking going on that
11 night?

12 A There was drinking going on.

13 Q A lot of people intoxicated?

14 A I would say some of them was.

15 MR. MCELHANNON: That's all the questions I have.

16 THE COURT: Redirect?

17 MR. CAMPBELL: Yes, sir, just a couple.

18 REDIRECT EXAMINATION

19 BY MR. CAMPBELL:

20 Q Mr. Rhodes, after this occurred over two-and-a-half
21 years ago and you talked to some other people that
22 witnessed what took place that night, did that change
23 your testimony in any way, shape or form?

24 A No.

25 Q Are you testifying to what you saw?

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

REDIRECT EXAMINATION OF SHANE RHODES BY MR. CAMPBELL 189

1 A Yes.

2 Q Now, when you were out on the back deck and all the
3 commotion was a big blur, this fight that was taking
4 place, were you paying attention exactly to what other
5 people such as Allen and Walt were doing?

6 A No.

7 Q What were you trying to do? What were you paying
8 attention to?

9 A All I was trying to do was to keep them from cutting or
10 hurting anybody else.

11 Q When you say "them", are you referring to Mr. Gibson?

12 A Gibson and that other guy.

13 Q Hamilton?

14 A Yeah, Hamilton.

15 Q Did you see anybody else but them two with a knife that
16 night?

17 MR. MCELHANNON: Objection, Your Honor. That's not, that
18 evidence, I didn't bring that up on cross examination. That's
19 new.

20 THE COURT: Overruled. Go ahead.

21 Q Did you?

22 A Did I see anyone else with a knife? No.

23 MR. CAMPBELL: I have no further questions.

24 MR. MCELHANNON: I have one follow-up matter, Your Honor.

25 CROSS EXAMINATION

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

RE-CROSS EXAMINATION OF SHANE RHODES BY MR. MCELHANNON 190

1 BY MR. MCELHANNON:

2 Q You didn't see Damon with a knife sheath?

3 A No.

4 MR. MCELHANNON: No further questions, Your Honor.

5 THE COURT: May this witness be excused?

6 MR. CAMPBELL: I have no further questions.

7 THE COURT: All right. Thank you, sir. You may be
8 excused. How long is your next witness?

9 MR. CAMPBELL: Your Honor, may we approach?

10 THE COURT: Yes, sir.

11 (Brief bench conference off the record)

12 THE COURT: Mr. Campbell, I'm going to go ahead and take
13 a morning break. If you would, go back, you guys relax. If
14 anyone on the jury needs anything that you don't have, make
15 sure Buck knows and he's make sure you get it. Okay? If you
16 would go back to the jury room right now.

17 (Jury out at 10:43 AM)

18 THE COURT: Is the State ready to proceed?

19 MR. CAMPBELL: Yes, Your Honor.

20 THE COURT: Is the Defense ready to proceed?

21 MR. MCELHANNON: Yes, Your Honor.

22 THE COURT: All right. Bring us the jury, please.

23 (Jury in at 11:03 AM)

24 THE COURT: Mr. Campbell, would you call your next
25 witness, please?

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 191

1 MR. CAMPBELL: Your Honor, the State would call LaBriska
2 Christopher.

3 (After being duly sworn by the Clerk of Court,
4 LABRISKA CHRISTOPHER testified as follows:)

5 CLERK OF COURT: Please have a seat in the witness chair.
6 If you would, please state your full name for the record and
7 spell your last name.

8 MS. CHRISTOPHER: Labriska Christopher.
9 C-H-R-I-S-T-O-P-H-E-R.

DIRECT EXAMINATION

10
11 BY MR. CAMPBELL:

12 Q Ms. Christopher, where do you live?

13 A [REDACTED] Pendleton, South Carolina.

14 Q And do you know Donnie Ray Gibson?

15 A Yes, I do.

16 Q How do you know him?

17 A He is my uncle.

18 Q Is he in the courtroom today?

19 A Yes, sir.

20 Q Would you please identify him?

21 A (Indicates by pointing)

22 Q The man with the tan shirt on?

23 A Yes, sir.

24 MR. CAMPBELL: Your Honor, we would ask that the record
25 reflect that she identified the Defendant.

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 192

1 THE COURT: The record so reflects.

2 Q Do you know Scotty Hamilton?

3 A Yes, I do.

4 Q And how do you know him?

5 A He's my brother.

6 Q And in 2009, do you know how old your uncle was?

7 A He was 38, or thirty-something at the time.

8 Q Your brother?

9 A Uh-huh.

10 Q How about your uncle?

11 A I think Donnie was 52.

12 Q And where did Donnie live?

13 A He lived with my brother, Scotty.

14 Q Do you know what address they lived at?

15 A Not at the time, I didn't, but I know now it's [REDACTED]

[REDACTED], Anderson.

17 Q Have you ever been down there?

18 A Yes.

19 Q How long did it take you to get there from Pendleton?

20 A About forty-five minutes.

21 Q And on April 26th, 2009, was he living with Scotty, your
22 brother?

23 A Yes, he was.

24 Q Now, on the early morning hours of April 26th, 2009, did
25 you have the opportunity or occasion to see both Donnie

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 193

1 and Scotty?

2 A Yes, sir.

3 Q And about what time in the morning was that?

4 A I know it was after 12:00 AM. I know it was after 12:00
5 AM. I don't know specifically what time it was.

6 Q Where were you living at the time?

7 A [REDACTED] Pendleton, South Carolina.

8 Q And approximately how far from Hog Tails bar was that
9 located?

10 A Maybe a half mile.

11 Q And when you saw them, how did they appear? Your first
12 observation of them.

13 A Scotty -- I was in bed and I had, on the 19th I had been
14 hit by a car and so had a broken ankle so there's a
15 knock on the door and so I had to get into my wheelchair
16 and get out into the living room and so it took me a
17 minute and I said, "Who is it," and Scotty said, "It's
18 me," and I could tell who it was by his voice. He said,
19 "It's me and I need your help". So I opened the door.
20 Scotty stepped through the door and Donnie was kind of
21 leaning on the side of the house kind of in the doorway
22 but leaning on the outside of the house. Donnie stumbled
23 in. Scotty looked like he was shaken, worried. Donnie
24 come in the door. Donnie had a gash over his eye, really
25 bad, some puncture holes behind his ear and the back of

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 194

1 his head, his hand was cut pretty bad, one of his
2 fingers, all the way to the bone. He was covered in
3 blood.

4 Q How were both of them dressed?

5 A Scotty had on a white tee shirt, a black Harley Davidson
6 jacket, blue jeans and white tennis shoes. Donnie had on
7 a black Harley Davidson tee shirt, a black Harley jacket
8 or a black leather jacket, blue jeans and black boots or
9 black shoes.

10 Q Now, prior to you seeing them on this early morning of
11 April 26th, 2009, had you seen them prior to that,
12 earlier that evening?

13 A No.

14 Q On that day?

15 A No.

16 Q When you saw Donnie, did you talk to your uncle?

17 A I asked -- first, I asked Scotty what happened and he
18 said, "I'll let Donnie tell you," and so once they got
19 in the bathroom and kind of got his bleeding under
20 control because he was bleeding pretty bad, after they
21 got the bleeding kind of slowed down and got it kind of
22 stopped, I asked him what happened.

23 Q And what did he tell you?

24 A He said that he was at the bar and he was talking to
25 some girl and she asked him what he did for a living and

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 195

1 he said he laid flooring for a living. She said, "My
2 boyfriend doesn't have a job, can't get a job." He said
3 he gave her his phone number and she left and went and
4 got her boyfriend and come back and said her boyfriend
5 was talking to him about a job and he said the guy
6 started up on him and sucker punched him and he said, "I
7 wasn't going to let nobody punk me up like that."

8 Q When you say "punk me up", what does that mean to you?

9 A Making him look like a little girl. That's the simplest
10 way to put it.

11 Q And after he told you he wasn't going to let anyone
12 "punk" him up like that, did he tell you anything else?

13 A After they had been there, approximately, about thirty
14 minutes, later on towards the end of them leaving he did
15 make a statement that -- I did ask him, "Did anybody get
16 hurt," and he was like, "Most definitely", and I said,
17 "Anybody get killed?" and he was like, "I don't know."
18 After that he did make a statement that he did cut
19 someone or cut some people but he was kind of out of it
20 at the time he said that.

21 Q And prior to that did he tell you after the first
22 incident when he said they guy sucker punched him, did
23 he go home?

24 A Yes. He said he went home, got what he needed, and went
25 back.

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 196

1 Q And from your observation based on his injuries, did he
2 appear to you to need medical treatment?

3 A Yes, he did.

4 Q And did, also, Scotty need medical treatment?

5 A Yes, he did.

6 Q What was his reaction to receiving some sort of medical
7 help?

8 A I told him he needed to go to the hospital because a cut
9 over his right eye was like really, really wide and it
10 was pretty huge and it needed stitches and his hand was
11 cut severely and I told him he was going to need
12 stitches and he was like, "I can't go to the hospital,"
13 and I said, "Why?", and he was like, "Because they will
14 know who I am", and I was like, "Well, you've got to get
15 some stitches, because it's not going to close up on its
16 own and he said, "I can't go to Greenville or if I go to
17 Greenville, I've got to go home and change clothes."

18 Q And what kind of vehicle was he in that night?

19 A He had a Ford pickup.

20 Q I'm sorry, I didn't hear you.

21 A A Ford pickup.

22 Q And at any point while he was at your apartment ---

23 A It was a house.

24 Q At your house, I'm sorry. Did he try to make any phone
25 calls to law enforcement?

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 197

- 1 A No.
- 2 Q Did he attempt to call 911?
- 3 A No. He was on the phone. I don't know with who. He was
- 4 on the phone when they first arrived.
- 5 Q When they arrived and you say he was on the phone, was
- 6 he using your phone?
- 7 A No. He was on his.
- 8 Q So, he had a cell phone with him?
- 9 A Yes.
- 10 Q Do you recall his phone number?
- 11 A Not now. At the time I had it prograded into my home
- 12 phone.
- 13 Q In your statement, you put [REDACTED]. Would that be about
- 14 right?
- 15 A Yes. That's right.
- 16 Q So, he didn't ask to use your phone, he already had one
- 17 with him?
- 18 A Yes.
- 19 Q Now, at some point, he and Scotty both left together. Is
- 20 that right?
- 21 A Yes, sir.
- 22 Q And after they left, what did you do?
- 23 A When they left, or after they pulled out onto the road,
- 24 they went to the left out of the driveway. When they had
- 25 first gotten there, my ten year old, at the time, had

DIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 198

1 made a pallet in the living room floor and was sleeping
2 outside my bedroom because of me having a broken ankle.
3 She wanted to make sure she could hear me. When they
4 come in, with the way Donnie was standing, there was
5 blood dripping on her bedcovers and on her and she woke
6 up and it scared her really bad when she seen it and I
7 told her to go get in her bed and she went over, so it
8 was probably about an hour-and-a-half and I was trying
9 to figure out what I should do and that's when it come
10 on the news, Donnie's picture, and what had happened
11 down at the bar.

12 Q And did you hear the sirens?

13 A Yes. I heard the sirens before they actually -- a few
14 seconds before they got to the house, I heard the
15 sirens. When they got to the house, there were a lot of
16 sirens, because my house is walking distance from the
17 red light from 76 and so it's very clear and you can
18 hear the sirens.

19 Q In describing your brother, Scotty, how big is he?

20 A Around six four-and-a-half, six five.

21 Q How much was he weighing around that time?

22 A I think around 220.

23 Q And when you were talking to Mr. Gibson, did he tell you
24 this all happened at Hog Tails?

25 A Yes, he did.

CROSS EXAMINATION OF LABRISKA CHRISTOPHER BY MR. MCELHANNON 199

1 Q Now, at that point, did you eventually go to Hog Tails,
2 yourself?

3 A Yes, sir.

4 Q And what was the reason or purpose that you went there?

5 A Because after the helivac come over the house and they
6 had a manhunt out for him, I didn't want to be charged
7 with accessory after the fact of the crime or murder,
8 whatever the case may be. I didn't want to be caught up
9 in it as accessory after the fact.

10 Q So, you went there and you talked to law enforcement?

11 A Yes, sir.

12 Q Did you tell them what you had witnessed with Mr.
13 Gibson?

14 A Yes, sir.

15 Q I know you are here today testifying about family, but
16 do you have a grudge against Mr. Gibson ---

17 A No.

18 Q --- to get you to testify?

19 A No. I love him very much. He's family.

20 Q And so, what are you here for today?

21 A I did not want to be caught up in something where
22 somebody got murdered or something happened and me not
23 step forward and then me end up going to prison for
24 something I witnessed and did not come forward.

25 Q I don't have anything further for this witness. Please

CROSS EXAMINATION OF LABRISKA CHRISTOPHER BY MR. MCELHANNON 200

1 answer any questions Mr. McElhannon may have.

2 THE COURT: Cross exam?

3 MR. MCELHANNON: Thank you, Your Honor.

4 CROSS EXAMINATION

5 BY MS. CHRISTOPHER:

6 Q Ms. Christopher, just to start, at the end of your
7 testimony, you didn't actually witness anything, did
8 you?

9 A No. I did not.

10 Q And like you said, accessory after the fact and I
11 appreciate that as a lawyer and that you didn't want to
12 be charged with that, but you don't know what transpired
13 at Hog Tails that night, do you?

14 A No, I do not.

15 Q And when Donnie was at your house, how would you
16 characterize his wounds?

17 A They was fair.

18 Q Had he been severely beaten?

19 A Yeah. I mean, the puncture marks on his head, the
20 puncture wounds on the back of his head were around that
21 diameter. I mean, holes behind his ear, which was ---

22 Q Which side of his head?

23 A Right here behind his ear. It was on the left side.

24 Q Puncture wounds?

25 A Yes. Like he had been hit with an object, because it was

CROSS EXAMINATION OF LABRISKA CHRISTOPHER BY MR. MCELHANNON 201

1 not just from fists, it was from some kind of object.

2 Q Let me show you Defendant's Exhibits #1 and #2 and see
3 if you can identify these. What are these?

4 A The wound above his eye and his fingers where they were
5 cut.

6 Q I believe you testified that one of his fingers had been
7 cut to the bone.

8 A Yes.

9 Q And the laceration above his eye was opened up?

10 A Yes. It was wide open. It looked like you could see his
11 eyebrow on the bone and his forehead right there where
12 his eyebrow is.

13 Q Did you ask -- let me clear this up right quick. You are
14 not going to appreciate this. I think you said you
15 thought he was 52.

16 A Yes.

17 Q I think he's actually 59.

18 A Okay. Sorry.

19 Q He's actually seven years older than you thought he was.

20 A Okay.

21 Q Did you ask Donnie that night what he did or if he did
22 anything?

23 A I asked Scott what happened and he said, "I'll let
24 Donnie tell you".

25 Q After that, did he reply anything to you?

REDIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 202

1 A No, he did not.

2 Q You don't remember your statement?

3 A When I asked him, "What did you do?", he gave me a look
4 like what am I supposed to say or what am I supposed to
5 do, but he did not say nothing else to me besides I'll
6 let Donnie tell you.

7 Q Your statement actually says, "I asked Scotty what did
8 you do and he gave me a look like, come one, what am I
9 supposed to do.

10 A Right. That is correct.

11 Q When you stated that Donnie came home and got what he
12 needed, you don't know what he meant by that, do you?

13 A No. That's specifically what he said. I could speculate,
14 but I don't know.

15 Q Could it have meant he got Scotty?

16 A I don't know.

17 Q He is 6'4", two hundred and some odd pounds, correct?

18 A I don't know.

19 Q Donnie did tell you about the first altercation, right?

20 A Yes, he did.

21 Q And he stated this guy sucker punched him, right?

22 A Yes, he did.

23 MR. MCELHANNON: That's all the questions I have.

24 THE COURT: Redirect?

25 MR. CAMPBELL: Just a couple.

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

REDIRECT EXAMINATION OF LABRISKA CHRISTOPHER BY MR. CAMPBELL 203

REDIRECT EXAMINATION

BY MR. CAMPBELL:

Q Ms. Christopher, based on what your uncle told you in the early morning hours and what you heard, sirens and helicopters, you knew something bad had happened.

A Yes, I did.

Q And based upon your opinion of what he told you and what you saw and observed, did you feel like he was involved in it?

A Yes, I did.

MR. CAMPBELL: I have no further questions.

THE COURT: May this witness be excused?

MR. CAMPBELL: Yes, sir.

MR. MCELHANNON: No objection.

THE COURT: Thank you, ma'am. You may be excused. Would you call your next witness?

MR. CAMPBELL: May Mr. McElhannon and I approach real quick?

THE COURT: Yes, sir.

(Bench conference off the record)

MR. CAMPBELL: Should we call our next witness, Your Honor?

THE COURT: Yes, sir.

MR. CAMPBELL: Lilly Gallman.

(After being duly sworn by the Clerk of Court,

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

DIRECT EXAMINATION OF LILY GALLMAN BY MR. ALLEN

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1 LILLY GALLMAN testified as follows:)

2 CLERK OF COURT: Please have a seat. If you would, state
3 your full name for the record and spell your last name.

4 MS. GALLMAN: My name is Lilly Smalls Gallman. Gallman is
5 spelled G-A-L-L-M-A-N.

6 DIRECT EXAMINATION

7 BY MR. ALLEN:

8 Q Ms. Gallman, tell us a little bit about your education
9 and background and what certifications you might have.

10 A I am employed with the South Carolina Law Enforcement
11 Division as a forensic DNA analyst. I received a biology
12 degree from the University of South Carolina. Once I
13 received my degree, I continued working in the area of
14 molecular genetics. I began working with the South
15 Carolina Law Enforcement Division in January of 1990, as
16 I stated, as a forensic DNA analyst. Since that time
17 I've been trained in the area of forensic DNA analysis
18 by the FBI schools. I've also been trained in the area
19 of serology, which is the identification of body fluids.
20 I've taken advanced genetic courses and advanced
21 statistical courses to enable me to do the job that I
22 have.

23 Q How many times have you been qualified as an expert in
24 DNA analysis?

25 A Approximately, fifty.

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

DIRECT EXAMINATION OF LILY GALLMAN BY MR. ALLEN

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1 MR. ALLEN: Your Honor, at this time, the State moves to
2 qualify Ms. Gallman as an expert witness in DNA analysis.

3 THE COURT: Any objection?

4 MR. MCELHANNON: No objection, Your Honor.

5 THE COURT: All right. Ladies and gentlemen of the jury,
6 this witness will be qualified as an expert in the field of
7 DNA analysis. Is that correct, Mr. Allen?

8 MR. ALLEN: Yes, Your Honor.

9 THE COURT: All right. Normally, a witness is limited to
10 testifying about what they heard, they saw, they sensed, what
11 you normally consider, using your senses. They are not
12 allowed, normally, to give their opinion. However, because of
13 a person's education or their experience, they may be
14 qualified as an expert and allowed to give their opinion in
15 the area of their expertise. In this case, Ms. Gallman has
16 been qualified as an expert in DNA analysis and will be
17 allowed to give her opinion in that area. Just like any other
18 evidence you hear in this case, you can accept it, reject it,
19 or do with it what you want. All right. You may proceed.

20 Q Ms. Gallman, did you receive any evidence in the case of
21 The State versus Donnie Ray Gibson?

22 A Yes, I did.

23 Q Could you tell us what that was?

24 A I received swabs and cuttings for items in this
25 particular case. I received swabs that were said to come

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

DIRECT EXAMINATION OF LILY GALLMAN BY MR. ALLEN

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1 from Mr. Gibson's shoes, cuttings from two jackets, one
2 that was found in a bedroom closet and another located
3 on a couch in a residence. I also received standards
4 that were taken from the subject and also from the
5 victim, the victims in this case.

6 Q Ms. Gallman, what I'm going to do is hand you State's
7 Exhibits #58 and #59. Now, Ms. Gallman, can you tell me
8 a little bit about this item, that in your report is
9 marked as Item #2.

10 A These shoes are labeled as SLED's item #2. Swabs were
11 taken from these shoes and given to me to perform DNA
12 analysis on them. The first thing I did with the swabs
13 was to detect for the evidence of blood and blood was
14 indicated on two of the swabs. Three of the swabs, I'm
15 sorry. And they were labeled as SLED's items #2.1, 2.3,
16 2.2, and 2.4. After I established that I did have
17 possibly blood on them, they were taken on to develop a
18 DNA profile from the blood found on these items.

19 Q What samples were compared for DNA analysis of the
20 shoes?

21 A From the shoes I received four different items. Three
22 were swabs and one was a cutting. All tested positive
23 for blood and then a profile was developed from them.
24 Reading from my report here, let's look at item #2.1.
25 Once I develop a DNA profile from the item, I compare it

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1 to the three standards that I received in this
2 particular case. I received one from Damon Marcengill
3 and one from Jason Marcengill and one from Donnie Ray
4 Gibson. Item #2.1, which is a swab from the shoe,
5 matched the DNA profile of Damon Marcengill. And then
6 the next item #2.2 matched the DNA profile of Donnie Ray
7 Gibson. Item #2.3 was from an unidentified male
8 individual and Item #2.4 also matched Donnie Ray Gibson.

9 Q Thank you, ma'am.

10 MR. ALLEN: Your Honor, at this time, I'd like to move
11 these items into evidence.

12 THE COURT: Any objections?

13 MR. MCELHANNON: No objections.

14 THE COURT: Admitted, without objection.

15 (Whereupon, tennis shoes and SLED items 2.1, 2.2, 2.3
16 and 2.4 are admitted into evidence as State's Exhibit #59,
17 without objection)

18 Q Ms. Gallman, the next item I'm going to show you is
19 what's been marked as State's Exhibit #58. Ms. Gallman,
20 can you identify this item that I just handed to you?

21 A This is SLED item #3, which is the black leather jacket
22 that we recovered from the bedroom closet. I received
23 two cuttings and one swab from this particular item. The
24 two cuttings were positive for blood. I identified blood
25 on those two items and the third item, the third one,

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1 3.3, I was checking for any DNA, we are looking for
2 ownership on that particular item. The results when I
3 developed a DNA profile from those items, Item 3.1 and
4 3.2 matched Donnie Ray Gibson's DNA profile and Item 3.3
5 was a mixture and the major contributor was Donnie Ray
6 Gibson. The minor contributor, the DNA profile, was
7 insufficient for reliable interpretation. It was not
8 enough information there to gather a result from that.

9 Q The two samples, you were able to obtain a result and
10 the match was Donnie Ray Gibson?

11 A All three, I was able to determine him. Okay, 3.1 and
12 3.2 were like single source, meaning like it was not a
13 mixture and they matched Donnie Ray Gibson and Item 3.3
14 was a mixture and the major contributor, meaning more
15 DNA was there from Mr. Gibson than the minor contributor
16 who was insufficient for reliable interpretation.

17 Q Thank you. I've got one more item to show you. This is
18 the knife that you received from the Anderson County
19 Sheriff's office. Could you tell us what samples you
20 used and what your results were?

21 A This is SLED Item #5. Three swabs were taken from this
22 particular item, two from the blade and one from the
23 handle. The two from the blade, Item 5.1 and 5.2 were
24 positive for blood. Item 5.3 was taken for ownership to
25 see who was handling the knife so Item 5.1 matched the

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1 DNA profile of Donnie Ray Gibson. Item 5.2 was a
2 mixture, just like 3.3, but the major contributor to
3 this item DNA profile matched the DNA profile of Donnie
4 Ray Gibson. The other swab 5.3 from the handle, there
5 was, it was from an unidentified individual. I did not
6 have a standard from the individual whose DNA was on the
7 handle.

8 Q Ms. Gallman, what, the samples that you took from the
9 knife, where were the swabs taken? Where was the blood
10 found on the knife, itself?

11 A Okay. The, the two swabs that were positive for blood,
12 Items 5.1, SLED's Items 5.1 and 5.3 were taken from this
13 area (holds up knife, indicating).

14 Q From the blade of the knife?

15 A From the blade. If you look at the knife, there's
16 indication as to where Item 5.2 and 5.1, there's a
17 circle for 5.1, which is looking here and 5.2, which is
18 looking there. And then Item swab 5.3 was the whole
19 handle, was swabbed.

20 Q Ms. Gallman, when you said earlier, when you were
21 talking about some of the other samples, you mentioned
22 the phrase, "Insufficient for reliable interpretation",
23 could you explain to the jury exactly what you mean by
24 that?

25 A When I say that there was insufficient for reliable

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1 interpretation, meaning that there was not enough
2 information there to include or exclude a person from
3 being a the contributor of that DNA profile. So it was
4 just not enough information.

5 MR. ALLEN: Your Honor, at this time I'd like to move
6 State's Exhibits #55 and #58 into evidence.

7 THE COURT: That's State's Exhibits #55 and #58?

8 MR. ALLEN: Yes, sir.

9 MR. MCELHANNON: What's the State's number on the knife?
10 I didn't get the number on the knife.

11 MR. ALLEN: Fifty-five is the knife.

12 THE COURT: And you are just moving in Exhibit #58 or
13 both?

14 MR. ALLEN: Both of them.

15 THE COURT: Any objection to either one?

16 MR. MCELHANNON: No objection on either one.

17 THE COURT: Okay. State's Exhibits #55 and #58 are coming
18 in, without objection.

19 (Whereupon, a knife and a leather jacket are entered
20 into evidence as State Exhibits #55 and #58, without
21 objection.)

22 Q Ms. Gallman, let me ask you as far as the knife handle,
23 the fact that you didn't have a match on the actual
24 handle, can you say that means that the handle on the
25 knife was never handled by Mr. Gibson?

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1 A No.

2 Q What does that mean?

3 A I'm saying that when the handle was swabbed, that what
4 was gathered at that time was from an unidentified
5 individual. It's not stating who touched it or who
6 handled it or anything of that sort.

7 Q Just from your standpoint, you weren't able to determine
8 whose DNA that was?

9 A That's correct.

10 MR. ALLEN: No further questions at this time.

11 THE COURT: Cross examination?

12 MR. MCELHANNON: Thank you, Your Honor.

13 CROSS EXAMINATION

14 BY MR. MCELHANNON:

15 Q Ms. Gallman, SLED's Item 2, the shoes, those were
16 actually taken from Donnie Ray Gibson. Correct?

17 A I don't know. They were entered into evidence stated as
18 being his shoes.

19 Q Okay. Do you have your DNA analysis report up there with
20 you?

21 A Yes.

22 Q Would you look on the first page and look at 2.1? Is
23 that not identified as whose shoes those are or where
24 they came from?

25 A Yes, it does say they came from Donnie Ray Gibson, but

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1 you asked me if they may come from him. I'm thinking you
2 are saying that I saw when they removed them from him.

3 A I'm sorry. I just meant that information that you got
4 from law enforcement was that they were Donnie Ray
5 Gibson's shoes, probably.

6 A Yes.

7 Q I didn't make myself clear. Also, the jacket, SLED's
8 Item #3. Is that the way that happened? Law enforcement
9 told you it was taken from a closet belonging to ---

10 A Yes. When the item was logged in at SLED, this is
11 information that was given to us.

12 Q And on both of those, your Items 2 and 3, the shoes and
13 the leather jacket, swabs that you took positively show
14 that DNA or blood on those two items were Donnie Ray
15 Gibson's. Correct?

16 A Item 2.1, the DNA profile matched Damon Marcengill.

17 Q And the other, there was also a match on that, was it
18 not, for Donnie Ray Gibson?

19 A Yes.

20 Q And that basically just means that apparently Damon
21 Marcengill and Mr. Gibson bled on the same item?

22 A That means that their DNA profile was found on the same
23 item.

24 Q And was that true for the shoes, as well? Or the jacket?

25 A The jacket? Which jacket?

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1 Q Item #3.

2 A Item #3? Yes.

3 Q I believe you stated that 3.1 and 3.2 were definitely
4 Donnie Ray Gibson's profile. Correct?

5 A Yes. There was not a mixture on those two items.

6 Q And on 3.3, Mr. Gibson was the major contributor and the
7 other was unidentified. Correct?

8 A The other one was insufficient for reliable
9 interpretation.

10 Q Okay. Let's go to State's #55, which is your Item 5,
11 which is the knife. There were three swabs taken, two
12 from the blade and one from the handle?

13 A That's correct.

14 Q And the two from the blade, 5.1 and 5.2, can you state
15 again what your analysis showed on that?

16 A Item 5.1 of the DNA profile, the DNA profile of 5.1
17 matched the DNA profile of Donnie Ray Gibson.

18 Q Okay.

19 A And then the DNA obtained from Item 5.2 was a mixture
20 and Donnie Ray Gibson is the major contributor to that
21 mixture.

22 Q Which meant that you know the DNA -- to what probability
23 was that? Some quadrillion for Donnie Ray Gibson?

24 A I did not apply a stat to that, a statistical value to
25 that item. I did it on the single source ones and that

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1 was one in nine hundred sixty trillion.

2 Q Okay. So, you're pretty sure that the DNA on those was
3 Donnie Ray Gibson's on the blade?

4 A Yes.

5 Q I'm going to ask you a question and you tell me if you
6 are qualified to answer it. If a person were cut by a
7 knife blade, cut severely, more than once, would you
8 tend to find DNA on that blade?

9 MR. ALLEN: Objection, Your Honor. Speculation.

10 THE COURT: Lay foundation for it, please, sir.

11 MR. MCELHANNON: That's why I was asking her if she was
12 qualified. I was waiting for a yes or no.

13 A No. I can't say for sure if you would or not.

14 Q Okay. That's fair enough. That's why I asked. And you
15 swabbed the handle, which is 5.3 and I believe that you
16 said you do that for identification for ownership of the
17 knife?

18 A Only to check to see who was handling it, that
19 particular item.

20 Q And that came back, my client's DNA, Mr. Gibson's DNA
21 was not on that?

22 A His DNA profile was not developed from that particular
23 item, not to say he did not touch it, but on that
24 particular item I was not able to develop a DNA profile
25 that matched him.

1 Q Okay. Not to say someone else did not handle that knife.
2 Correct?

3 A It's not to say he didn't touch it and someone else did,
4 because it's possible that he did touch it and I did not
5 pick up his DNA profile.

6 Q It's possible someone else handled the knife, as well?

7 A Yes.

8 MR. MCELHANNON: That's all the questions I have.

9 THE COURT: Redirect?

10 MR. ALLEN: No further questions, Your Honor.

11 THE COURT: May this witness be excused?

12 MR. ALLEN: Yes, sir.

13 THE COURT: Thank you, ma'am, you may be excused.

14 (Brief bench conference off the record)

15 THE COURT: All right. Mr. Campbell, I've conferred with
16 counsel and it appears that the next witness is going to be
17 rather lengthy. Instead of breaking up testimony, I'm going
18 to go ahead and excuse the jury for lunch and ask that you be
19 back in your chambers no later than 1:15. I remind you that
20 you are not to speak amongst yourselves or to anyone else
21 about the case, but at this point, you are free to go to
22 lunch until 1:15. Thank you.

23 (Jury out at 11:45 AM)

24 FIFTH AMENDMENT RIGHTS

25 THE COURT: All right. Mr. Gibson, would you please

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1 stand, please? Would you raise your right hand?

2 (Oath is duly administered to the Defendant by Judge
3 McIntosh)

4 I need you to speak loud enough so I can hear you and
5 the court reporter can hear you. Okay, sir? And give me
6 verbal responses, okay?

7 MR. GIBSON: Yes, sir.

8 THE COURT: Now, Mr. Gibson, I'm going to explain certain
9 of your constitutional rights. We've gotten close to that
10 point in the trial when you need to make a decision whether
11 or not you are going to present a defense. You have a right
12 to claim the protections of the fifth amendment to the United
13 States Constitution which states in part and I'm going to
14 read it to you, "That no person shall be compelled in any
15 criminal case to be a witness against himself." Do you
16 understand that right?

17 MR. GIBSON: Yes, sir.

18 THE COURT: Have you had that explained to you?

19 MR. GIBSON: Yes, sir.

20 THE COURT: Just so that you do know and I'm satisfied
21 that you do, but that means that you cannot be required or
22 forced to testify against yourself in this case. Now, that
23 being said, you do have the right to testify on your own
24 behalf. No one can make you testify, however, because of that
25 constitutional right. Do you understand?

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1 MR. GIBSON: Yes, sir.

2 THE COURT: This right to you is personal. It can be
3 exercised only by you. It can't be exercised by your attorney
4 or any family member. It can only be exercised by you. Do you
5 understand that?

6 MR. GIBSON: Yes, sir.

7 THE COURT: Now, I will also tell you, Mr. Gibson, that
8 if you do decide to testify, you will be subject to the same
9 rules that govern other witnesses that testify in this
10 courtroom and that means that you may be examined and cross
11 examined on any relevant issue in this case. In addition, if
12 you have any convictions that would involve dishonesty or
13 false statements or for crimes that would be punishable by
14 imprisonment by more than one year and I were to determine
15 that the probative value of admitting this evidence outweighs
16 its prejudicial effect on you, you may be cross examined by
17 the solicitor's office with regard to those charges in an
18 attempt to attack your credibility. Do you understand that?

19 MR. GIBSON: Yes, sir.

20 THE COURT: Okay. Now, if you decide that you do want to
21 testify, that decision must be made by you, personally. It
22 must be made freely, it must be made voluntarily, and with
23 knowledge or intelligence of the protections afforded you by
24 the United States Constitution. Do you understand?

25 MR. GIBSON: Yes, sir.

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1 THE COURT: Also, it must be made with the consequences
2 that may attend if you testify in this courtroom, i.e. the
3 ability to examine or cross examine you on any relevant
4 matter and any prior crimes that I find to be probative to
5 this matter. Do you understand?

6 MR. GIBSON: Yes, sir.

7 THE COURT: Now, if you decide that you will not testify,
8 in my instructions to the jury, I will tell them that they
9 cannot and they shall not consider whatsoever nor can they
10 discuss the fact that you did not testify, because the burden
11 remains on the State at all times to prove all elements of
12 the charges against you. Do you understand?

13 MR. GIBSON: Yes, sir.

14 THE COURT: Now, I'm going to give you time over the
15 lunch break to speak with your attorney or any family members
16 or anyone else that you wish to consult as to whether or not
17 you do, in fact, want to testify, but again, I remind you
18 that this decision is personal to you and must be made solely
19 by you. Do you understand?

20 MR. GIBSON: Yes, sir.

21 THE COURT: Do you have any questions as to anything that
22 I have explained to you at this point?

23 MR. GIBSON: No, sir.

24 THE COURT: Thank you very much. We will be in recess
25 until ---

1 MR. MCELHANNON: One more thing, Your Honor. I need to
2 ask about something. You just stated that he could discuss
3 this with any family member.

4 THE COURT: They can come down to the holding cell if he
5 wishes to and speak with them and they will accommodate any
6 people he wants to speak to. Now, I'm not going to let him
7 have happy hour down there, but if he wants to speak with
8 anyone about his fifth amendment rights, then he has a right
9 to, but it's not going to be everybody going down and having
10 visitor hour. Okay? But if he wants to, you make that
11 information available and if you need my assistance in
12 getting somebody down there, I'll be glad to afford him that
13 opportunity. Okay, sir?

14 MR. MCELHANNON: Thank you, Your Honor.

15 THE COURT: Otherwise, we are in recess until 1:15.

16 (LUNCH BREAK)

17 AFTERNOON - DECEMBER 13, 2011

18 THE COURT: Mr. Campbell, are you ready to proceed?

19 MR. CAMPBELL: Yes, sir, Your Honor.

20 THE COURT: Call your next witness.

21 MR. CAMPBELL: Your Honor, the State would call Detective
22 Rob Gebing.

23 (Jury in at 1:20 PM)

24 (After being duly sworn by the Clerk of Court,

25 **ROB GEBING** testified as follows:)

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1 CLERK OF COURT: Please have a seat. If you would, please
2 state your full name for the record and spell your last.

3 DETECTIVE GEBING: Robert Ken Gebing, Jr. G-E-B-I-N-G.

4 DIRECT EXAMINATION

5 BY MR. CAMPBELL:

6 Q Detective Gebing, do you work in the Anderson County
7 Sheriff's office?

8 A I do.

9 Q And how long have you been employed there?

10 A Ten-and-a-half years.

11 Q And in what position or capacity are you employed in?

12 A Currently?

13 Q Altogether.

14 A I started out in uniformed patrol division and then
15 after a number of years I moved to K-9 handler. After
16 about four years, total, I moved to criminal
17 investigations and I'm currently a sergeant in the
18 criminal investigations division.

19 Q Now, on April 28th, 2009, were you a detective with the
20 CIE division of the Sheriff's office?

21 A I was.

22 Q Now, prior to this job, do you have any other law
23 enforcement experience?

24 A Prior to this, I spent five years in the United States
25 Army in the military police corps.

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1 Q And after that is when you came to the Anderson County
2 Sheriff's office when you were discharged?

3 A Yes.

4 Q Now, on April 26th, 2009, as you well know, because
5 you've been here, there was an altercation and fight at
6 Hog Tails bar here in Anderson County.

7 A Correct.

8 Q How did you become first involved in this case?

9 A Prior to being moved to my current position, I was a
10 detective, but I was assigned. As a homicide detective,
11 we had a call rotation. We had a couple of guys who
12 would handle the normal stuff, the robberies, the more
13 common things, but we also had a pool of 60 detectives
14 at the time who would be death investigators. They would
15 handle homicides, suicides, deaths of a suspicious
16 nature. That was the role I had then and I was called
17 because of that.

18 Q And why did they call you when you are a homicide
19 investigator?

20 A My supervisor that night called me and said that he was
21 concerned that a gentleman had taken a pretty serious
22 injury to the neck and that at the time they weren't
23 sure whether he was going to survive his injury.

24 Q And how was he transported and how did he receive
25 medical treatment?

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1 A He was transported to Greenville Memorial Hospital by
2 helicopter.

3 Q Now, initially, how did the call to law enforcement, how
4 was it initially made?

5 A It was a call from the people at the bar.

6 Q As a result of that, law enforcement was dispatched to
7 go to Hog Tails bar?

8 A Correct.

9 Q Which is in Anderson County, right?

10 A It is.

11 Q And can you briefly describe the location of it?

12 A If you are traveling from Anderson on Highway 76 towards
13 Pendleton, for those who have heard of the train
14 trestle, its right before the train trestle on the left
15 right before the split for Williams Street. It's
16 classified as a Pendleton address although it's actually
17 just this side of LaFrance.

18 Q Now, when you arrived -- you went to the scene that
19 night. Is that right?

20 A I did.

21 Q Do you recall, approximately, what time you arrived?

22 A I checked the CAD earlier. I got there at 3:29 in the
23 AM.

24 Q And what is a CAD?

25 A It's a log. It's a detail of the dispatcher's of

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1 everything that is radioed into them. They just jot a
2 note and so when I go on scene or move to somewhere
3 else, they note where I'm at or what I'm doing. It's a
4 time stamp.

5 Q Now, when you got there, was the scene already secure?

6 A It was.

7 Q When we talk about, when we say, "secure scene", what
8 does that mean?

9 A That means that at that point, they isolated witnesses
10 and tried to keep them out of the scene to keep them
11 from further trampling or contaminating any of the
12 evidence. So the area that we believe the fight took
13 place was, at that point, all the people had been
14 removed from that and it was maintained so that nobody
15 else would go in there until law enforcement, forensics,
16 or investigators went to collect their evidence.

17 Q And when you arrived, did you become the primary
18 investigator or the lead detective in this case?

19 A I did.

20 Q And as you are the lead detective, what are your
21 responsibilities or duties?

22 A In a case like this when I have to assume
23 responsibility, I now have to check to see what my
24 colleagues are doing. By the time I got there, we'd
25 already been on scene for a significant amount of time.

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1 We had two other detectives there as well as one of my
2 supervisors, so I got with them and tried to figure out
3 who else still needed to be interviewed and kind of get
4 a broader picture of what had happened so that way we
5 could kind of develop a plan as far as what happened.
6 And so that was my first thing was to figure out who to
7 talk to and what had been said at that point and where
8 we needed to go from there.

9 Q And were either of the two victims, the two people that
10 were hurt and reported injuries, Damon Marcengill or
11 Jason Marcengill, were they on scene when you arrived?

12 A No. They had both been taken by respective EMS units to
13 different locations.

14 Q How about the suspect? Were there any suspects on scene
15 at that time?

16 A No. What was relayed to me was that the suspects had
17 fled and were not on scene at that time.

18 Q And how would you describe the weather that day?

19 A It was warm. I would describe it as unseasonably warm
20 for late April. I do recall, especially the next day as
21 we continued working on this, I remember it being hot,
22 but that evening, it was warm.

23 Q And were you able to determine or potentially identify a
24 potential suspect while you were on scene at Hog Tails
25 bar when you arrived around 3:30?

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- 1 A We were.
- 2 Q And who did you develop as a suspect?
- 3 A Initially, we developed Mr. Gibson who is seated next to
- 4 Mr. McElhannon as one of the suspects, based again, on
- 5 witness statements. The bartender who called into 911
- 6 actually followed him out to the parking lot and read
- 7 off his tag so dispatch actually had his license
- 8 information available.
- 9 Q Were you able to run that tag number?
- 10 A Yes.
- 11 Q And who did it come back to?
- 12 A Mr. Gibson.
- 13 Q Did it give an address?
- 14 A It did.
- 15 Q And what was that?
- 16 A [REDACTED], Anderson.
- 17 Q And where, exactly, is [REDACTED] in relationship,
- 18 I guess, to within the county?
- 19 A [REDACTED] is, though it's an Anderson address, it's
- 20 probably closer to Belton than Anderson. If you were
- 21 traveling down Highway 52, turn on 413 going towards
- 22 Iva, you go up a couple miles and turn right on Grove
- 23 Road and almost as soon as you turn right, you look to
- 24 the left and there's [REDACTED] there at the corner.
- 25 That's the best way I can describe it.

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1 Q From the bar, did you ever go out to [REDACTED]?

2 A Yes.

3 Q From Hog Tails bar and [REDACTED] how far is it,
4 mileage-wise?

5 A It's about 20 miles. I mapquested it this morning just
6 to check my math and it showed 19.55 miles, but again, I
7 don't know how precise Mapquest is address to address,
8 but...

9 Q When you drove it, it was approximately 20 miles?

10 A Yes.

11 Q And how long did it take you to get there from Hog Tails
12 bar if you are driving the speed limit?

13 A Twenty-five to thirty minutes.

14 Q Also, after you got the tag and ran it, did it give a
15 description of the vehicle that Mr. Gibson was said to
16 have left in?

17 A We got that from witnesses at the scene.

18 Q And what kind of vehicle was that?

19 A A dark Ford Ranger pickup truck.

20 Q Now, as a part of -- while you were on the scene, did
21 you learn, also, that Mr. Gibson had potentially been
22 injured in this altercation?

23 A Yes.

24 Q As a result of that, do you check any type of medical
25 facilities to see if they are possibly there?

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1 A Dispatch does that without even asking them. If they
2 have reason to believe that another party has been
3 injured, they call ahead, usually, to the cab companies
4 and the hospitals to notify us in case anyone comes in.

5 Q Besides -- they just call the Anderson area?

6 A They usually just call surrounding areas, Oconee and
7 usually Greenville.

8 Q Now, while you were at the scene, were you able to
9 identify who else was potentially with Mr. Gibson?

10 A Partially, yes. One of the items collected as evidence
11 was a medical alert I.D. tag on a necklace located on
12 the back porch in relation to where the fight was and it
13 bore the name of Scotty Hamilton.

14 Q Now, while you were on scene, did you go inside and look
15 at everything from inside the bar to outside on the
16 patio area?

17 A Briefly. I didn't linger long because, again, we were
18 still in the process of collecting evidence and I try to
19 minimize contaminating the scene further.

20 Q As a part of your job, did you determine if there were
21 cameras in the bar on 4/26/09?

22 A I have noted that there was a single camera head pointed
23 at the door. There was a monitor hanging above the bar.
24 I did observe that and later checked on that again to
25 obtain footage.

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1 Q And did you attempt to obtain videos from this?

2 A I tried to, but I was unsuccessful.

3 Q And why not?

4 A The bar had changed hands not too terribly long before
5 and the current owner did not have any way -- or the
6 former owner did not tell them how to get into the
7 system, but did speak to the owner and we had no way of
8 recovering that footage. Again, it was one camera at the
9 back door and there were no other cameras on the outside
10 or the back porch, outside the front of the bar. It was
11 just that one pointing from the center of the room
12 towards the door as people came in.

13 Q And since then, have you been back to the bar since
14 4/26/09?

15 A In preparing for this case, I had gone back there to try
16 to locate some people. They upgraded their system, but
17 it doesn't help us now, but they have installed a
18 different system with several more camera heads.

19 Q So, there are more cameras than just the one they had
20 back on 4/26/09?

21 A Yes.

22 Q Now, after you were on the scene, did you eventually
23 leave Hog Tails?

24 A Yes.

25 Q Where did you go?

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1 A I had left after taking Ms. Whitfield's statement and I
2 left and returned to the Sheriff's office where I was
3 going to contact SLED and try to get them to compile a
4 photo lineup using Mr. Gibson's driving license photo as
5 we didn't have anything in the local system, so I went
6 there to go do that.

7 Q And were you able to accomplish this?

8 A Not that night.

9 Q And why not?

10 A It was three in the morning. It was three-thirty in the
11 morning when I got there. It was probably four fifteen
12 when I went back to the office. There probably was
13 nobody manning that unit at SLED.

14 Q Now, did you go home at that point in time or what did
15 you do next?

16 A While I was there sending these emails to SLED, one of
17 the other detectives from the scene, Detective Johnson,
18 called me and stated that a female had shown up on scene
19 with some information pertaining to this and had stated
20 that the parties involved in this had come to her house
21 shortly thereafter and so I left the office and met Ms.
22 Christopher at her house on [REDACTED] Road.

23 Q Is that the Ms. Christopher who just testified?

24 A Yes. The same person.

25 Q So you were the detective that actually went to her

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1 house as stated earlier?

2 A Correct.

3 Q While you were there did you collect any potential
4 evidence that may have been in her apartment or her
5 house?

6 A I didn't. One of our forensic technicians did.

7 Q As a result of this, did you learn where the potential
8 suspects were living?

9 A Yes.

10 Q And where was that?

11 A Well, she didn't know where they were living. She
12 confirmed a few things with me. When we found the I.D.
13 medical bracelet, Scotty Hamilton didn't really mean
14 anything to me. Nobody at the bar knew who he was, but
15 according to Ms. Christopher, that was her brother.
16 According to Ms. Christopher, Mr. Gibson and Mr.
17 Hamilton were living together. I had an address for Mr.
18 Gibson. I now knew that Scotty Hamilton, whose license
19 and such were already in the system and they were the
20 one and the same and so she shored up that Scotty was
21 possibly my other suspect and that Mr. Gibson, the one
22 whose tag I had, was the other suspect. She confirmed
23 their identities for me.

24 Q As a result of that, what did you?

25 A Went back to the bar. They were finishing up there

1 taking more statements. I gathered up the statements
2 that had been taken up to that point. I talked to the
3 other detectives about what she told me and what they
4 had been told had transpired and kind of reviewed those
5 things. I went back to the office, briefly, to gather
6 some more information. I instructed Detective Johnson,
7 initially, to go to the [REDACTED] address and kind of
8 survey the place and when they were able to see it, to
9 call me with a description so I could begin preparing a
10 search warrant. I did that at the office on my computer
11 and then when I had the search warrant ready, I went
12 over to the magistrate at the jail to get search
13 warrants signed and arrest warrants signed on both
14 suspects.

15 Q Now, you said that other detectives also collected
16 statements. How many statements did y'all take for this
17 incident? Do you recall? All together.

18 A Thirty-three.

19 Q And that were the people that were remaining when y'all
20 were out on scene?

21 A Correct.

22 Q Now, did you, yourself, talk to any witnesses at the bar
23 while you were there?

24 A I spoke to Ms. Whitfield at length.

25 Q As a result of talking to her as well as talking to the

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1 other detectives, what did you learn took place?

2 A The story as it was given to me, it appeared that
3 earlier in the evening some sort of altercation took
4 place between Mr. Gibson and either Damon or Jason
5 Marcengill. One or both. I was told that Mr. Gibson was
6 escorted from the property and told not to come back.
7 What had been pieced together to me was that Mr. Gibson
8 arrived with a larger individual. They went from the
9 parking lot to the backside of the property, came up
10 onto the porch area and got into some, again, another
11 altercation with Damon. Damon, during this, Damon was
12 cut on the side of the neck and Jason had also received
13 some stab or cut-type injuries, as well.

14 Q As a result of what you had done at that point in time,
15 you took out arrest warrants on Donnie Ray Gibson and
16 Scotty Hamilton?

17 A I did. I took out one on Mr. Gibson for the assault on
18 Damon Marcengill. I took out one on Mr. Hamilton for the
19 assault on Jason.

20 Q In the case we are dealing with today, the warrant led
21 to the arrest of Donnie Ray Gibson for the assault on
22 Damon Marcengill?

23 A That's correct. Scotty's is still pending.

24 Q Now, did you learn that Mr. Gibson, was he a frequent
25 customer at Hog Tails bar?

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1 A From what I was told, he had been there a couple times
2 before but he was not what they described as a regular.

3 Q Now, while Detective Johnson and Detective Mitchell were
4 now close to [REDACTED] Lane, what, if anything, took
5 place?

6 A They called me with a description. I prepared my
7 documents and as the judge was signing it, literally,
8 while he had pen to paper, they called and said they
9 were leaving. I instructed them to stop them and told
10 them that I had warrants for both of them and so they
11 conducted a traffic stop and took Mr. Gibson and Mr.
12 Hamilton into custody without incident.

13 Q And did you go down there at that point in time?

14 A I did.

15 Q Did you see Mr. Hamilton and Mr. Gibson?

16 A I did.

17 Q Did you conduct a search warrant on [REDACTED] Lane?

18 A I did.

19 Q Now, while you were on scene, did either one of the
20 individuals, Hamilton and Gibson, need any type of
21 medical treatment?

22 A Yes. Both of them had injuries consistent with having
23 been in some sort of fight. Mr. Gibson, in particular,
24 had some sort of gash over his eye and it appeared to be
25 some cuts on his finger. EMS was summoned and Mr. Gibson

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1 went to the hospital before he went to the jail to be
2 treated for those injuries.

3 Q What about Mr. Hamilton?

4 A He had much more minor injuries. He had scraps and nicks
5 and things. He didn't have anything that appeared to
6 require treatment, but prior to him going to the jail we
7 did have to go in and recover some of his medications.
8 He suffers from diabetes and we had to make sure that
9 was in place before.

10 Q Was that consistent with the tag that you found at the
11 scene?

12 A The truck they were in?

13 Q No, the identification medal, the identification tag
14 that was recovered at the scene.

15 A Oh. Yes. Sorry. Mr. Hamilton's condition is consistent
16 with the tag that we found, the medical alert tag we
17 found on scene.

18 Q Did you conduct a search warrant at [REDACTED] Lane.

19 A I signed it, yes, sir.

20 Q What, if anything, did you find?

21 A Previously at the scene we learned that the suspects had
22 arrived in leather jackets and so we were, obviously,
23 looking for leather jackets, clothing that might have
24 blood on it, shoes, there was a considerable amount of
25 blood at the scene and so we were trying to find

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1 anything that might transfer on the footwear, things of
2 that nature, knives, and we were looking for anything
3 that might further identify what items were found
4 belonged to what person.

5 Q Did you collect any items?

6 A We did. During the search of the residence, we found a
7 leather jacket in a bedroom closet that we believed to
8 be Mr. Gibson's bedroom. There was another leather
9 jacket on a couch in the living room common area. A
10 third leather jacket hanging on a coat rack in the
11 living room. There were some clothing items that were
12 wet in the washing machine, a couple pairs of jeans,
13 some shirts, a wash cloth. We took some shoes. Photos,
14 we took photos of the place and everything as we found
15 them.

16 Q How did you determine which room was Mr. Gibson's?

17 A Again, the one with the jacket we found in the closet,
18 we also found in a night stand drawer, a prescription
19 medication bottle bearing Mr. Gibson's name and we also
20 found some personal correspondence, some letters, that
21 had his name on them, as well, and so that's what led us
22 to believe that room belonged to Mr. Gibson.

23 Q And items that were previously shown with the DNA
24 analyst chemist, the leather jacket and shoes, those
25 were items that you collected from [REDACTED] Lane?

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1 A I didn't collect those items. I identified them as we
2 seized them, but when they were bagged, I actually
3 marked that bag as "closet" as opposed to the one that
4 says "couch". We didn't want them confused.

5 Q So you were present when these were taken?

6 A Oh, yes.

7 Q In fact, you were present when all the evidence that was
8 collected at [REDACTED] Lane, you were present when all
9 of it was collected?

10 A Yes, sir.

11 Q So items #58 and #59, the leather bike jacket and the
12 tennis shoes are what you collected or had collected
13 while you ---

14 A Which tennis shoes are you speaking of?

15 Q The gray tennis shoes that are in evidence.

16 A The gray tennis shoes, I did not collect.

17 Q Okay. Where did those come from?

18 A Mr. Gibson, when being transported to the hospital, was
19 being observed by a deputy. This deputy called me and
20 told me that it appeared Mr. Gibson had an item, spots
21 on his shoes consistent with blood and he asked if I
22 would like for him to seize those and I instructed him
23 to seize those from Mr. Gibson when he got to the jail
24 and so that deputy took them from him at the jail and
25 placed them into evidence, himself. He actually took a

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1 picture with them on at the hospital..

2 Q After that, you observed the shoes and they were placed
3 into the evidence locker?

4 A Yes.

5 Q Now, you said he was cut on his hand. Do you remember
6 what hand he was cut on?

7 A If I recall, and I think we have a picture of that, too,
8 we have the two left fingers on his left hand that
9 appeared he tried to self-treat his injuries on his
10 hand.

11 Q Now, at that point in time, both of them are transported
12 back to the Anderson Detention Center, Mr. Hamilton and
13 Mr. Gibson. Is that correct?

14 A Correct.

15 Q At some point in time, did you attempt to go and talk to
16 either one of them?

17 A I did. Mr. Hamilton, since he didn't have any injuries
18 that needed further treatment, I tried to talk to him
19 that day. We took him to an interview room, but he
20 invoked the right to counsel and did not wish to speak
21 to me about this. When Mr. Gibson was brought to the
22 jail after returning from the hospital, it was my
23 intention to speak with him that day, but he smelled
24 heavily of alcohol, or so I thought at the time, and it
25 was my concern that he might be drunk and I opted to

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1 just let him sleep that off and try to talk to him at a
2 different time.

3 Q Now, did you have an occasion to talk to either one of
4 the victims in the case, Damon Marcengill or Jason
5 Marcengill?

6 A Not that day.

7 Q When did you talk to them?

8 A I talked to Jason the next day. I think it was Detective
9 Mitchell that took a statement, briefly, from him. He
10 had been treated and then transported back to the scene.
11 One of my other detectives spoke to him, initially. I
12 went and spoke to him the next day to take some follow-
13 up pictures and to speak to him further.

14 Q Did you eventually go back and talk to Mr. Gibson?

15 A I did. The 27th, I believe it was.

16 Q Now, when you went back to talk to them, did you just
17 walk in and say, "Tell me what was going on", or what is
18 the procedure or process you normally go through?

19 A No. When somebody has been accused of a crime and they
20 are in my custody, we have to advise them of their legal
21 rights before any comments or statements can be
22 admissible and so I had to advise him of his rights,
23 first.

24 Q I'm going to show you what has been marked for
25 identification as State's Exhibit #56. Can you please

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1 identify what this is, sir?

2 A This is an Anderson County Sheriff's office advisement
3 of rights form. It's what you would hear on T.V. as the
4 Miranda warnings. This is a standard form that we use in
5 our office. This is the one that I completed on the
6 27th, April 27th of 2009 with Mr. Gibson.

7 Q And when you went through this, did you read him his
8 rights?

9 A Yes, sir.

10 Q You read, "You have the right to remain silent"?

11 A Well, actually, I make him read the first couple of
12 lines just to verify that they are capable of reading
13 without, you know, glasses, contacts, and that they can
14 read the English language and so he read those first two
15 out to me.

16 Q And then you have him initial that he read them?

17 A Yes. And I do that so I can verify that they can, in
18 some manner, write.

19 Q And you write down whether they can read or write,
20 graduated from school?

21 A I do. At the top, I ask them how far they went in school
22 just so I can kind of gauge the level of intelligence
23 they have and can understand what's going on.

24 MR. CAMPBELL: Your Honor, may I have the witness come
25 down off the stand? I think it will be easier to just explain

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1 it.

2 THE COURT: Yes, sir.

3 (Witness leaves the witness stand and stands in front of
4 the jury in front of the large screen)

5 Q Detective Gebing, I just want you to go through and
6 explain the process you go through. It will probably be
7 easier to show it than to talk about it. (Document is
8 magnified on large screen)

9 A One of the flaws of our forms is that we don't
10 necessarily have a line designated to put someone's name
11 and so I always put their name up here, because it's
12 happened in the past where people have just gone in and
13 scribbled their name and I couldn't figure out who it
14 was later. So, I put Donnie Ray Gibson. That's where I
15 asked how far he went in school and he indicated he had
16 a GED. I asked if he could read and write English, does
17 he need glasses or contacts or anything of that nature
18 and if they reply they don't require anything and they
19 can read and write, I'll make a note of it there. Then,
20 we are at the Anderson County Detention Center, this was
21 on April 27th, 2009, we began this form at 10:55 AM. I
22 usually have this upside down to me, but I tell them,
23 "Before you are asked any questions, you must understand
24 your rights. I'll make these two marks beside here and
25 ask him, "Will you read those two out loud to me", to

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1 verify he can read and write. And in this case, Mr.
2 Gibson read out, "You have the right to remain silent.
3 Anything you say may be used against you in court." I'll
4 ask that he initial the two lines that he just read and,
5 again, that's for my own benefit, really, so that I can
6 say, yeah, he's able to read and write. I will read the
7 rest of these out loud for him. The rest of it says,
8 "You have the right to speak for a lawyer for advice
9 before you are asked any questions or answer any
10 questions and, unfortunately, that typographical error
11 has been there for the past six years. If you cannot
12 afford a lawyer, one will be appointed for you if you
13 wish. If you decide to answer any questions now without
14 a lawyer, you may stop answering questions at any time.
15 You will also have the right to stop answering at any
16 time and ask to speak to a lawyer. I will ask if they
17 understand those rights as I just read them and if they
18 do I will ask that they indicate with a signature here,
19 which Mr. Gibson did. I will put a time and a date,
20 approximately, when he signed that, which was April
21 27th, 2009, at 10:56 AM. I will sign myself as a
22 witness. I did not have anybody else with me that day.
23 Moving along, this is the waiver of rights and it simply
24 reads, I have read this statement of rights and I
25 understand what my rights are. I want to make a

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1 statement and answer questions. I do not want a lawyer
2 at this time. I understand what I'm doing. No promises,
3 threats have been made to me, no pressure or coercion of
4 any kind has been made against me. I always underline
5 this word and ask them if they understand what coercion
6 means. Even if people say yes, I tell them it means: I'm
7 not threatening you, I'm not bribing you, I'm not
8 forcing you to sign this or to tell me anything and if
9 they agree with this waiver I will ask that they
10 indicate with their signature here as Mr. Gibson has and
11 again, the date and time and myself as a witness.

12 Q This was done on 4/27/2009 and finished at 10:57 in the
13 morning?

14 A Yes, sir.

15 MR. CAMPBELL: Your Honor, at this time, I'd ask that
16 State's Exhibit #56 be entered into evidence.

17 THE COURT: Any objection?

18 MR. MCELHANNON: No objection.

19 THE COURT: Admitted, without objection.

20 (Whereupon, a Miranda warning form is entered into
21 evidence as State's Exhibit #56, without objection)

22 Q Detective Gebing, do you go through this process no
23 matter if he's going to speak with you or not?

24 A You have to. He's in custody.

25 Q And so, this isn't special, you do it to everybody?

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1 A Well, if I walk in a room and he says, "Get out of my
2 face I have nothing to say to you," I wouldn't bother
3 with the paperwork, but I go in and try to speak with
4 them. If they are willing to go through that and answer
5 questions, great, but 99.5% of the time we at least get
6 that far and usually farther.

7 Q And so, you took this from him. What did you ask him at
8 that point in time?

9 A I inquired about what happened at the bar.

10 Q What, if anything, did he tell you?

11 A He said something to the effect that he had been talking
12 to a girl about a job and got sucker punched and then he
13 said his head wasn't too clear and he wanted to speak to
14 a lawyer first.

15 Q And what did you do at that point in time?

16 A Oh, we have to terminate the interview at that time.

17 Q Now, after you terminated the interview, are you still
18 working on this case?

19 A There are things that still need to be done, yes, sir.

20 Q Now, getting back to the scene, you as a lead
21 investigator, do you go through everything that is
22 collected and review all the statements that are taken
23 from potential witnesses that were at the scene that
24 night?

25 A Yes.

1 Q Did you do that in this case?

2 A I did not, necessarily that night, but at some point,
3 yes.

4 Q Now, did you, yourself, go out to re-interview or talk
5 to any witnesses after the fact?

6 A I had.

7 Q And the fight that took place where Mr. Damon Marcengill
8 was injured, where did it occur at the bar?

9 A It occurred, it took place at the back deck very near a
10 set of stairs. On some of the pictures that were shown
11 earlier, there is an inside area and then a back, big
12 large patio constructed of wood. It looks out over a
13 pond. There's a set of stairs to the south and it took
14 place very near those stairs and tables.

15 Q And is this where you determined he was injured?

16 A It's what we believe based on the blood and findings
17 there and some of the witness testimony.

18 Q Were you able to determine how many people were out
19 there that witnessed this fight on the back deck?

20 A It's hard to determine how many left before we got there
21 or before we managed to keep them, but when I spoke to
22 what witnesses I did have available, the same handful of
23 names kept coming up, which was basically the ones we
24 have heard from today and yesterday.

25 Q Now, when you take these statements from people, are

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1 these typically taken after, as in this case, I guess
2 for some people, a traumatic experience because it was
3 obviously a lot of commotion going on during this fight.
4 Is that correct?

5 A Correct.

6 Q And you took statements shortly thereafter from these
7 people?

8 A We try to as soon as we can, yes.

9 Q And what is the purpose or reason for that?

10 A We try to take a statement from people to get a written
11 record from what they recall. It's something we have
12 available when we do have to go present something to a
13 judge for probable cause. It also, later on down the
14 line, gives them something to refresh their memories by
15 and if we didn't take statements from people and we ask
16 them two-and-a-half years later to come testify and they
17 could very well get up and say, "I have no idea what you
18 are talking about. I wasn't even there that night." Now,
19 we have a written record that they were.

20 Q And do you expect, when you take these statements, to
21 have every minor detail put in them?

22 A Some people try better than others. I mean, we try to go
23 into as much detail as we can, but it's difficult to get
24 every minor detail, especially when people go home and
25 start thinking about things, some people remember more,

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1 some people forget things, but again, that's why we try
2 to take them down.

3 Q Now, when you were reviewing these statements, there
4 were several inconsistencies between different
5 witnesses. Is that correct?

6 A That's correct.

7 Q And do you find this out of the ordinary during your
8 years as a detective? Is that something that's
9 different?

10 A It's fairly commonplace for the same handful of people
11 witness the same event and see slightly different
12 things. Everybody is going to have their own
13 perspectives, everybody is going to remember what they
14 remember. Some people may have heard things, some may
15 have not. Some people were looking at a certain vantage
16 point that the other may not have had, so it's not
17 uncommon for there to be slight differences in things as
18 they were observed or heard. It's common.

19 Q And you strictly go, as the lead detective, since you
20 are the one making the charges, do you go strictly by
21 what these witnesses are telling you when you make these
22 charges or are you trying to piece it together yourself?

23 A No, we have to piece everything together as best we can.

24 Q Now, when you were interviewing people, did you learn
25 that -- there was no question that Mr. Gibson was there

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1 earlier that night. Did you learn if he was asked to
2 leave?

3 A From what the witnesses we spoke to, yes, he was asked
4 to leave, and I wasn't there to hear myself, but the
5 witnesses indicated he was.

6 Q So, technically, if he were coming back, he'd be on
7 trespass notice?

8 MR. MCELHANNON: Objection, Your Honor. That's not ---

9 THE COURT: I sustain that.

10 Q Now, after you took this first statement and you talked
11 to Mr. Gibson, was that at the detention center? Were
12 you at the detention center the first time you talked to
13 Mr. Gibson?

14 A He -- I didn't take his statement. He spoke to me
15 briefly, but that wasn't at the Anderson County
16 Detention Center.

17 Q When you took the statement that you took and gave him
18 the advice of rights, was that at the Anderson County
19 Detention Center?

20 A Yes, sir.

21 Q Did you have any contact thereafter with him?

22 A I did.

23 Q And when was that?

24 A May 1st, 2009. Mr. Gibson had called my office three
25 times. May 1st was on a Friday and the third call. It

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1 was the first opportunity I had to get back to him. In
2 that he had reached out to me, I returned his call.

3 Q And do you recall what number he called you from?

4 A I don't off the top of my head, but it's in my notes.

5 Q The number, [REDACTED], would that be right?

6 A I believe so. I do recall that the number he called me
7 from is also the number he had that he gave the booking
8 officer and what I had gotten from LaBriska.

9 Q Now, so he had called you three times on or about May
10 1st. Is that right?

11 A I hate to say I don't remember the exact dates and times
12 that he called. I know that I received those messages on
13 the first, and again, I went in and when I listened to
14 my voicemail, it said, "You have "x" amount of messages
15 and I had three from him and so in my notes, if it says
16 May 1st, that's when I first became aware that he called
17 me three times.

18 Q And when he called you, wasn't he returning a call from
19 you for you reaching out to him? Is that right?

20 A No. Once he requested a lawyer, I wasn't looking to
21 speak to him any further.

22 Q But in this case, he reached out to you and wanted you
23 to return his phone call?

24 A Correct.

25 Q And did you do that in this case?

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1 A I did.

2 Q And when you were speaking to him on May 1st, 2009, did
3 you record it?

4 A I did.

5 Q Detective Gebing, I'll show you State's Exhibit #57. Is
6 this a copy of the recording you provided as a part of
7 your case investigation?

8 A It is.

9 MR. CAMPBELL: Your Honor, at this time I would like to
10 publish this to the jury.

11 THE COURT: Any objections?

12 MR. MCELHANNON: No objection, Your Honor.

13 THE COURT: Go right ahead, please.

14 MR. CAMPBELL: Your Honor, I guess at this time, I want
15 to move State's Exhibit #57 into evidence.

16 THE COURT: Any objection?

17 MR. MCELHANNON: Is that the audio?

18 THE COURT: Yes, sir.

19 MR. MCELHANNON: I have no objection.

20 THE COURT: All right. Admitted, without objection.

21 (Whereupon, a CD is admitted into evidence as State's
22 Exhibit #57, without objection)

23 MR. CAMPBELL: Your Honor, if you would ask the jury if
24 this is too loud or if they need it raised or lowered, to
25 just let me know.

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1 THE COURT: Can y'all hear it okay? (All nod heads)

2 (Whereupon, an audio CD is played for the jury)

3 Q Now, Detective Gebing, what you just heard on State's
4 Exhibit #57, is that the phone call that you recorded
5 when you spoke to Mr. Donnie Ray Gibson on May 1st,
6 2009?

7 A It is.

8 Q Now, after he spoke to you, he kind of gives you a
9 version of his attempt to take out a lynching warrant,
10 did you go back and investigate to see if there were any
11 grounds or reasons that he could take out a lynching
12 warrant against the individuals at the bar?

13 A Again, I re-examined all the witness statements at that
14 point and when you compare it to Mr. Gibson's comments
15 during the phone call, it didn't really, it didn't
16 really match what all the witnesses at that point had
17 said, it didn't really offer an explanation of how the
18 victims had been cut and I didn't really find a basis to
19 seek a lynching based on a lot of things. I couldn't
20 prove that there was any sort of mob mentality or
21 attempt to harm Mr. Gibson by that group. It wasn't
22 supported by what we had found thus far, that, and with
23 what LaBriska had told me that night, it is kind of a
24 different mind set from what he said in that phone call
25 and what he told her that night.

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1 Q Did it appear to you that he brought trouble on himself?

2 MR. MCELHANNON: Objection, Your Honor. That's ---

3 THE COURT: Sustained.

4 Q Now, when you take a warrant out for assault and battery
5 with intent to kill, you have to determine who is the
6 primary aggressor. Is that right?

7 A Yes, sir.

8 Q And who did you determine, based on your investigation,
9 who was the primary aggressor in this case?

10 A With regard to Damon Marcengill, based on witness
11 statements, it was determined Mr. Gibson was the primary
12 aggressor in that.

13 Q Did it appear to you to be a case of self defense on Mr.
14 Gibson's part?

15 A I've not found anything yet to indicate as such.

16 Q Now, he mentioned in his statement that he was going
17 back to the bar, that he drove all the way to Belton
18 and then back, to get a pack of cigarettes, a lighter,
19 and a \$20 bill.

20 A That's what he told me on the phone call, yes, sir.

21 Q Now, to you, in your investigation, does that seem like
22 a plausible reason to go back?

23 A To me, no. But to him, who knows. It wouldn't -- after
24 being thrown out, I would probably have let the pack of
25 cigarettes go.

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1 Q And the reason I'm asking is, when he was booked in, did
2 they make a list of items that he had on him when he was
3 booked in?

4 A They did.

5 Q And what stood out to you? Did you see the booking
6 report?

7 A I was provided a copy of it, yes, sir.

8 Q And what stood out to you regarding his personal effects
9 they took from him at the jail?

10 A Among that taken was an open pack of cigarettes and a
11 lighter.

12 Q So, he already had an open pack of cigarettes and a
13 lighter on him when he was arrested during the early
14 morning hours of 4/26/09.

15 A Correct.

16 Q In this case, we know what type weapon he used, it was a
17 knife.

18 A Correct.

19 Q And you saw the evidence you reviewed. You saw Item #55,
20 the knife that was collected.

21 A Yes.

22 Q Did you see it that night?

23 A I did.

24 Q And prior to law enforcement collecting it, how many
25 people handled this knife?

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1 A Allegedly, Mr. Gibson, and Walton, then Denise
2 Whitfield, then Detective Jordan, then Deputy Scott. So,
3 five, total.

4 Q So, when we talk about DNA analysis and whether DNA may
5 or may not, should or should not, be present, do you
6 find it odd that nothing was recovered from the handle
7 of this knife, any type of DNA?

8 MR. MCELHANNON: Objection, Your Honor. I'm not sure he's
9 qualified to speak about DNA.

10 THE COURT: Lay further foundation, please, sir.

11 Q In your experience in law enforcement, you routinely
12 collect evidence to send to SLED for analysis?

13 A Yes.

14 Q Are there proper procedures and steps that y'all take,
15 y'all being law enforcement, to preserve evidence?

16 A Yes.

17 Q And what type of procedures, such as for a bloody item,
18 that y'all typically take?

19 A A bloody item that you think you are going to later on
20 try to get DNA from, you have to take steps to prevent
21 additional contamination or removal from that item of
22 prospective DNA so, you know, in the case of a knife or
23 a gun or something like that, you obviously don't want
24 multiple people handling it. It would provide for
25 possible additional DNA contamination or possible

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1 removal of the DNA that's already there.

2 Q And in this case, numerous people did handle this knife.

3 A Yes.

4 Q And would you expect people to handle it by the handle?

5 A In this case, yes. And people have said they thought it
6 had blood on it. I don't, I wouldn't touch a bloody
7 knife with my bare hand.

8 Q And as a result of that, when the results came back from
9 the DNA analysis that there was no blood found on the
10 handle, did that surprise you?

11 A Blood on it? No, it doesn't.

12 Q Now, in Mr. Gibson's recording to you, his phone call,
13 he stated that there were no items at his house, [REDACTED]
14 [REDACTED], that should have anybody else's blood on it
15 but his. Is that right?

16 A That is what he stated on the phone. Yes.

17 Q Did you find that to be true?

18 A I think we found blood on the leather jacket from the
19 couch that was Damon's. We found some of Jason's blood
20 on the jacket on the couch. Again, the shoes that he was
21 wearing never made it back to the house, but we did find
22 Damon's blood on his shoes.

23 Q Let's talk about the shoes there.

24 A Yes, sir.

25 Q Now, the chemist testified that Damon Marcengill's blood

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1 was on the shoes that he was wearing that they removed
2 from him at the hospital. Right?

3 A That there was blood on the shoes that she was given to
4 test. Yes.

5 Q And the test came back as blood on the shoes of one of
6 the victims, Damon Marcengill's.

7 A As well as Mr. Gibson's, but yes, that's correct.

8 Q So, both of their blood was on the shoes.

9 A Correct.

10 Q So, what does that, you, as a detective looking at this
11 case, what does that tell you?

12 A It just tells me that at some point he was close enough
13 contact with Mr. Marcengill's blood that he managed to
14 get it on top of his shoe.

15 Q And we're talking about what he told LaBriska and he
16 also told you in his audio that he was sucker punched
17 that night.

18 A Yes.

19 Q Did you find any evidence or anything to back that up,
20 to corroborate that?

21 A Again, witness statements were that there was an earlier
22 altercation. We are not really sure who was at fault on
23 that, but there are indications that prior to this knife
24 assault that there was something that went on between
25 Mr. Gibson and one or both of the Marcengill brothers

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1 and so that was supported.

2 Q Well, let me ask you this: Did you take out a warrant on
3 either Damon or Jason Marcengill for any type of assault
4 that may or may not have taken place on that night with
5 Mr. Gibson?

6 A No.

7 Q Why not?

8 A Mr. Gibson had an hour to hour-and-a-half to have done
9 so, but he made no efforts to contact law enforcement or
10 file any kind of complaint of that nature.

11 Q And as he left the bar the first time, Hog Tails bar,
12 and he went back to his house, [REDACTED] Lane, he
13 passes by several law enforcement agencies, doesn't he?

14 A He does.

15 Q And, in fact, he had his cell phone with him that night,
16 didn't he?

17 A That's what LaBriska testified he did.

18 Q And at no point in your investigation did you learn that
19 he called law enforcement?

20 A No.

21 Q The DNA that was collected, does that really tell you
22 who started the fight?

23 A No. It doesn't say who started what, who pushed who. It
24 doesn't tell me that. It really just ties people to a
25 certain scene or to a person in a certain incident in

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1 this case.

2 Q And what you can tell from this case is that Damon and
3 Donnie were both cut as indicated by his shoes because
4 both their blood was on top of them?

5 A Basically, it tells me that I have the right Donnie Ray
6 Gibson and that I have the right Scotty Hamilton and
7 that I have the victim's blood having been transferred
8 to their clothing at some point, but it doesn't
9 necessarily tell me how.

10 Q And after you did all this, you took out warrants on
11 Mr. Gibson for assault and battery with intent to kill
12 and possession of a weapon during the commission of a
13 violent crime. Is that right?

14 A I did.

15 Q And a violent crime being assault and battery with
16 intent to kill.

17 A I did.

18 Q And why did you just charge him with that? Why didn't
19 you charge anybody else or, you charged Mr. Hamilton.
20 Why did you charge him with that and your reasoning
21 behind it?

22 A Again, the evidence indicated and based on witness
23 testimony and things of that nature and some of the
24 testimony that we've heard today is that Scotty got into
25 it with Jason. Jason had knife injuries, as well, and

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1 witness testimony is that Donnie stabbed or slashed
2 Damon and he had the corresponding injuries and so we
3 were able to, with the witnesses and what they were
4 saying, figure out that this suspect assaulted this
5 victim and that suspect assaulted that victim. I had
6 nothing to indicate that Donnie had done anything to
7 Jason or, in this case, that he had done anything to
8 Jason. All the witnesses to that point indicated that he
9 had solely assaulted Damon.

10 Q And did you also learn through your investigation and
11 through the chemist that blood was also recovered from
12 the knife that matched Donnie Ray Gibson?

13 A I did.

14 Q Where was it located on the knife?

15 A It was, it had markings on it, the length being
16 approximately that long, there were two spots that the
17 analyst at the lab actually alluded to, that she took
18 the swabs from. They were up on the blade, kind of as
19 Shane Rhodes had described in his testimony earlier
20 where he said there were three or four inches of the
21 blade sticking out. That's where the two samples were
22 approximately down the blade.

23 Q Detective Gebing, we're getting about done. I just want
24 to -- photographs were taken in this case. Is that
25 right?

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1 A They were.

2 Q They were taken at the scene?

3 A They were.

4 Q Taken of the victim?

5 A All of them.

6 Q And also taken of Mr. Gibson?

7 A Yes.

8 Q And you took photographs of the vehicle?

9 A The vehicles, we took photographs of Mr. Hamilton's, we
10 took photographs of LaBriska's house.

11 Q And you also took photographs of [REDACTED] Lane?

12 A I did.

13 Q I want to show you photographs marked 1 through 54, are
14 these the photographs that were taken on or about April
15 26th, 2009, regarding this case?

16 A Well, these first several are not. These were taken in
17 preparation for this trial. We wanted to have some
18 photographs in daylight, because the ones that were
19 dark, it was kind of hard to really tell where we were
20 describing in the dark and so these were taken more
21 recently.

22 Q And that's items 1 through 4?

23 A That's correct.

24 Q Take a look at the photographs. I don't need you to
25 explain them at this point in time. Are these the

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1 photographs that you took and do they fairly and
2 accurately represent what you saw or observed on or
3 about April 26th, 2009 regarding this case?

4 A (Witness complies) I might need to make one brief
5 correction and dealing with my testimony, as well.

6 Q Yes, sir.

7 A This was a follow-up photo ---

8 Q When you say "this", please identify what the number is
9 on the back.

10 A Items #25, #27, #28, #29, #30, #31, #32, these were
11 photos of Damon Marcengill that I took at a later date.
12 They were follow-up photos of his injuries. They were
13 not taken that day.

14 MR. CAMPBELL: Your Honor, may I have the witness step
15 down briefly to go through the photographs on the overhead?

16 THE COURT: Yes.

17 Q Detective Gebing, I want you to step down and briefly
18 run through these photographs so the jury can get an
19 idea of what was going on.

20 A You've seen this one earlier. This is the front of Hog
21 Tails bar as viewed from the road. This is a slightly
22 more distant view of Hog Tails bar viewed from the road.
23 This was to kind of give you an indication of the length
24 of the building and the side here that opens up to the
25 back area where the bulk of this took place. This is

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1 another one I took in the daylight. It illustrates the
2 view from the back porch parking area. As witnesses
3 indicated, the bulk of this took place down in this area
4 here and witnesses have given statements and have since
5 testified that they saw Mr. Gibson and Mr. Hamilton
6 approaching from this way. Also, Mr. Whitfield has said
7 that she followed them out here. This is where she
8 observed somewhere around in here, their truck parked
9 and getting the tag, which she called into dispatch.

10 COURT REPORTER: Could you please identify the numbers on
11 the photographs?

12 A Just for the Court's benefit, that was photographs #1
13 through #3.

14 Q As you are going through them, please identify, first,
15 the number of them before the explanation, please.

16 A Photograph #4 is kind of a reverse of the last image.
17 It's showing from the parking lot looking towards the
18 back porch. This is what has been referred to as the
19 back porch deck. This is upstairs here and here is the
20 back porch area where this cutting incident took place.
21 Photograph #5 is a picture of the knife and Deputy
22 Scott's trunk and the biohazard bag he placed it in.
23 Photograph #6 is a similar image without the forensic
24 scale. Photograph #7, again, of the knife. They exposed
25 it to show the blade, removed some of the plastic from

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1 that. Photograph #8, is the back porch area. The stairs
2 leading up to this porch area are over this way and kind
3 of cut off by the picture. This is a bench mentioned
4 earlier and the bar, itself, is up in this direction.
5 Over in this area is where this confrontation is said to
6 have started and this is the bottom portion of a random
7 table on the porch. Photograph #9, this is another
8 portion up above all that where this incident took
9 place. It shows you there was a blood trail, actually
10 leading from beyond this gate heading back in towards
11 the bar this way. A correction on that last one. That
12 was photograph #9. This is photograph #10. This is the
13 sidewalk that runs between the wooded area where the
14 band was playing and the parking lot, again, showing a
15 blood trail. Photograph #11 is the back porch. This one
16 was taken at night and our concern was that it would be
17 difficult to kind of put this in context of where it was
18 so we took the ones in the daylight hours, but if this
19 were illuminated out here, this is the horseshoe pit,
20 the parking lot, and again, this photograph shows a
21 significant amount of blood in this area, as well. These
22 are the tables with little wire stools. That kind of is
23 what separates, as testimony was heard earlier, Jason
24 and Scotty were over here and then Donnie and Damon were
25 on the other side. Photograph #12, a very similar

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1 photograph. It's just slightly closer. Photograph #13,
2 the stairs. You can see the rail kind of down here and
3 so this is the stair area. It looks like an ashtray was
4 knocked over, some furniture and such, a ball cap that
5 was left behind and a stocking cap that was left behind
6 and, again, significant amounts of blood on the ground
7 and this is one of those spool tables, as well.

8 Photograph #14 is another view of the area kind of
9 between the spool tables and the pond, itself, is
10 oriented out this way, so the building, the main body of
11 the building is back towards this direction. The stairs
12 are to your left as you are viewing this. Photograph
13 #15, if you recall a moment ago, the furniture that was
14 knocked on the ground, this is that bench that was
15 mentioned in testimony earlier and a ball cap that was
16 directly behind it that was left at the scene.

17 Photograph #16 is just another view of that ball cap on
18 the rail.

19 Q Were you able to determine whose ball cap that was?

20 A No. Photograph #17 is that of a blood trail leading to
21 the back door of the bar from the porch area with blood
22 on the ground leading back inside. This is photograph
23 #18, the forensic technician has gone and placed yellow
24 markers at items that he considered to be of evidence
25 value or we had discussed as being of evidence value. He

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1 photographed those with the markers in place just to
2 make it visually easier to see and what number
3 correlates to what. Photograph #19 is a black-in-color
4 folding-type knife. It is oriented at the base of that
5 bench somewhat near where the bulk of the blood is. I
6 think we had it -- actually, I will get back to that.
7 But that is the knife, if you want to look at this
8 picture, is marked as item #1.

9 Q Now, were you able to determine, Detective Gebing, who
10 owned this knife or where this knife came from?

11 A No. Unfortunately, not. That knife didn't have ownership
12 DNA or blood on it. Of the witnesses I have spoken to,
13 nobody has been willing to identify or know whose knife
14 that was.

15 Q You did send it down to SLED?

16 A Yes. Photograph #23 is the chain that Mr. Hamilton's
17 medical alert tag was on and found on the porch. Those
18 we've already shown. Photographs #20, #21 and #22 are
19 duplicates of the ones already seen. I don't know if
20 they would be beneficial. #24 is a picture of Mr. Gibson
21 being treated at the Anderson Area Medical Center for
22 injuries sustained during this incident and I don't know
23 if it's out of focus or what, but the reason is I
24 believed that he suffered injuries to his left hand, you
25 see this piece of gauze here and you can see his shoes

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1 that he's wearing. Those are the shoes that were
2 ultimately seized by the deputy and placed into
3 evidence. In fact, he took this photograph if I recall.
4 Photograph #26 is of Damon Marcengill at Greenville
5 Memorial Hospital. This is one of the injuries he
6 sustained to his arm and as you can see, he's also been
7 bandaged up on his neck. Photograph #33 is [REDACTED]
8 [REDACTED], which we determined to be Mr. Hamilton's and Mr.
9 Gibson's residence. This is a photograph taken from the
10 intersection of Grove Road and [REDACTED] Photograph
11 #34 is the Ford Ranger pickup truck, which was located
12 at [REDACTED] Lane with the search warrant. The tag
13 [REDACTED] matches that given to dispatch during the 911
14 call. #35 is just a side view of that pickup truck.
15 Photograph #36 is the closet in what I would call the
16 secondary bedroom in the residence. It's the bedroom
17 that's nearest to the [REDACTED] side of the trailer
18 and there is a leather jacket in there. This is the
19 leather jacket that was seized that day and I actually
20 marked the packaging "bedroom closet" just to avoid
21 confusion.

22 Q Is this the jacket that is marked State's Exhibit #58?

23 A It's the one we heard testimony about from SLED earlier.

24 Q So this jacket was sent to SLED. In evidence, this is
25 the jacket you took?

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1 A The only way we could be sure is if we could find the
2 paper bag it was in. It should have markings on it.
3 (Locates bag) Yeah, I marked this "bedroom closet" just
4 to avoid confusion because the leather jackets kind of
5 look alike to me. This has markings of the bedroom
6 closet. #37 is a piece of mail that was found in the
7 same bedroom with the closet with the jacket which led
8 me to believe that was most likely Mr. Gibson's bedroom.
9 #38, and it's kind of out of focus, but it can be read
10 if you look at it closely. It is a prescription
11 medication bottle carrying the name Donnie Gibson and
12 that was in the night stand that was found in the same
13 room where the leather jacket was recovered from or
14 recovered from the closet. I think for clarity, I'll do
15 these out of order. This is #40, which is an overall
16 view of the living room taken approximately from the
17 door leading into the residence. On the couch there was
18 noticed a leather jacket and actually visible to the
19 naked eye, it appeared to be a substance consistent with
20 blood on that jacket which is a part of why it was
21 seized and on the wall here there is like a coatrack
22 which also had another leather jacket. Both of those
23 were seized that day pursuant to the search warrant, as
24 well. Photograph #39 is the leather jacket that was on
25 the couch. Photograph #41 is the leather jacket that was

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1 found on the coatrack in the living room which we saw
2 earlier. #42 is, again, a closer view of the tag [REDACTED]
3 this is a closeup of it.

4 Q This is the tag that Denise Whitfield called out to the
5 dispatcher?

6 A Yes. #43 is another photograph of the back of the pickup
7 truck. It's kind of redundant, but that's where it was
8 parked in reference to the residence. #44 is just a shot
9 of, a shot of the interior of the truck. #45, some
10 closeup photographs, these were taken by forensic
11 investigator Rusty Ables as he was processing the
12 vehicle. There were some spots on the seat which were
13 consistent with blood. #46 is a closer photo as you are
14 moving in. In particular, I think he was focusing in on
15 this console item because there was a significant amount
16 of blood found on it later, which is illustrated in
17 photograph #47. That's the console with the two cans in
18 it. It appeared to us to be consistent with blood and so
19 that's why he took photographs of that. #48 is a similar
20 photo of that truck and that console. #49, another
21 photograph of the interior portion of the truck near the
22 floor and the substance we believed to be consistent
23 with blood there. #50 is kind of out of sequence, but
24 that is the driver's side. #51 is the driver's seat and
25 there is a substance that resembles blood going up and

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1 down that seat there. #52 is yet another photograph of
2 that console and the metal down here on the bottom
3 consistent with blood, would appear to be blood on that
4 console. #53 is similar to that. #54 is just the spot on
5 the upholstery with a forensic scale to give it some
6 size.

7 Q Detective Gebing, if you will please take the stand.
8 (Witness complies) Now, one of the photographs, there
9 were several questions asked of the witnesses,
10 identified as Exhibit #13, in reference to the ball
11 caps.

12 A Yes.

13 Q There's one here and a stocking cap here, which is what
14 was testified to.

15 A Yes.

16 Q Do those caps or hats in any way, shape, or form, tell
17 you who the aggressor was in this case?

18 A No. It didn't. I mean, people mentioned that they came
19 up with stocking caps on and we found one as opposed to
20 two, but that doesn't help me determine who started it.

21 Q Detective Gebing, I have no further questions. Please
22 answer any questions Mr. McElhannon may have.

23 THE COURT: Cross examination?

24 MR. MCELHANNON: Your Honor, may we approach?

25 THE COURT: Yes, sir.

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1 (Brief bench conference off the record)

2 THE COURT: Mr. Campbell, we are going to take about a
3 fifteen minute break for the afternoon. If you would take
4 your jury back and relax and if you need anything, the
5 bailiff will provide it to you. Okay, sir?

6 (Jury out at 2:41 PM)

7 THE COURT: Don't talk to anybody. You can stay there or
8 just don't talk to anybody about your testimony.

9 DETECTIVE GIBSON: Right.

10 THE COURT: We'll be in recess for 15 minutes.

11 (Break)

12 THE COURT: I'm not going to turn a case into the jury
13 after 4:00 in the afternoon. I can't imagine that we are
14 going to finish up today. Judge Maddox has a big product
15 liability matter that's coming up here tomorrow. So, we'll
16 move down to the third floor courtroom if we have to. Mr.
17 McElhannon, are you ready to proceed?

18 MR. MCELHANNON: Yes, sir.

19 THE COURT: State ready to proceed?

20 MR. CAMPBELL: Yes, Your Honor.

21 THE COURT: Thank you. Would you bring them out, please,
22 Buck.

23 (Jury in at 3:03 PM)

24 THE COURT: Mr. Campbell, it's been pointed out to me, I
25 get to wear this dress up here and so I can't necessarily

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1 feel it as much, but are you or your jury uncomfortable in
2 here with the temperature in the courtroom? Is everybody
3 okay? If you need anything, become uncomfortable, raise your
4 hand and we'll see if we can deal with it. Just FYI, we don't
5 control the temperature here. It's controlled, I believe, in
6 Columbia, but we do our best. With that being said, Mr.
7 McElhannon, are you ready to go with cross examination?

8 MR. MCELHANNON: Yes, sir. Thank you.

9 THE COURT: Yes, sir.

10 CROSS EXAMINATION

11 BY MR. MCELHANNON:

12 Q Detective Gebing, we'll start with this audio that the
13 jury heard with Mr. Gibson when he called you, I think,
14 on May 1st, about five days, roughly, after this
15 incident.

16 A Yes, sir.

17 Q And throughout the audio, isn't it true that Mr. Gibson
18 maintained that he went back to the bar to get
19 cigarettes, a lighter, and \$20.00?

20 A That's what he maintained, yes, sir.

21 Q And that he didn't take a knife in.

22 A That's what he maintained, yes, sir.

23 Q That's what I'm saying. All my questions are from his
24 conversation with you.

25 A Correct.

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1 Q And that he had been sucker punched earlier.

2 A Correct.

3 Q That when he got into the altercation on the porch or on
4 the deck, that someone had a knife and he grabbed the
5 blade of it. Correct?

6 A That's what he ---

7 Q That's what he said.

8 A Correct.

9 Q Now, the pictures that the jury just saw, the 54 photos,
10 of all the blood that was on the deck and the blood
11 trails out the side door and all of that, was any of
12 that tested as far as DNA, as far as you know of?

13 A The blood from the scene, sir?

14 Q Yes.

15 A No.

16 Q And wouldn't it be -- we know people got hurt. We know
17 people got hurt. We know even Donnie Ray Gibson got cut
18 or hurt. Wouldn't it be, after, wouldn't you assume all
19 that blood is going to be a mixture of several people's
20 blood?

21 A It would be fair to assume that, yes, sir.

22 Q And that the blood that you were showing in the truck
23 would be more than likely Mr. Gibson's blood dripping or
24 whatever since he left in it?

25 A It would be fair to assume that, yes, sir.

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1 Q And Mr. Campbell asked you about when he was actually
2 brought in, what was in his property, and you said
3 cigarettes and a lighter.

4 A Among other things, yes, sir.

5 Q But that was brought out to the attention of the jury
6 because he said he went back for cigarettes and a
7 lighter.

8 A Cigarettes, a lighter, and a \$20.00 bill.

9 Q Right. There was a certain lapse of time between the
10 time he left the bar and the time this property was
11 taken from him. Correct?

12 A Yes, sir.

13 Q So, I mean he had ample opportunity to get another pack
14 of cigarettes and a lighter.

15 A Yes, sir.

16 Q The -- let me share this photo. I hate to keep putting
17 photos up, but I've picked out three I need you to look
18 at. State's Exhibit #19 is the folding knife.

19 A Yes, sir.

20 Q With the blade out.

21 A Yes, sir.

22 Q And you said y'all were unable to determine who that
23 knife belonged to?

24 A We have not been able to determine who it belonged to.

25 Q And you said no one would tell or come forth with

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1 information about who it belonged to?

2 A That's correct.

3 Q And it had no -- it was sent to SLED?

4 A It was.

5 Q And it had no DNA on it?

6 A Correct.

7 Q Was it fingerprinted?

8 A I believe it was. The handle, being textured, is not a
9 conducive surface for fingerprints. I don't believe it
10 had fingerprints from the blade, which is why I'm not
11 able to determine ownership.

12 Q Okay. In direct exam, you testified that, I think you
13 did, correct me if I'm wrong, that normally when you are
14 collecting evidence and it's at night, people are taught
15 to pick it up by the handle and not the blade?

16 A You want to pick it up as minimally as you possibly can.
17 Ultimately, if you are hoping it's got a blade or a
18 handle that's got blood on the blade, don't touch the
19 blade. If it's got, if you think you might be able to
20 get prints from the handle, don't touch it where you
21 think evidence might be. That's the rule of thumb.

22 Q On this night, the State's #55, as you heard Lilly
23 Gallman from SLED testify, there was no DNA, no
24 identifiers on the handle.

25 A No, there was DNA on the handle, but it's thus far

1 unknown.

2 Q It was unreliable, it's insufficient.

3 A No, it's not matched to anybody. The standards that we
4 provided, it didn't match the standards.

5 Q Okay. On the handle.

6 A Correct.

7 Q And then there were two swabs taken from the blade and
8 both of those matched Donnie Gibson.

9 A Correct.

10 Q You stated, I believe, you've been in law enforcement at
11 least 15 years or more?

12 A Give or take.

13 Q Given your military, police, and everything?

14 A Yes.

15 Q So, you've probably seen quite a number of assaults.

16 A I've seen my share, yes, sir.

17 Q And you've seen defensive wounds?

18 A Yes.

19 Q I'm going to show you Defendant's Exhibit #2, which I
20 don't know if you want to come down or stay up there.

21 (Witness leaves the stand) This has already been
22 admitted, but I believe this is the left hand of Donnie
23 Gibson.

24 A Yes, sir.

25 Q What does that show you?

CROSS EXAMINATION OF ROB GEBING BY MR. MCELHANNON 275

- 1 A That shows me a cut to his index finger somewhere and
2 the area between the first ---
- 3 Q Can you show them on here?
- 4 A Sorry. There is an incision type injury here, which is
5 between the first and second joint of the finger.
- 6 Q And what would be on the, I guess that's his little
7 finger?
- 8 A His little finger. He had already done some self
9 treatment.
- 10 Q I don't believe we have one where the gauze is off of
11 it, but you would assume that the way that blood is on
12 there that that is another cut.
- 13 A It would be a fair assumption, but I can't say yes or no
14 from this picture.
- 15 Q Okay. Thank you. In your experience in law enforcement,
16 have you seen wounds like this on people's hands before?
- 17 A I have.
- 18 Q And is it consistent with grabbing the blade of a knife?
- 19 A It is consistent with many things. I've seen people with
20 a knife have it slip out of their hands get cut in that
21 area as well and so it could be.
- 22 Q It could be either/or.
- 23 A Correct.
- 24 Q So, it could be a defensive type wound where Mr. Gibson
25 was blocking a knife or it could be the opposite.

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CROSS EXAMINATION OF ROB GEBING BY MR. MCELHANNON

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1 A Or it could be where he squeezed down on a blade,
2 itself, or it slipped out of his hand, yes, sir.

3 Q Okay. And Defendant's Exhibit #1, which I believe we've
4 identified as Mr. Gibson with the laceration over his
5 eye, were you able to determine if that was from a knife
6 wound or from a beating or what it was from?

7 A You may be asking questions a little beyond my scope,
8 but ---

9 Q That's what I did. Thank you.

10 A Can I finish?

11 Q Now, the testimony has been, I believe, that Damon
12 Marcengill was cut with the knife that was sent to SLED.
13 Correct?

14 A Correct.

15 Q And there was none of his DNA or blood on the blade?

16 A There was none found when they tested it.

17 Q Okay. But she said she tested everything that she saw on
18 the blade. Correct?

19 A Right. She also mentions that just because she didn't
20 find it doesn't mean it wasn't there at one time.

21 Q So are you saying that the blade was wiped off at some
22 point?

23 A I'm saying that it most certainly would have to have
24 been placed into a plastic bag while still wet.

25 Q And how do you explain that only if Damon Marcengill's

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CROSS EXAMINATION OF ROB GEBING BY MR. MCELHANNON 277

1 DNA or blood was on that blade, how that's the only DNA
2 that was wiped off and Mr. Gibson's was still on it?

3 A I don't explain it. That's just the facts of the case.

4 Q Mr. Campbell, the solicitor, asked you again about the
5 ball cap and the stocking caps and various witnesses
6 testified and they testified differently, several of
7 them did. He asked you, "Does that help you find the
8 aggressor in the case," and you stated, "No".

9 A It doesn't.

10 Q It doesn't. Okay. I agree. But does the conflicting
11 testimony and statements by the witnesses of what they
12 saw that night go to, basically, their credibility?

13 A In a case like this, I don't see as much of an issue on
14 why some people remember two stocking caps and some
15 might remember a stocking cap and a ball cap. At the
16 heart of it is, everybody seems to remember Mr. Gibson
17 attacking Damon and everybody seems to remember Scotty
18 attacking Jason, but everybody's got their own vantage
19 point, everybody's got their own point of view about
20 what they saw. That, to me, wasn't a deal breaker.

21 Q And you said that you were talking about the testimony
22 of witnesses, how you like to get the statements as soon
23 as possible because they remember more right after
24 something happens.

25 A We try to get them while it's fresh in their memory.

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1 Yes, sir.

2 Q Rather than two years and eight months later, like
3 today?

4 A I agree.

5 Q And you, of course, heard all the witnesses' testimony
6 and there again, the Solicitor agrees that they were
7 conflicting in what they saw.

8 A To some extent, yes. I'll concede to that.

9 Q And you're not telling the jury that the only ones that
10 were basically accurate, telling the truth, are the ones
11 that help the State's case and the ones that are
12 conflicting, they just don't remember right?

13 A I'm not sure I understand that question.

14 Q I'm saying that, basically, your testimony is that you
15 believe everyone that said that they saw Mr. Gibson pull
16 a knife and I think some of them said he pulled this
17 huge machete-looking knife out of his back pocket, but
18 when, under cross examination of the other witnesses,
19 you stated that they didn't say certain things in their
20 statements. Are you saying you believe the ones that
21 bolster the State's case and not believing the ones that
22 help Mr. Gibson?

23 A No. What I'm saying is, again, it's not uncommon for
24 multiple people to basically see the same event and have
25 slightly different variations of what they saw. That's

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1 just -- I accept it for what it is. It's not my place to
2 go in there and tell them what they saw. That's why we
3 invite them to come to court and testify. Everybody is
4 going to have their own point of view.

5 Q Correct. And what I'm saying is, the ones who think they
6 saw Mr. Gibson pull a knife out, they can be just as
7 inaccurate in that as the ones who said they didn't see
8 him.

9 A I don't really understand the question. As I recall, so
10 far, everybody said they saw Mr. Gibson pull a knife
11 out.

12 Q All the witnesses said that?

13 A Almost all of them.

14 Q And as far as the jacket that you found, the one that
15 was admitted, which has, apparently, blood or DNA on it
16 of Mr. Gibson as well as Damon. Right?

17 A As I recall, the jacket did not have Damon's. It had a
18 non-identified, a third unidentified person.

19 Q So, it did not have Damon Marcengill's DNA ---

20 A According to SLED, it did not.

21 Q Just Donnie's?

22 A Correct.

23 MR. MCELHANNON: That's all the questions I have.

24 THE COURT: All right. Redirect?

25 MR. CAMPBELL: Just a couple.

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REDIRECT EXAMINATION OF ROB GEBING BY MR. CAMPBELL

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REDIRECT EXAMINATION

1
2 BY MR. CAMPBELL:

3 Q Now, Detective Gebing, on cross examination Mr.
4 McElhannon was asking you about the wounds that Mr.
5 Gibson received, whether defensive wounds or possibly
6 could have -- he could have done it himself. Is that
7 right?

8 A Correct.

9 Q And you've looked at State's Exhibit #55, have you not?

10 A I have.

11 Q And on this blade here, when SLED tested it, Items 5.1
12 and 5.2 is where Mr. Gibson's blood was found. Correct?

13 A That's correct. The marks on the blade are indicators of
14 where SLED took the swabs from and they make that mark
15 to indicate that's where it came from and it correlates
16 to the numbers in her report.

17 Q And a knife of this size, based on your experience, as
18 Mr. McElhannon went into, the number of assaults you
19 have, cases you have worked, would you have expected to
20 see more wounds on Mr. Gibson if he was cut with this
21 knife himself?

22 A I would think so.

23 Q And the fact that he had a laceration on, I believe, one
24 finger in Defense Exhibit #2, that would be consistent
25 with him holding the blade, would it not?

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REDIRECT EXAMINATION OF ROB GEBING BY MR. CAMPBELL 281

1 A It would. It could be.

2 Q And I think you testified that it's not uncommon that a
3 person who cuts themselves, the blade slips in their hand.

4 A I've seen it before.

5 Q And based upon what you observed, numerous people have
6 touched this knife prior to it coming into y'all's
7 possession.

8 A That's according to witness statements, yes.

9 Q And, in fact, two of your own officers touched this
10 knife in some way, shape or form.

11 A That's correct.

12 Q And the witness statements, Mr. McElhannon was going in
13 stating that these witnesses were wrong because some
14 said that he had a cap on, some said he had a beanie
15 cap, some said he had a stocking cap on, the fact that
16 these witnesses were inconsistent on that fact alone,
17 does that cause you any great concern?

18 A On what happened that night? No. It doesn't.

19 Q In fact, the witnesses were all consistent that he was
20 wearing a leather jacket.

21 A Correct.

22 Q And the fact that DNA from Damon Marcengill was not
23 found on his jacket, that just goes to show Damon wasn't
24 close enough to him to get his blood on it at that point
25 in time?

RE-CROSS EXAMINATION OF ROB GEBING BY MR. MCELHANNON 282

1 A It just shows Damon didn't bleed on the jacket and there
2 was, apparently, no transfer to the jacket.

3 Q But he did bleed on his shoes?

4 A Either bled on his shoes or there was transfer on the
5 top of his shoe.

6 MR. CAMPBELL: I have no further questions.

7 MR. MCELHANNON: Just one.

RE-CROSS EXAMINATION

8
9 BY MR. MCELHANNON:

10 Q There again, the knife that was just shown, regardless
11 of where the blood is on the blade, it could have been
12 either from grabbing the blade in a defensive posture
13 and the blade hit those two or three fingers and cut
14 him?

15 A It could have been either way.

16 Q Thank you. That's all.

17 THE COURT: Thank you, sir. You may step down.

18 DETECTIVE GIBSON: Thank you, Your Honor.

19 MR. CAMPBELL: Your Honor, that's the State's case.

20 THE COURT: Okay. Mr. Campbell, I'm going to ask that you
21 step back to the jury room. The State has announced they have
22 presented all the evidence in their case in chief and I have
23 several administrative matters and then we will let you know
24 where we go from there. Okay, sir?

25 (Jury out at 3:22 PM)

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1 THE COURT: All right. Mr. McElhannon, do you have any
2 motions?

3 DIRECTED VERDICT MOTION

4 MR. MCELHANNON: Your Honor, at this time I would make
5 the standard motion for a directed verdict based on the fact
6 that I believe they have not proven their case and that,
7 certainly, credibility is at issue in this.

8 THE COURT: Motion is denied. Now, at this point, has
9 your client had the opportunity to consult with whomever he
10 needs to, to determine whether or not he wishes to testify?

11 MR. MCELHANNON: Yes, sir.

12 THE COURT: And what is his decision?

13 MR. MCELHANNON: He will not testify.

14 THE COURT: Okay. Let me verify that. You are still under
15 oath, Mr. Gibson.

16 MR. GIBSON: Yes, sir.

17 THE COURT: Have I afforded you ample opportunity to
18 discuss with anyone your desire whether or not you want to
19 testify?

20 MR. GIBSON: Yes, sir.

21 THE COURT: And Mr. McElhannon advises that you have
22 exercised your rights under the fifth amendment and have
23 chosen not to testify?

24 MR. GIBSON: Yes, sir.

25 THE COURT: Okay, sir. Do you feel you have had ample

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1 opportunity to speak with Mr. McElhannon or anyone else?

2 MR. GIBSON: Yes, sir.

3 THE COURT: Very good. Thank you, sir. Do you have any
4 other evidence you intend to introduce?

5 MR. MCELHANNON: No.

6 THE COURT: Okay. What I'm going to do is bring the jury
7 in, send them home, we will do a charge conference. I just
8 don't see putting it this late into their hands this
9 afternoon. Okay?

10 MR. MCELHANNON: I understand.

11 THE COURT: Unless either one of y'all think differently.
12 I figure the charge conference may take fifteen, twenty, to
13 thirty minutes. By the time we get through with everything,
14 it will be five o'clock.

15 MR. CAMPBELL: Yes, sir.

16 THE COURT: Would you bring the jury back in?

17 (Jury in at 3:26 PM)

18 THE COURT: Mr. Campbell, ladies and gentlemen of the
19 jury, if you remember at the first part of this case, I told
20 you that there would be five phases in every trial: Opening
21 statements, presentation of the evidence, closing statements,
22 my charge to you on the law, and then your deliberations. We
23 have reached the end of the presentation of the evidence
24 aspect of this case, which means that we need to get into the
25 closing arguments and the charge on the law. Quite frankly, I

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1 have meetings with these attorneys to determine the law that
2 I'm going to charge and it will take us a while to make sure
3 we go over that and by the time that's all said and done, it
4 will be around 5:00 and it's just a little late in the day
5 for me to give you the case at 5:00 and so I'm going to stop
6 the case today. I'm going to send you home for the afternoon
7 with the admonition that you are not to speak to anybody
8 about this case, not to look, read, or hear anything about
9 this case. One change in the logistics. We are going to be on
10 the third floor tomorrow. There's a big civil matter up here
11 involving bunches and bunches of lawyers and so they need a
12 bigger space and so we are going to drop down to the third
13 floor courtroom. Before you leave, I'm going to ask Buck to
14 take you down. Do you mind doing that to the third floor and
15 show them where they need to report in the morning and if you
16 would, be back in your jury room at 9:30 in the morning. I'm
17 excusing you for the day. Thank you very much.

18 (Jury out at 3:27 PM)

19 THE COURT: Any additions or exceptions from the State?

20 MR. CAMPBELL: No, Your Honor.

21 THE COURT: From the Defense?

22 MR. MCELHANNON: No, Your Honor.

23 CHARGE CONFERENCE

24 THE COURT: Now, my understanding is that you are going
25 to ask for a lesser included of ABHAN?

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1 MR. MCELHANNON: I think I'm going to withdraw that, Your
2 Honor.

3 THE COURT: You are?

4 MR. MCELHANNON: Yes, sir. It's all or nothing.

5 THE COURT: Any request from the Defense or from the
6 State? So I just charge assault with intent to kill and then
7 possession of a weapon during a violent crime. Now, the
8 question I have about that is that the indictment says he had
9 a firearm.

10 MR. CAMPBELL: I will move to amend the indictment.
11 There's no testimony regarding a firearm. It's just a typo.

12 MR. MCELHANNON: Your Honor, I am going to ask for the
13 charge about self-defense or necessity under duress.

14 THE COURT: We will debate that. Do you have an objection
15 to amend the indictment under the possession of a weapon
16 during the commission of a violent crime to change firearm to
17 knife since the charge of AWIK has knife?

18 MR. MCELHANNON: I think that's just typographical, Your
19 Honor, and actually that's not going to impact the case.

20 THE COURT: Okay. I'll grant the motion to amend the
21 indictment. Now, let's go over that, because I have my
22 standard charge on assault and battery with intent to kill
23 from the charge book and possession of a weapon during the
24 commission of a violent crime. Where does self-defense come
25 into this case?

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1 MR. MCELHANNON: Your Honor, I believe Mr. Gebing's
2 testimony was that the wounds on Mr. Gibson's hands could be
3 defensive wounds possibly or defensive wounds. Mr. Gibson, in
4 his audio recording that Detective Gebing produced on the
5 State's case, Mr. Gibson says a knife came at him and he put
6 his hand up to block and grabbed the blade of the knife. Your
7 Honor, if that's not self-defense, I don't know what is.

8 THE COURT: Well, you know, that's why I'm asking. Mr.
9 Campbell, what's your position on that?

10 MR. CAMPBELL: Your Honor, I don't think he's entitled to
11 the charge of self-defense. First of all, there is no where
12 in the audio that he says he was defending himself. Self-
13 defense is a defense that court's have ruled that -- first of
14 all, the Defendant has to be at fault bringing about this
15 difficulty. He, himself, put himself there. The elements in
16 State v. Long, it's 325 S.C.59 or 487 S.E.2nd 62(1979), our
17 courts have stated what the elements of self-defense are: The
18 Defendant is without fault in bringing on the difficulty, the
19 Defendant felt he was actually in danger of losing his life
20 or sustaining serious bodily injury, a reasonable prudent
21 person of ordinary firmness and courage would have
22 entertained the same belief and if they had no other means of
23 avoiding the danger.

24 First of all, two of these fail right off the bat. The
25 fact that he's without fault bringing on the difficulty. He

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1 is the one that instigated it. He was kicked out, he went
2 home, he drove the 45 minutes, he drove 45 minutes back, the
3 20 mile trip there and 20 miles back. He thought about it and
4 he, as the witness stated, LaBriska Christopher, he went home
5 to get what he needed because he wasn't going to be "punked"
6 like that. The act of him going home, arming himself, putting
7 on a leather jacket when it's a very hot night, getting
8 another individual and coming back shows this is not, "he's
9 there to defend himself". All he had to do was stay home and
10 we wouldn't be in this courtroom today.

11 THE COURT: Let me stop you right there. Mr. McElhannon,
12 with regard to the first element of self-defense that the
13 Defendant is without fault in bringing on the difficulty.

14 MR. MCELHANNON: He came back to the bar, without a
15 doubt. Now, we dispute that he went home and armed himself
16 and there is not testimony that he did. He said he got what
17 he needed, but LaBriska ---

18 THE COURT: I agree. I agree. Go ahead.

19 MR. MCELHANNON: And furthermore, Mr. Campbell just
20 stated that there is nowhere in that audio where he said he
21 saw a knife coming at him, but there is. He says they were
22 beating him already. He says, "I was down on my knees and I
23 saw a knife coming at me. I don't know who had it, because
24 they had done beat me so bad, blood was running all over me
25 there." You know, his testimony throughout that audio is,

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1 they had already beaten him up so bad and actually, the
2 testimony from the witnesses, at least five different guys up
3 on the stand said that they either kicked Mr. Gibson or
4 punched him. There's no doubt that he was beaten.

5 THE COURT: The problem with that is, that from all the
6 evidence is, it took place after the alleged stabbing or
7 slicing or slashing. The concern I have with this is, number
8 one, has to do with bringing on the difficulty. Clearly, he
9 was kicked out of this bar. Clearly, he came back of his own
10 volition. Clearly, he went around the back with a larger
11 gentleman where the incident ensued. That's my concern. In
12 addition, to be self-defense, doesn't there have to be some
13 type of acknowledgment or evidence or something that he
14 struck some type of fatal blow or potential fatal blow and
15 that is, being your client, for self-defense?

16 MR. MCELHANNON: You mean ---

17 THE COURT: I mean, yeah. In other words, you have to
18 have somebody who is putting you in a position that a person
19 of reasonable firmness and reasonable apprehension that they
20 are in threat of death or serious bodily harm and therefore,
21 without the ability to extricate yourself from that, you
22 strike a fatal blow or something along those lines. Correct?

23 MR. MCELHANNON: I don't think it has to be a fatal blow.

24 THE COURT: Or something that reasonably could be a fatal
25 blow.

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1 MR. MCELHANNON: Yes.

2 THE COURT: And there's no evidence of that in this case.

3 MR. MCELHANNON: There's evidence they were beating him
4 down in a corner and he said a knife came at him and he just
5 grabbed the handle of it and he says he threw the knife and
6 it cut him.

7 THE COURT: He doesn't -- even if you take his testimony,
8 which obviously is self-serving after the fact, but even so,
9 looking at the facts on the record, because I've got to
10 charge the law based on what's in evidence or the facts in
11 evidence and if you look at that and you construe that he
12 called Detective Gebing where he tries to get him to go out
13 and arrest these other boys for lynching, number one, he
14 never says that's why I cut them, that's why I stabbed them.
15 He never makes an admission that he strikes any type of blow.
16 He just says that I have a defensive wound on my hand and
17 that's it. That doesn't constitute self-defense. Also, is
18 there any evidence that he attempted to remove himself from
19 the situation or that he couldn't remove himself from the
20 situation?

21 MR. MCELHANNON: His testimony, by his own ---

22 THE COURT: His testimony is not in evidence. He chose
23 not to testify.

24 MR. MCELHANNON: Yes, but I mean the audio.

25 THE COURT: Sure.

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1 MR. MCELHANNON: So, basically, what he's saying in that
2 statement is that they had him trapped in a corner and they
3 were beating him down so bad he could not leave. I can't get
4 around the fact that he left and came back. I cannot get
5 around that fact, Your Honor. I cannot get ---

6 THE COURT: But -- Okay. Go ahead.

7 MR. MCELHANNON: But I was just going to say, he did say
8 that to Detective Gebing, that they were beating him down in
9 the corner so bad that he could not get out.

10 THE COURT: Okay. And, you know, I grant you on that one,
11 that's probably correct. Do you have that transcript?

12 MR. CAMPBELL: Yes, sir.

13 THE COURT: It appeared you were reading along with ---

14 MR. CAMPBELL: I was. If I can find it. I can hand up to
15 the Court the one that's marked all over it.

16 THE COURT: That's fine. And do you have one?

17 MR. MCELHANNON: I do.

18 THE COURT: Do you mind me looking at it?

19 MR. CAMPBELL: Certainly not.

20 THE COURT: How do you address the fact, though, that
21 these elements -- and he's got to strike some type of fatal
22 blow based on circumstances. I know you have other witnesses
23 saying he did the cutting, but that doesn't -- I mean, can
24 you mesh that together?

25 MR. MCELHANNON: He said he threw the knife, Your Honor,

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1 in that audio.

2 THE COURT: Oh, he does?

3 MR. MCELHANNON: Yes.

4 THE COURT: I didn't catch that.

5 MR. CAMPBELL: He does. He says he threw the knife. This
6 is what we transcribed. However, this is not the redacted
7 version. The stuff from the penitentiary was redacted.

8 THE COURT: Do you want to look at this before I look at
9 it? There's something on the back.

10 MR. CAMPBELL: Give me a second and I will get a clean
11 copy.

12 THE COURT: Okay. Either way. I just want to make sure
13 everybody is okay with it. I'm going to -- let me tell you
14 this: I'm going to take it under consideration. I want to
15 hash out the different elements because it seems to me, under
16 this State v. Bixby, number one, you raised the self-defense.
17 Right?

18 MR. MCELHANNON: Yes, sir.

19 THE COURT: A big question in my mind is whether or not
20 he is without fault.

21 MR. MCELHANNON: I agree.

22 THE COURT: I'm going to ponder on that. We are going to
23 research it a little bit more and you've got a problem here,
24 quite frankly.

25 MR. MCELHANNON: Yes, sir.

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1 THE COURT: I will grant the Defendant actually believed
2 he was in imminent danger of losing his life or serious
3 bodily injury, based on his phone call, and so I think that's
4 in your favor. And then, number four, the Defendant had no
5 probable means of avoiding the danger and acting as he did in
6 the particular circumstances, the fourth element of that. In
7 some regards, that ties him with the first one in my mind,
8 may not, and that causes me some concern, too. Quite frankly,
9 the two big ones I have is 1)exposing himself to danger. You
10 know that. 2)It seems to me there has to be some type of
11 acknowledgment of infliction of a blow that could be fatal.
12 Throwing a knife at them, I don't know if that gets up there.
13 I'm not saying it doesn't. That's just my concern.

14 MR. MCELHANNON: I understand.

15 THE COURT: With that done, any other charges that you
16 want to propose?

17 MR. MCELHANNON: No, just the standards. I don't have
18 anything else.

19 THE COURT: Do you have any proposed charges?

20 MR. CAMPBELL: Just the standard ones.

21 THE COURT: How about take a minute and look at my charge
22 on assault and battery with intent to kill. This includes the
23 lesser included, which I've been asked not to and I won't,
24 and I will take that out of the verdict form, but with that
25 being done, y'all take a minute to look at those and I'm

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1 going to go over the meat and potatoes of my standard charge.
2 (Attorneys look at document) All right. Just for purposes of
3 the record, I've taken under advisement whether or not I'm
4 going to charge self-defense. I'll let you know my ruling in
5 the morning. I know that's not very pleasant for you, but I
6 don't want to do it off the cuff.

7 MR. MCELHANNON: It is what it is, Your Honor.

8 THE COURT: I agree with you that State versus Belcher
9 requires that I excise a part of my standard charge that
10 would infer malice by use of a deadly weapon and I have
11 stricken that out. I will not charge the jury on that. Also,
12 we will redact the verdict form to delete the high and
13 aggravated. Also, for the record, the indictment was amended
14 by consent to modify firearm to knife. Any other matters of
15 record that we need to take care of, Mr. Campbell?

16 MR. CAMPBELL: No, Your Honor.

17 THE COURT: Mr. McElhannon?

18 MR. MCELHANNON: No, Your Honor.

19 THE COURT: All right. Let me say, both lawyers have been
20 well prepared and you've done a good job for your respective
21 positions in this case and I appreciate that and the
22 preparation, regardless of the outcome, and I'll see you in
23 the morning at 9:30 downstairs on the third floor.

24 MR. MCELHANNON: Thank you, Your Honor.

25 THE COURT: And Mr. Allen.

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2 THE COURT: They are bringing up the Defendant. I don't
3 think it will be a big matter for him not to be here, just
4 because it's in his favor. For the record, Mr. McElhannon,
5 yesterday afternoon at the charge conference, requested the
6 charge on self-defense. Quite frankly, initially, my
7 impression of it was it was not appropriate under the facts
8 of this case for two or three reasons. 1) The first element of
9 self-defense being that the Defendant must not be at fault in
10 bringing about the conflict, but I felt like in this case,
11 the Defendant had been escorted from the premises and told he
12 could not come back, therefore, when he came back regardless
13 of the reason, he was a trespasser and I know. I sustained the
14 objection, but you are correct in that yesterday and I was
15 wrong. That being the case, he also, if you read the
16 transcript, he is speaking with Detective Gebing, said, you
17 know, I didn't want to go back because I thought it might
18 cause trouble. So, the idea being if you are at fault, you
19 might precipitate a conflict that bars you from raising the
20 defense of self-defense and I was reading a 1907 case last
21 night, State versus Emerson, which is 78 S.C. 83, 58
22 S.E.2nd, 974, it's a murder case and surprisingly enough, it
23 comes out of Anderson, so did a lot of the other cases we
24 read last night and there was a charge in that case that they
25 excepted to, the Defense excepted to, that says that if you

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1 conclude that the Defendant was a trespasser in that house
2 and the trespassing was such that would be reasonably
3 calculated to precipitate a conflict, then such trespasser
4 could not be said to be without fault in that event such
5 trespasser could not invoke the plea of self-defense and that
6 seemed to be right on point for what we're doing, but the
7 difference is, in those days, interestingly enough, the law
8 was that if you were a spouse and you caught your spouse in a
9 compromising situation, you couldn't be charged with murder,
10 you could only be charged with manslaughter. I started
11 thinking that through with this case and in this case, the
12 Defendant unquestionably, when he returned to the premises
13 was a trespasser, but if you think it to its logical end, and
14 he knew by his own statement when he talked with Detective
15 Gebing that it very likely precipitated the conflict and
16 that's why he allegedly sent his nephew Scotty in to get
17 whatever items, at least under his version, what he had to
18 get, but that doesn't mean the bar or the people that ran
19 that bar had the right to kill him. If you think through the
20 logical extent, if he couldn't raise the defense of self-
21 defense, then they would have a right to just kill him
22 because he was a trespasser and therefore, although it's
23 extremely slim, I'm going to give the benefit of the doubt to
24 the Defendant and I'm going to charge self-defense and let it
25 be what it is. I note your objection, strenuously.

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1 MR. CAMPBELL: Yes, sir.

2 THE COURT: And I very well may be wrong, but just
3 looking at it. In fact, when I left last night, I had
4 concluded with Cliff, that I was not going to charge self-
5 defense, and then on the way home, I don't know if you want
6 to call it an epiphany or whatever it is with me, but I
7 started thinking it through and I thought, you know, it's
8 probably correct. Be that as it may, that's my analysis.

9 MR. CAMPBELL: Noting my objection, I will argue it to
10 the jury.

11 THE COURT: Right.

12 MR. MCELHANNON: Thank you, Your Honor.

13 THE COURT: Yes, sir. All right. Anything else from the
14 State before we bring the jury in?

15 MR. CAMPBELL: No, Your Honor. My understanding is, since
16 exhibits were put in by the Defense, even though it was
17 through the State's case, I will open on the law, then Mr.
18 McElhannon closes, and then I will close.

19 THE COURT: Now, we discussed this off the record, but if
20 you were not to open on the law and he chose not to give a
21 closing statement, then I would go straight to charging the
22 jury. Also, counsel has decided, both, that they want me to
23 charge on the law first and then they will close after my
24 charge to the jury. Is that correct?

25 MR. CAMPBELL: Yes, sir.

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1 MR. MCELHANNON: Yes, sir.

2 THE COURT: All right. If there's nothing further, let's
3 bring the jury on up here, please. Mr. Frazier, would you
4 make sure no one comes in or goes out of the courtroom during
5 my charge and closing statements?

6 MR. FRAZIER: Yes, sir.

7 (Jury in at 10:01 AM)

8 THE COURT: Mr. Campbell, ladies and gentlemen of the
9 jury, first, let me apologize. Some of the logistics around
10 here I thought we were going to be on the third, but anyway,
11 things are what they are.

12 Good morning. I've spoken with counsel and I told you
13 yesterday, we are getting ready to get into the third phase
14 of the case when we have closing arguments of the attorneys
15 and then I will charge you on the law. By agreement with
16 counsel, we are going to turn that around. I'm going to
17 charge you on the law first and then the attorneys will give
18 you their closing arguments and then you will be given the
19 case for your deliberations. Okay?

20 CHARGE ON THE LAW

21 This is the charge on the law. Ladies and gentlemen, now
22 that you have heard all the evidence in this case, it is your
23 duty to listen to the law and I instruct it to be. These
24 instructions will be in three parts. The first part will be
25 the general rules that define and control your duties as

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1 jurors. The second part will be the substantive law that
2 applies to this case, in other words, what the State must
3 prove to make its case and then the third part will be rules
4 about your deliberations, then Mr. Campbell, I will explain
5 this verdict form and how it needs to be filled out. Okay?

6 Now, as I told you at the beginning of this case, it is
7 your duty as jurors and under your oath to find the facts
8 from the evidence that's been presented here in the courtroom
9 and no other place. I will tell you what evidence is in just
10 a minute. To those facts as you find them to be, you must
11 apply the law as I instruct you. You must follow the law as I
12 give it to you. You must not be concerned with what the law
13 should be or what you'd like it to be, but what it is and you
14 must not be influenced by any personal likes or dislikes,
15 opinions, prejudice, or undue sympathy you may have for any
16 person involved in this case. That means, you decide this
17 case solely from the evidence that has been presented here in
18 the courtroom and according to the law. In fact, when you
19 took your jury oath, that's what you agreed to do.

20 Now, following my instructions, you must follow all of
21 them and not single out the parts that you like and follow
22 those and disregard any parts that you may dislike. They are
23 all equally important and you must not read into my
24 instructions to you now or anything that I may have done
25 during the course of this trial, a feeling on my part of how

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1 you are to find facts. I can assure you, I have no feeling
2 one way or the other. Our state constitution does not allow
3 judges to have opinions on the facts. We are, essentially,
4 referees to make sure that the process is followed and then
5 we are instructors on the law so that you can apply the facts
6 as you find them to be. So, if you think you saw me do
7 anything or say anything or somehow make a gesture as to how
8 you are to find facts, I'm going to ask you and also instruct
9 you to disregard those because you, the jury, are the judges
10 of the facts and I may not, and nobody, may invade that
11 province.

12 Now, in deciding facts, you do that by evaluating and
13 weighing the evidence that you heard during this trial. There
14 is no way I can give you a scale in the literal sense. It is
15 entirely a mental process and you weigh and you evaluate
16 evidence simply by using your good sound judgment and sense
17 of logic.

18 Now, that being said, I'm going to tell you what is
19 evidence. First, the sworn testimony from any witnesses that
20 you heard during this case, whether it be on direct
21 examination or cross examination or any combination of that
22 and it's regardless of who called that witness. Any exhibits
23 that have been admitted into this case is evidence and that
24 is only the evidence that you may consider in this matter.
25 Therefore, I'm going to explain to you what is not evidence.

1 If you recall, at the beginning of this case, I told you
2 that the arguments and statements of the lawyers is not
3 evidence and it's not. They are not witnesses, they are not
4 sworn, but they are advocates for their clients, so whatever
5 they tell you or told you in their opening statements,
6 whatever comments they made during the course of this trial
7 or whatever they tell you in just a minute in their closing
8 statements is helpful and is designed to try to explain to
9 you the facts and the circumstances and the issues in this
10 case, but it is not evidence and so, therefore, and back in
11 your deliberations when you are allowed to begin there, if
12 your memory of what the facts are differs from what either of
13 these lawyers tell you, then your memory of those facts will
14 control.

15 Also, questions and objections by attorneys is not
16 evidence. As I told you at the beginning of this case,
17 lawyers have a duty to object if they see something that they
18 think is improper during the course of the trial. During your
19 deliberations, it would be improper and I instruct you that
20 you may not discuss the fact that an objection was raised or
21 my ruling on that objection. That is simply the process that
22 goes on in each and every case that is tried here.

23 Also, ladies and gentlemen, anything that you may have
24 heard outside of this courtroom when court was not in
25 session, breaks or overnight, is not evidence, either. In

1 short, the evidence is what you heard from this witness stand
2 and the exhibits that I allowed into evidence. That's it.

3 Now, in South Carolina, we have two types of evidence.
4 We have direct evidence and we have circumstantial evidence.
5 Direct evidence is fairly simple and it's this: It is
6 testimony of a person who asserts or claims to have actual
7 and direct knowledge of a fact such as an eyewitness.

8 Now, circumstantial evidence is a little more difficult,
9 but it is also very credible evidence that you may consider.
10 Circumstantial is this: Circumstantial evidence is indirect
11 evidence. It's proof of a chain of facts and circumstances
12 from which you may find another fact exists even though that
13 fact has not been proven directly. Now, if that's not
14 confusing enough for you, let me give you an example. If you
15 were to go to bed at night and you were to have snow in your
16 front yard. When you were to wake up in the morning and you
17 were to see tracks in your front yard, you may infer from the
18 existence of those tracks that someone or some thing walked
19 through your front yard during the night although you didn't
20 see them in your front yard doing that. Now, the law makes
21 absolutely no distinction between the weight or value that
22 you, the jury, may give either direct or circumstantial
23 evidence. You are entitled to consider both and there is not
24 a greater degree of certainty required for circumstantial
25 evidence to be considered by you.

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1 However, if, after weighing all the evidence in this
2 case you are not convinced of the guilt of this Defendant
3 beyond a reasonable doubt, it is your job to find the
4 Defendant not guilty.

5 Now, in determining what the facts are, it is necessary
6 that you consider credibility of the witnesses and you must
7 consider that in considering all the evidence in this case.
8 You must decide which testimony that you want to believe and
9 which testimony you do not want to believe. You may
10 disbelieve all or part of any witness' testimony or you may
11 believe all of any witness' testimony. In making that
12 decision, you may take into account a number of factors
13 including the following, but this is not an exclusive or
14 exhaustive list. Those factors to consider in a witness'
15 credibility is this: Was the witness able to see or hear or
16 know the things by which that witness is testifying, how well
17 was the witness able to recall and describe those things,
18 what was the witness' manner while testifying or what we
19 commonly refer to as their demeanor, is there some reason
20 some witness would want to give testimony that would help or
21 hurt one side or the other, did that witness have an interest
22 in the outcome of this case or any bias or any prejudice
23 concerning any party or any matter involved in this case, how
24 reasonable was the witness' testimony considered in light of
25 all the evidence and was the witness' testimony contradicted

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1 by what that witness had said or done or by other testimony
2 of other witnesses at some point in the trial or other -- let
3 me say that again. Was the witness' testimony contradicted by
4 what that witness had said or done at another time or by the
5 testimony of another witness or by other evidence.

6 Now, ladies and gentlemen, those are some, but certainly
7 not all the factors that you can consider in deciding the
8 credibility of witnesses in this case and, of course, as
9 jurors you do not check your common sense at the door when
10 you are sworn in as jurors, and you shouldn't, in this case,
11 so you should use those things as in your day to day lives
12 you find indicative of truthfulness or lack of truthfulness
13 when you decide the credibility of the witnesses.

14 In deciding credibility or believability, again, you
15 may believe as much or as little of each witness' testimony
16 as you think is proper. You may believe all or part or none
17 of any witness' testimony and you may believe one witness
18 over several or several over one, but certainly, what you do
19 not do in determining this matter of credibility is add up
20 the number of witnesses that happen to testify for one side
21 or the other because it doesn't matter to you whether the
22 truth comes from the Plaintiff's side or the State's side or
23 the Defense's side of this case. Your sole objective is to
24 find the truth.

25 Now, you have also heard testimony from persons who are

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1 described as experts in this case. As I told you earlier,
2 people who by their education or experience have become
3 expert in a field have a right to give their opinion on
4 matters in which they are expert and give their reasons for
5 them, but expert testimony should be judged as any other
6 testimony in this case. You may accept it, you may reject it,
7 and give it as much weight as you think it deserves
8 considering the witness' education, their experience and the
9 reason they give for their opinion as well as all the
10 evidence in this case.

11 Ladies and gentlemen, as I told you earlier and I'll
12 remind you again, this is the indictment. The Defendant has
13 been charged with assault and battery with intent to kill and
14 possession of a weapon during the commission of a violent
15 crime. I will remind you of the fact that the Defendant was
16 arrested, that he was charged and he was indicted is not
17 evidence in this case of his guilt. It does not raise an
18 inference nor a presumption of his guilt. It is simply the
19 mechanism by which the State of South Carolina brings
20 criminal defendants before this court so people such as
21 yourselves can listen to the evidence and make a
22 determination of their guilt or innocence.

23 In this case, the Defendant has pled not guilty to the
24 indictment and that plea of not guilty puts the burden on the
25 State to prove him guilty. That burden is beyond a reasonable

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1 doubt.

2 Now, I will tell you that a defendant charged with
3 committing a criminal offense in South Carolina is never
4 required to prove himself innocent and I charge you that it
5 is an important rule of law that a defendant in a criminal
6 trial, no matter what the seriousness of the charge is, will
7 also be considered innocent of the crime or crimes to which
8 the indictment was issued unless that guilt has been proven
9 by evidence satisfying you of his guilt beyond a reasonable
10 doubt. This presumption of innocence does not end when you
11 begin your deliberations, but it accompanies the Defendant
12 throughout the trial until you reach a verdict based on
13 evidence satisfying you of guilt beyond a reasonable doubt.

14 The presumption of innocence is like a robe of
15 righteousness that stays upon the Defendant's shoulders until
16 it has been stripped from him by evidence satisfying you, the
17 jury, of guilt beyond a reasonable doubt. The presumption of
18 innocence is not a mere technical legal theory, it is a
19 substantial right which every defendant is entitled to unless
20 you, the jury, are satisfied from the evidence of the
21 Defendant's guilt beyond a reasonable doubt.

22 So, that leads us to what is a reasonable doubt. This is
23 the law of that: A reasonable doubt is the kind of doubt that
24 would cause a reasonable, sincere, honest, and conscientious
25 person to hesitate to act in an important matter in their own

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1 affairs. Proof beyond a reasonable doubt is proof that leaves
2 you firmly convinced of the Defendant's guilt. Now, there are
3 very few things in this world that we know with absolute
4 certainty and in criminal cases, the law does not require
5 proof that overcomes every possible doubt. If, based on your
6 consideration of the evidence, you are firmly convinced that
7 the Defendant is guilty of the crime for which he is charged,
8 you must find the Defendant guilty. If, on the other hand
9 there is a real possibility that the Defendant is not guilty,
10 you must give the Defendant the benefit of the doubt and find
11 him not guilty.

12 A reasonable doubt may arise from the evidence or from
13 the lack of evidence and I further instruct you that the
14 Defendant is entitled to every reasonable doubt that may
15 arise in the case and what that simply means is this, that if
16 upon any issue of fact essential to a conviction and a
17 verdict of guilty of the offense for which he is charged, if
18 you have a reasonable doubt as to how that issue should be
19 resolved, it is your duty to resolve that doubt in favor of
20 the Defendant.

21 In order to establish criminal liability, criminal
22 intent is required. For example, the mental state required to
23 be proven by the State for a particular crime might be:
24 purpose, intent, knowledge, recklessness, or criminal
25 negligence. Criminal intent must be proven by the State

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1 beyond a reasonable doubt. Criminal intent is always a matter
2 that must be determined by the jury from the circumstances
3 surrounding the situation. Now, there is no way to prove
4 intent to a mathematical certainty and there is no way
5 medical science can dissect a person's brain to determine
6 what they had in mind at the time they did it, so the law
7 says that criminal intent may be inferred from the
8 circumstances shown to have existed at the time and that is
9 how you make a determination of whether or not the element of
10 intent was present.

11 It is not necessary to establish intent by direct or
12 positive evidence, but intent may be established by inference
13 in the same way as any other fact by taking into
14 consideration the acts of the parties and all the facts and
15 circumstances of the case. Criminal intent is a mental state,
16 a conscious wrongdoing and it is up to you, ladies and
17 gentlemen, to determine what the Defendant intended to do
18 based on the circumstances shown to have existed.

19 Finally, ladies and gentlemen, I will instruct you that
20 the fact that the Defendant did not testify in this case is
21 of no consequence. It would be improper and I instruct you
22 that you shall not consider the failure of the Defendant to
23 testify in this case, whatsoever. You may not discuss it at
24 all in your deliberations.

25 Also, there are two charges. Each of these charges must

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1 be considered separately and independent of one another and
2 you can find the Defendant guilty of both, not guilty of
3 both, or a combination of the above. You must consider each
4 charge separately.

5 Now, those are the rules that define and control your
6 job as jurors. I know it's not the most exciting, and so I'm
7 going to give you a minute to stand up and kind of move
8 around, because I will next charge you on the substantive law
9 in this case. If you would, get up and move around for a
10 second. (Jury complies)

11 This is the second part of my charge. This is the law of
12 assault and battery with intent to kill and the law on the
13 possession of a weapon during the commission of a violent
14 crime. In addition, I will charge you on an affirmative
15 defense or a defense raised by the Defendant of self-defense.

16 The Defendant has been charged with assault and battery
17 with intent to kill. In order to prove assault and battery
18 with intent to kill, the State must prove beyond a reasonable
19 doubt that the Defendant committed an unlawful act or a
20 violent nature to the person of another with malice
21 aforethought. An assault occurs when a person unlawfully
22 attempts or offers to commit a violent injury upon another
23 person and have the present ability to complete the attempted
24 injury. An assault is the intentional creation of a
25 reasonable fear of immediate bodily harm. It is not necessary

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1 that the attempted injury or harm actually take place. For
2 example, if I walk up to you and when we are within arms
3 reach, I draw back to hit you, that is an assault.

4 A battery, on the other hand, is the unlawful touching
5 of another person by the person who has committed the
6 assault. An unlawful touching can be caused by a part of the
7 accused's body or by any object the accused puts in motion. A
8 battery is the completion of the assault by using or applying
9 force to another person, however slight, in a rude, angry, or
10 resentful manner without legal justification for doing so.
11 Using my earlier example, if I carry through the assault by
12 hitting you, then there is a battery.

13 Now, malice is hatred, ill-will, or hostility towards
14 another person. It is the intentional doing of a wrongful act
15 without just cause or excuse and with an intent to inflict an
16 injury, or under the circumstances that the law will infer an
17 evil intent. Let me do that one more time. It is the
18 intentional doing of a wrongful act without just cause or
19 excuse and with an intent to inflict an injury or under
20 circumstances that the law would infer an evil intent.

21 Malice aforethought does not require that malice exists
22 for any particular time before the act is committed, but
23 malice must exist in the mind of the Defendant just before
24 and at the time the act is committed. Therefore, there must
25 be a combination of the previous evil intent and the act.

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1 Malice aforethought may be expressed or inferred. These
2 terms expressed and inferred do not mean different kinds of
3 malice, but merely the manner in which malice may be shown to
4 exist, that is, either by direct evidence or by inference
5 from the facts and circumstances which are proved. Express
6 malice is shown when a person speaks words with expressed
7 hatred or ill-will for another or when the person prepared
8 beforehand to do an act which was later accomplished. For
9 example, laying in wait for a person or other acts in
10 preparation going to show that the deed was within the
11 Defendant's mind would be expressed malice. Malice may be
12 inferred from conduct showing a disregard for human life.

13 Now, ladies and gentlemen, if the facts were proven
14 beyond a reasonable doubt sufficient to raise inference of
15 malice to your satisfaction, this inference would simply be
16 an evidentiary fact to be considered by you along with the
17 other evidence in this case and you may give it the weight
18 you decide it should receive.

19 A specific intent to kill is not an element of assault
20 and battery with intent to kill, but there must be a general
21 intent to commit serious bodily injury. Intent means
22 intending the result which actually occurs, not accidentally
23 nor voluntarily. Intent may be shown by acts and conduct of
24 the Defendant and other circumstances from which you may
25 naturally and reasonably infer intent. Evidence of the

1 character of the assault, the character of the instrument
2 used, the manner in which it was used, the purpose to be
3 accomplished and the resulting wounds and injuries may be
4 considered in determining the intent with which the assault
5 was committed. Intent may be inferred when it was
6 demonstrated that the Defendant voluntarily and willfully
7 commits an act, the natural tendency of which is to destroy
8 another's life. That is the law of assault and battery with
9 intent to kill.

10 Now, this is the law of possession of a weapon during
11 the commission of a violent crime. The Defendant is charged
12 with possession of a weapon during the commission of a
13 violent crime or an attempt to commit a violent crime. The
14 State must prove beyond a reasonable doubt that the Defendant
15 visibly displayed a knife during the commission of a violent
16 crime. A knife means an instrument or tool with a sharp
17 cutting blade whether or not fastened to a handle which can
18 be used to inflict a cut, slash or wound. In order to find
19 the Defendant guilty of possession of a weapon during the
20 commission of a violent crime you must first find the
21 Defendant guilty of either committing a violent crime or of
22 attempting to commit a violent crime. Now, I charge you that
23 assault and battery with intent to kill is classified as a
24 violent crime. That is the law of the charges.

25 The Defendant has raised the defense of self-defense and

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1 this is the law applicable to that defense. Self-defense is a
2 complete defense and if it is established, you must find the
3 Defendant not guilty. The State has the burden of disproving
4 self-defense beyond a reasonable doubt. If you have a
5 reasonable doubt of the Defendant's guilt after considering
6 all of the evidence, including the evidence of self-defense,
7 then you must find the Defendant not guilty. On the other
8 hand, if you have no reasonable doubt of the Defendant's
9 guilt after considering all the evidence, including the
10 evidence of self-defense, then you must find the Defendant
11 guilty.

12 The following elements are required to establish self-
13 defense: First, the Defendant must be without fault in
14 bringing on the difficulty. If the Defendant's conduct was of
15 the type which was reasonably calculated to, and did, provoke
16 a deadly assault, the Defendant would be at fault in bringing
17 on the difficulty and would not be entitled to an acquittal
18 based on self-defense.

19 The second element of self-defense is that the Defendant
20 was actually in imminent danger of death or serious bodily
21 injury or that the Defendant actually believed he was in
22 imminent danger of death or serious bodily injury. If the
23 Defendant was actually in imminent danger, it must be shown
24 that the circumstances would have warranted a person of
25 ordinary firmness and courage to strike the fatal blow to

1 prevent death or serious bodily injury to themselves. If the
2 Defendant believed he was in imminent danger of death or
3 serious bodily injury, it must be shown that a reasonably
4 prudent person of ordinary firmness or courage would have had
5 the same belief. In deciding whether the Defendant was or
6 believed he was in imminent danger of death or serious bodily
7 injury, you should consider all of the facts and
8 circumstances surrounding the crime, including the physical
9 condition and characteristics of the Defendant and the
10 victims.

11 Finally, ladies and gentlemen, the final element of
12 self-defense is that the Defendant had no other probable way
13 to avoid the danger of death or serious bodily injury than to
14 act as the Defendant did under the particular circumstances.
15 Those are the elements of self-defense. And that concludes
16 the substantive law, ladies and gentlemen, that applies to
17 this case.

18 Finally, I'm going to talk to you about your
19 deliberations. First, you were selected by the State and the
20 Defendant in this case because each side felt you could be
21 fair and impartial and make your decision solely from the
22 evidence that was presented in this case. Remember, you took
23 an oath to do that. You don't serve as jurors to be partisans
24 or advocates for one side or the other. You should decide
25 this case solely based on the evidence uninfluenced by any

1 bias or prejudice or sympathy for one side or the other. In
2 making your decision on what the facts are in this case, you
3 should and you can use your experience in your life, your
4 good common sense and your good sense of logic in making your
5 determination.

6 Now, in deliberations, deliberations are defined as
7 this: It's a careful consideration weighing up with a view to
8 a decision. One thing that, regardless of what you think
9 about our system, the genius of it is, that it allows twelve
10 people such as yourselves, that have different backgrounds,
11 different perspectives, different walks of life to listen to
12 the evidence to go back and to carefully, calmly, and
13 courteously discuss all the evidence and discuss each other's
14 points of view and to, ultimately, come to a unanimous
15 verdict, if you are able to do so.

16 Now, we call them deliberations for a reason. You are to
17 consider all the evidence and discuss it in a calm, thorough,
18 and courteous manner and not be hurried in doing so. And
19 again, remember, you are not partisans or advocates for one
20 side or the other. You are judges of the fact and your sole
21 interest in this matter is to find truth from the facts that
22 have been presented here in the courtroom. I'm going to ask,
23 I'm going to instruct, each of you to consider all points of
24 view from your fellow jurors, talk to and listen to all the
25 evidence, talk to everybody, talk about everybody's

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1 positions, and remember agin, if you are doing something
2 deliberately, you are not doing something in a hurry and this
3 is a very important case for both sides, because this is
4 their only day in court. In order to be valid, your verdict
5 must be unanimous. With that being said, each of you must
6 decide this case by yourselves based on your decision of what
7 the facts are after you have impartially considered all the
8 evidence, have discussed it fully with all the other jurors,
9 and listened to everybody's point of view. Don't be afraid to
10 change your opinion about what the facts are if the
11 discussion persuades you that's the right thing to do. On the
12 other hand, don't come to a decision just because the other
13 jurors say that's the right thing to do.

14 Now, Mr. Campbell, you are the foreperson, as you well
15 know. You will preside over the deliberations in this case.
16 If at any time you need to have a question or communicate
17 with the Court for any reason, I'm going to ask that you
18 write it on a piece of paper, sign your name, knock on the
19 door, and give your information to the bailiff and they will
20 bring it to me and we will consider it here in open court.
21 Remember this, you are never to let me, the bailiff, or
22 anyone know where the jury stands numerically. Okay? That is
23 solely within your own province and nobody will ever ask you
24 that. That is not for us to consider.

25 Now, this verdict form has to be in one order or the

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1 other and so the order this things appear is of no
2 consequence, but your options are this: First, under
3 indictment 2009-GS-04-2046, we the jury, unanimously find the
4 Defendant, Don Ray Gibson, is not guilty of assault and
5 battery with intent to kill or guilty of assault and battery
6 with intent to kill. And you will see lines either way. What
7 I will have you do is check or initial those lines. At the
8 bottom there will be a place for you to sign your name, but
9 you only do that after you consider the other charge, as
10 well. Okay?

11 And the other charge is: We, the jury, unanimously find
12 the Defendant, Don Ray Gibson, is not guilty of possession of
13 a weapon during the commission of a violent crime or guilty
14 of possession of a weapon during the commission of a violent
15 crime.

16 Remember, you may not, if you find the Defendant not
17 guilty of the assault and battery with intent to kill, then
18 you may not consider the possession charge. If you find him
19 guilty, then you'd naturally consider the possession charge.

20 Once you have made that determination, you mark those
21 options, the option you find appropriate by unanimous vote,
22 sign it, knock on the door, then we will receive your verdict
23 here in the open courtroom. Okay?

24 Now, with that being said and before I allow these
25 lawyers to do their closing arguments, I want to send you

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1 back to your jury room to see if I mis-stated something or
2 omitted to say something I should have, then we will bring
3 you right back for closing arguments. If you will take the
4 jury back, please.

5 (Jury out at 10:34 AM)

6 THE COURT: Any additions or exceptions from the State?

7 MR. CAMPBELL: No, Your Honor.

8 THE COURT: From the Defense?

9 MR. MCELHANNON: No, Your Honor.

10 THE COURT: All right. And your objection to the self-
11 defense charge is already done. So, are you ready to go or do
12 you need a quick break?

13 MR. CAMPBELL: A quick break.

14 THE COURT: Okay.

15 (Break)

16 THE COURT: Mr. Campbell, are you ready for closing
17 argument?

18 MR. CAMPBELL: Yes, Your Honor. May it please the Court.

19 THE COURT: Yes, sir.

20 OPENING ON THE LAW - MR. CAMPBELL

21 MR. CAMPBELL: Ladies and gentlemen of the jury, we
22 really shouldn't be here today. We shouldn't have been here
23 yesterday. Shouldn't have been here Monday. This whole case
24 would have been completely avoided if Mr. Donnie Ray Gibson
25 had stayed home that night of 4/26/2009, after he had already

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1 been asked to leave and had not come back. But he chose, he
2 himself, made a decision to come back. As a result he was
3 involved in an altercation in which several people were cut,
4 and mainly in this case, the victim, Damon Marcengill.

5 He came close to losing his life. As a result, he's been
6 charged with assault and battery with intent to kill and
7 possession of a weapon during the commission of a violent
8 crime.

9 Assault and battery with intent to kill, an unlawful
10 act, is a violent injury to another person with malice
11 aforethought. It's almost the same as murder except the
12 person didn't die. That's what we are dealing with here.

13 Possession of a weapon during the commission of a
14 violent crime in this case, being the knife, as the Judge
15 instructed you, you have to first find him guilty of the
16 assault and battery with intent to kill before you can move
17 on to decide whether or not he's guilty of having a weapon.

18 And your decision in this case has to be beyond a
19 reasonable doubt and the way -- it is a legal term, you know,
20 a doubt that would cause a hesitant person to hesitate to
21 act. That's legalistic. Here's how I look at it: If you think
22 he did it, if you think he's guilty of the crime, find him
23 guilty. If you think not, find him not guilty. It's that
24 simple.

25 In this case, the Defense is raising self-defense.

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1 That's what you must decide. This case really comes down to
2 three things: 1) Was he there to begin with? "I wasn't there,
3 it wasn't me." We know that's not the case. We have the
4 victim's blood on his shoes, we know he, himself, was there.
5 He admitted it several times. So, it really comes down to two
6 issues. "I was there, but I was defending myself or I was
7 there, he was there, and he assaulted me and he committed
8 these crimes."

9 Self-defense, and this is what it comes down to. You
10 have to decide if, really, was he defending himself. Was he
11 there for other reasons? For self-defense, as the Judge has
12 instructed you, says you have to be without fault in bringing
13 about this assault, this confrontation. He had to not have
14 put himself there. I mean, he had ways to avoid it.

15 And he must have been in actual imminent danger for his
16 life. Now, he had to believe that other people would look at
17 his facts and situation and believe, yeah, I would have done
18 the same thing.

19 The last thing is, he had no other probable means of
20 avoiding this. He could have stayed home. And that's what we
21 come down to. We have two versions of facts. You've heard the
22 witnesses, you've seen the evidence, you've heard the
23 testimony. You get to pour through it, look over it, and you
24 decide, as a group, whose version you believe, the State's
25 version or the Defense's version. That's what this comes down

1 to. That's why y'all have been chosen.

2 Now, in the way these closing arguments go, I open on
3 the law. Mr. McElhannon will give his version of the facts,
4 then I get up and give my version of the facts. Both of our
5 versions are what we think. We argue for our side, our
6 position, but it is you, you are the judges of the facts.
7 You, also, decide and you, alone, come to a decision and you,
8 alone, mark the sentencing sheet. It's not what we say, it's
9 what y'all think and what y'all say and that will be the
10 final determination in this case.

11 I will look forward to talking to you in just a minute.
12 Thank you.

13 THE COURT: Mr. McElhannon.

14 MR. MCELHANNON: May it please the Court.

15 THE COURT: Yes, sir.

16 CLOSING ARGUMENT - MR. MCELHANNON

17 Good morning. This is the first time I've actually had
18 the chance to address y'all, to speak with y'all. I do
19 apologize coming up here with a legal pad, but we've had so
20 many witnesses up on the witness stand, I'm afraid I'll not
21 remember everyone's name and where I want to direct your
22 attention.

23 This is not a case, as the State said, of vengeance or
24 revenge. This is a case of self-defense. Donnie Ray Gibson,
25 who has been seated the last three days at this table with me

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1 was escorted, as y'all heard, after the first altercation
2 that night, he was escorted out of the bar. He was not
3 allowed go get his personal belongings, which it has come out
4 was a cigarette lighter, cigarettes, and a \$20.00 bill. He
5 was not allowed to take those with him.

6 He got home, got his nephew, Scotty Hamilton, and he
7 said, I need to go back and get my \$20.00, was the main
8 thing, and my cigarettes and my lighter. So, they got back in
9 the truck and went back to Hog Tails to get those.

10 Now, one thing that I want you to remember about all
11 these witnesses, and I hope you saw what I was trying to
12 bring out in defense, virtually every one of the State's
13 witnesses added something to the testimony from the time on
14 April 26th, 2009 to two years and eight months later, now
15 they remember things more than they did back then.

16 Even Detective Gebing said that normally, I mean, not
17 normally, always, we try to get witness statements as quickly
18 as possible, because they will remember things more clearly
19 right after it happened than more than two years later.

20 Every one of them, I think everyone, actually, added
21 things being said, threats being made, that were not in their
22 statements. Actually, one of the witnesses stated that he saw
23 my client, Mr. Gibson, pull a pocketknife. And certainly,
24 that wasn't the case. Mr. Gibson didn't take a knife with him
25 there. He did not take a knife back to Hog Tails with him and

1 neither did Scotty Hamilton. The fact of the matter is, that
2 knife that was shown, I think it's State's Exhibit #55, was
3 -- I don't think we can see it anymore-- was pulled on Mr.
4 Gibson. That's what happened. That's why we have a self-
5 defense argument.

6 When Mr. Gibson came back up on the porch, he went --
7 first, there was much made of why he came up on the porch. He
8 came back on the porch because he thought the guys that
9 escorted him out would still be inside the bar. He didn't
10 want to cause any trouble. He wanted Scotty to go in and get
11 his belongings and come back out, but it so happened they
12 were on the back porch because the band had taken a break. So
13 everyone that had seen the initial confrontation inside the
14 bar was standing outside the bar.

15 Well, as soon as Mr. Gibson comes on the deck, I
16 counted, I may have missed one, but I counted on the witness
17 stand, four of the State's witnesses testify that at some
18 point, they had kicked or beaten Donnie Gibson. Four on one,
19 and there may have been one other one, too, but Damon
20 Marcengill, the actual victim in this case stated that he was
21 hitting Donnie Gibson.

22 Ralph Gesell, which I question his testimony because he
23 said he was standing on that bench, that elevated bench on
24 the porch, and actually kicked him in the face and nobody
25 else saw him kick Donnie in the face, which totally in my

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1 mind, discredits Mr. Gesell's testimony.

2 Walt Wooten said he took Donnie to the ground and got
3 Donnie to drop the knife and, basically, people said that
4 Donnie never went to the ground, but Walt Wooten said he did
5 and Shane Rhodes testified that he hit Donnie.

6 What's interesting about this is, when I questioned
7 everyone of them, did you see -- you know, I asked Mr.
8 Gesell, did you see Walt Wooten take him to the ground? No.
9 When I kicked him Donnie was standing up and that's why I was
10 on the bench, I kicked him in his face.

11 Shane Rhodes, I asked him did he see Ralph Gesell or
12 Walt Wooten physically assault Donnie, he said, no. So
13 basically, what you've got is, they were all coming back and
14 hitting Donnie one at a time or kicking him in the face or
15 whatever, or they were all on him at the same time.

16 Now, as I stated, I think they added to the testimony.
17 They've had almost three years now to basically talk about
18 their testimony together and basically make it conform to the
19 State's idea of this case and that's what actually, the two
20 witnesses that were here yesterday, they were out there
21 talking about their testimony before they came in and got on
22 the witness stand. They both admitted to that.

23 Now, the one thing that we've got, and I think is the
24 most telling part of this case, is the DNA. You heard Lilly
25 Gallman from SLED testify about that DNA. That large knife

1 had Mr. Gibson's DNA on it in two separate places and she was
2 not able to identify anybody else's DNA on that knife.

3 Defendant's Exhibit #2, which is the picture and y'all have
4 seen this, of Donnie Ray Gibson's left hand where two of his
5 fingers and I actually believe the third one was nicked, but
6 two of them were cut severely. There's no doubt, based on the
7 DNA evidence which doesn't lie, of the knife and this
8 picture, there's no doubt that Mr. Gibson's left hand was on
9 the blade of that knife.

10 It's our position, someone and I don't know if it was
11 Damon Marcengill or who, thrust this knife while they were
12 beating Mr. Gibson, thrust it at him. He saw it coming and he
13 grabbed it with his left hand and cut his fingers and somehow
14 got the knife out of whoever's hand had it.

15 Now, the only other thing about this, and the main
16 question that you have to really decide is, whose hand was on
17 the handle of that knife. Because as Ms. Gallman testified,
18 there was nobody's DNA that could be traceable or
19 identifiable on the handle.

20 The other very interesting thing and a key element of
21 this about the knife and the blade is that the only DNA that
22 was able to be determined on that knife at all and the blade
23 was Donnie Ray Gibson's. If that knife blade had cut Damon
24 Marcengill three times as severely as it did, his DNA would
25 be on that blade and I know the State tried to wash that away

1 by saying or explaining it away by saying, well, so many
2 people touched the knife that it probably got wiped off. His
3 DNA got wiped off. That's not plausible. If he was cut that
4 bad and bleeding, and he was bleeding severely, everybody a
5 lot of people were bleeding severely, but Mr. Marcengill was
6 bleeding so severely and you saw the staples in his neck and
7 arm and side. All of his DNA would not have been wiped off of
8 that blade unless somebody did it intentionally, but that's
9 crazy. Why would people do that? And what doesn't make sense
10 is that if it was wiped, that Donnie Ray Gibson's DNA would
11 still be on it. That just does not make sense. The only
12 plausible explanation is as I said, it was a self-defense
13 matter when he grabbed the blade.

14 Now, we don't know. If it wasn't Damon Marcengill's DNA
15 on the handle, then, it means somebody else was coming after
16 Mr. Gibson with that knife and luckily, he was able to
17 wrestle it away from them, although he did cut his hand.

18 My exhibit, Defense Exhibit #1, is the picture of Donnie
19 Ray Gibson's severely lacerated left eye. There was no
20 testimony as to whether that was from a kick or a punch or a
21 knife blade. No one was able to determine that. The witnesses
22 that actually saw him afterwards said it was opened up where
23 you could see the bone, and actually, she stated that one of
24 his fingers was cut all the way to the bone.

25 What Mr. Gibson -- and I apologize. I haven't told you

1 how much we do appreciate your service in this case, because
2 as the Judge said, this is his only day in court to vindicate
3 himself. He's been accused of this now for almost three years
4 and he did not plead guilty because he feels that he is not
5 guilty, as I do. He feels he was in imminent danger of
6 serious bodily harm or death and as you heard his audio to
7 Detective Gebing, over and over he said they liked to beat me
8 to death. They almost beat me to death. And like I said, from
9 the witness stand, you've got at least four of them admitting
10 they kicked him and beat him.

11 The only way that you can find him guilty of this is if
12 you don't have a reasonable doubt that he, in fact, did it,
13 and I think, as I said, the strongest evidence in this case
14 is the DNA evidence. I don't see how you get around saying
15 that he cut Damon Marcengill with that large blade and his
16 DNA was not on that knife blade. And that Donnie Ray Gibson's
17 DNA was not on the handle of it, and it wasn't.

18 So what I would like to ask you to do is, as the Judge
19 instructed you, please, please, take your time. Think about
20 this. Deliberate seriously about this, because it's the most
21 important day of Donnie Ray Gibson's life. I can assure you
22 of that. Thank you.

23 THE COURT: Mr. Campbell.

24 CLOSING ARGUMENT - MR. CAMPBELL

25 Ladies and gentlemen of the jury, this is an important

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1 case, as much for the State as for the Defense. As Mr.
2 McElhannon said, this is his day in court, this is also the
3 State's day in court.

4 Now, this case, it doesn't draw -- it's not noteworthy
5 of a newsflash or a made for T.V. special. It's not getting a
6 lot of attention in the local media, whether by print or on
7 the news stations, but this case is important, because people
8 should have the right to go places, to socialize at places,
9 without the fear of being, having their life taken from them.

10 Yes, this is a bar, and yes, typically at a bar, people
11 drink. That's no surprise. That's typical. However, what did
12 the officer tell you, Deputy Scott? He said, you know, we get
13 no calls from this place and you probably picked up from the
14 witnesses, they police themselves. This isn't a violent bar.
15 This isn't a place where there's a lot of trouble. I think,
16 as Joe stated, they handle it like men. If you have a problem
17 you take it outside between the two of you, y'all shake it
18 off, go away, come back later, probably buy each other a beer
19 next day.

20 This place is not violent. The only violence came when
21 he showed up. (Indicating Defendant) Damon Marcengill didn't
22 deserve coming this close to losing his life, no matter what
23 was said. But revenge, vengeance, the want of getting even,
24 can blind a person's judgment. It can make a person do
25 unrational things. I guess, I don't know, the instinct of

1 retribution, getting even, maybe that's a part of human
2 nature, but that is why we have the criminal justice system,
3 is that people should not be allowed to take matters into
4 their own hands, especially when it rises to this level.

5 And don't know what took place in that first incident
6 and I will concede that that first instance inside the bar
7 was the catalyst, the springboard for what happened next.
8 Think about this, I don't know what was going on in Mr.
9 Donnie Ray Gibson's mind, but something snapped. Think about
10 this. Testimony shows he drove 20 miles from Hog Tails bar in
11 the Pendleton/LaFrance area to his house at [REDACTED] Lane,
12 which is the south end of the county near the Belton area, 20
13 miles as the witness told you. It takes you 30 to 45 minutes
14 one way to get there. He thought about it all the way there,
15 got what he needed, thought about it all the way back. At any
16 point, he could have stopped. He could have stayed home, he
17 could have stopped along the side of the road, he could have
18 turned that truck around. But he had one intention in mind
19 and that was getting even. And he followed through with
20 exactly what he set out to do. He never calmed down. I don't
21 know what was going on. He was like a pressure cooker. He was
22 simmering until he exploded and when he exploded, people got
23 hurt to the point they had to be air-lifted out of there.

24 Now, when he was kicked out the first time, as he said,
25 I was ushered out. He wasn't happy about it, but I guess

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1 that's human nature. Nobody is going to be happy about that.
2 But did that rise to the level that he should have come back
3 with a 17" to 18" knife and take matters into his own hands?
4 In fact, when he was told to leave, he, when he came back,
5 was trespassing. And not only was he asked to leave the first
6 time, he was asked to leave again before this all exploded.

7 You know, when he left the bar the first time, he had
8 nothing but bad thoughts in his mind and you might say, how
9 do you come up with that? Well, I think the most telling
10 piece in this case is his niece's testimony. She gives you a
11 glimpse into his mind set. What did she tell you? "I was
12 sucker punched for no reason." "I'm not going to let anybody
13 punk me out like that." "I went home and got what I needed."
14 That shows you what's going on upstairs.

15 And got what you needed? You drag your nephew into this?
16 Your 6'4" or 6'5", 220-pound nephew? You both get on leather
17 jackets when everybody testified it was really warm and hot
18 outside? You know, his putting on that leather jacket and
19 zipping it up like he did, two things; he's hiding something
20 and also, he expects these other people at this bar, he is
21 suspecting trouble. They could possibly have a knife, too.
22 And it's typical. Working people carry knives. Most men carry
23 knives. And so, he was anticipating that.

24 And he can't get around the fact that he left and came
25 back. And what he says he comes back for, a pack of

1 cigarettes, a lighter and a \$20.00 bill. Well, we know it
2 wasn't for the cigarettes and the lighter because he was
3 arrested, what, an hour-and-a-half later and he had a pack of
4 cigarettes on him and a lighter according to the booking
5 report at the detention center. So, either he stopped by a
6 store on the way there or on the way home or the way back or
7 he picked them up when he got to [REDACTED]. He's just
8 making the story meet the facts in this case. And if that had
9 been the real truth, that would have been on the inside at
10 the table that he was kicked out to begin with from the first
11 incident and they wouldn't have been around back. If what he
12 says is true and he had sent Scotty Hamilton in, then there
13 was no reason for him to get out of the truck. He should have
14 stayed in there if that was what their intentions really were
15 and none of this would have happened if he had stayed in
16 there. He didn't go back to make peace, to make amends, to
17 make friends. He went back to get even, to prove a point.

18 Now, I think of the audio in this case, when he called
19 Detective Gebing, kind of sums it up when he said, "We didn't
20 have those knives, we didn't do these people, somebody shoved
21 a knife at me, I reached out with my hand and I threw the
22 knife." He also testified in that audio that 12 or 15 people
23 were assaulting me. Well, the way I look at it from a
24 witness' standpoint, if 12 people were assaulting him, he
25 sure did come out light. And he only had one cut right here

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1 and a couple of stitches, maybe. Maybe a couple of stitches
2 up here. Think about it. We had five people cut; Damon,
3 Jason, Walt, Allen and Shane. How did all these people get
4 cut if they are supposed to all be on the same side and they
5 were after him, how did five of them get cut? And claiming he
6 threw the knife, that knife must have been a boomerang,
7 because it sure did hit a lot of people. A lot of people got
8 hurt. And the fact they had to -- that Damon Marcengill was
9 transported to the hospital, had a blood transfusion, stayed
10 in there a couple of days, that's not due to a knife thrown
11 at you.

12 Now, the witnesses -- and Mr. McElhannon did a good job
13 of going through these witnesses when they took the stand and
14 you heard them and they had some discrepancies in their
15 statements, but that is to be expected. These aren't
16 professional witnesses. These are common people. You know,
17 Detective Gebing, Officer Scott, these people, the DNA
18 chemist, they are professional witnesses. They, on a regular
19 basis, go to court and they know how to handle attorneys,
20 they know how to field questions. These people that took the
21 stand. They are common working class people. I think only two
22 of them had a history, one of them with a recent history in
23 the legal system and one ten years ago. All these other
24 people, they didn't have any history of coming up here. This
25 is their first exposure experience and yeah, it's nature that

1 when you are out there, yes, there's drinking. They are going
2 to have differences and I guarantee, y'all can think of
3 something in your life where something happened and right
4 after the fact, you thought you remembered it and thought it
5 through, but as time went on, the next day or so or month
6 later, you remember something. It hits you. You remember
7 facts later, too, as it calms down and you can have time to
8 reflect.

9 The thing is, you know, these witnesses did not rehearse
10 their statements. You can tell. If they rehearsed their
11 statements and had been together for two-and-a-half years,
12 they would all have been on the same page and if they had
13 done that, you would have heard Mr. McElhannon jumping up and
14 saying, Joe and Allen and Jason and Damon and Walt, they all
15 said the exact same thing. But in this case, they didn't.
16 They all spoke from their point of view and their
17 perspective. Not everybody is going to see everything. That
18 little area had two fights going, the commotion, there's a
19 lot of knife wielding going on and most people were in the
20 intention of not being cut and not letting other people get
21 hurt.

22 So, yes, I expect these people not to be able to say,
23 well, I didn't see this guy get kicked in the head or I
24 didn't see this part, I didn't hear that. That's typical. But
25 they all said the same thing and what is that? He came back

1 in a black leather jacket. He came up on the back deck. It's
2 about an hour to an hour-and-a-half later. The Defendant, Mr.
3 Gibson, cut Damon Marcengill. Mr. Marcengill did not have any
4 weapons and he swung at Mr. Gibson. He didn't do anything to
5 provoke it. That's what all of them say. And as Mr.
6 Marcengill said, water under the bridge. He was so drunk, he
7 can't remember what went on in the first place.

8 You know, the fact that he may or may not have had a
9 stocking cap on, that's not relevant. Mr. Gibson came back
10 loaded for bear. And when I say he came back loaded for bear,
11 he brought more than one knife, which is why he had that
12 second knife down there and as Shane said, "I thought I saw a
13 pocketknife the first time, but I saw the big one the second
14 time." Nobody else has testified and no other witness has
15 said a knife was pulled. In fact, I was thinking about this,
16 these boys were out there and you saw how big they are. These
17 boys are going to fist fight. They aren't going to pull
18 knives. They -- it happened so fast, they wouldn't have had
19 time to react to pull a knife and that was a pocketknife. He
20 had to reach into his pocket, pull it out, unsnap it and then
21 hold it up. Yes, he did get assaulted, and he claims it was
22 self-defense. When he turned around, he aimed that knife at
23 me, I wasn't going to let him cut me, to give him a chance.
24 That's what all the other witnesses were doing, too.

25 And you know, about this DNA. This large knife, when you

1 look at it, and you saw it, about two-thirds of the way up,
2 it has his blood on it. It's exactly where you cradle it when
3 you hold it exactly as Shane Rhodes said, "He was choked up
4 on that knife when he went to slashing. It slipped in his own
5 hand." Walt Wooten told you, "When I took the knife off, that
6 sucker was this long." They all took a part in it, they all
7 had a role in disarming him and, yes, he was hit and like he
8 should. And like they said, he wasn't going down and he
9 wasn't going to stop. They said, "He's a tough old bird. He
10 wasn't going to give up until they beat him into submission."
11 He wouldn't have been beaten into submission if he hadn't
12 shown up there to begin with.

13 Let's think about this self-defense. Now, if this was
14 really a self-defense case, then when he left the first time,
15 why didn't he call law enforcement? Why didn't he call and
16 say, "I've been assaulted." Why didn't he make a report? They
17 would have come down there. But he didn't, because it's not
18 the truth. I mean, he could have went to his sister's. She
19 was a half mile away, or his niece, LaBriska Christopher. He
20 didn't do that. This isn't -- he didn't go there to defend
21 himself. The first case wasn't bad. He had his cell phone
22 with him. He could have called law enforcement. He didn't do
23 it. If it was really as he made it out to be and he really
24 felt he was threatened the first time, he should have made a
25 report and he shouldn't have taken matters into his own

1 hands.

2 And I think, you know, Mr. McElhannon was going on about
3 the DNA. As we told you, Detective Gebing, five people
4 handled this knife. Stuff is going to get cleaned off. But
5 what the most telling piece of evidence is in this case, his
6 niece's testimony. He's already drug two people into this
7 case. I can imagine what the story was that he told Scotty
8 Hamilton to get him to come down there. Scotty wasn't
9 involved in this until he dragged him in. His niece wouldn't
10 have been here unless he hadn't gone to her house right after
11 that. He dragged her into this mess, too.

12 And the telling thing is, you may consider that the
13 strongest piece of evidence is, he admitted to her, as she
14 told you when I asked her, she said, "I cut several people, "
15 and he didn't know if he killed anyone. That, in and of
16 itself, his own admission to his own kin blood is the best
17 piece of evidence. How did she know the facts of the case?
18 She described him coming back in the leather jacket. She
19 described his wounds. He was on a cell phone calling. As she
20 told you, he didn't call law enforcement, he didn't call 911,
21 he didn't call EMS. He was talking to someone, but she didn't
22 know who. And if he was really as innocent as he's trying to
23 make out to be and he was just defending himself, why didn't
24 he stay there and call law enforcement and have the cops come
25 in there and talk to him first? Why was he so afraid of going

1 to seek medical treatment for his wounds locally, where he
2 said, "I would be found". It's because he's trying to hide.
3 "I have to go home first, you know, to clean up before I can
4 go to Greenville and, hopefully, they won't find me there,"
5 because he knows law enforcement is going to check and he can
6 be found that way.

7 Ladies and gentlemen, this case is not a self-defense
8 case. He deliberately and intentionally, by his own actions,
9 went there loaded for bear, armed himself, and was looking
10 for a fight. He could have chose to avoided this. He could
11 have stayed home. He was completely at fault for bringing
12 this on. Nobody would have been hurt that night. Six total
13 people, including himself, were hurt or cut and none of these
14 people would have been cut that night if he had stayed home.
15 That's all he had to do, stay at the house.

16 Ladies and gentlemen, Mr. Gibson should be held
17 accountable for his actions. He should be held responsible
18 for his actions. He brought this on himself. It could have
19 been avoided, and therefore, when you go back to the jury
20 room and you render a verdict, bring back a verdict that
21 speaks the truth and that is Mr. Donnie Ray Gibson is guilty
22 of assault and battery with intent to kill and possession of
23 a weapon during the commission of a violent crime. I thank
24 y'all for your attention in this case.

25 THE COURT: Mr. Campbell, we are going to gather all the

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

1 evidence and send it all back to the jury room. I'm going to
2 get the verdict form and give it to Buck and get him to bring
3 that back there. Also, if you want to handle any of the
4 evidence, we will supply plastic gloves so you don't feel
5 like you are touching tainted property. Other than that, once
6 you have the verdict form and the evidence, you may begin
7 your deliberations. Okay? Thank you.

8 (Jury out at 11:12 AM)

9 THE COURT: All right. Y'all go over the exhibits and
10 I'll have Buck take them back. If you want to go, leave your
11 number so we can call you. Thank you, guys. Good job by
12 everybody involved.

13 (Evidence back at 11:15 AM)

14 FIRST QUESTION FROM THE JURY

15 THE COURT: The jury has a request or a question. It is:
16 Can we have Ms. Christopher's testimony? Signed, Foreperson.
17 I told the attorneys off the record that it is normally my
18 practice that we will have our court reporter trace back to
19 that testimony and then we will bring them into the courtroom
20 and play it on an audio basis for them to hear. Mr.
21 McElhannon, I know you were kind of shaking your head, no. Do
22 you have an objection to me doing that?

23 MR. MCELHANNON: Your Honor, I would object to that just
24 for the fact that it is basically letting them hear just one
25 part of the testimony, verbal testimony, again without

1 hearing the rest of it. That would be my objection.

2 THE COURT: I note your objection. It's overruled. That's
3 going to be my plan. I've done it in every other case we have
4 that. I don't know of any other procedure. I do note your
5 objection. Would you bring the jury in? Hold on, how long is
6 it going to take you to get to it?

7 COURT REPORTER: Not too long.

8 THE COURT: What would be the best thing, to go there now
9 or just wait to get them in here and let you do it?

10 COURT REPORTER: Let me set it up and then we can get
11 them.

12 (Jury in at 12:28 PM)

13 (Testimony of Labrisk Christopher played for the jury)

14 SECOND QUESTION FROM THE JURY

15 THE COURT: We have a second question from the jury. This
16 is the question: Does the charge of assault and battery with
17 intent to kill pertain only to the big knife? Quite frankly,
18 I can't answer that question without commenting on the facts.
19 Do you have any proposals, from either side, how I should
20 respond to that?

21 MR. MCELHANNON: It's kind of hard since you can't
22 comment on the facts. The only thing I can think of is to re-
23 read the ABWIK charge, but I don't think that really take
24 care of that question because it's not about the law. It
25 pertains only to a piece of evidence. I think they have to

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

1 take the evidence as they heard it on the stand. You know,
2 the evidence is, Your Honor, no one ever said he was cut with
3 a knife other than that big knife. The big knife is the
4 weapon. No other knife was put into evidence.

5 THE COURT: Well, you had that pocketknife that was on
6 the ground.

7 MR. MCELHANNON: But it didn't have anything on it. There
8 was testimony that ---

9 THE COURT: Somebody testified that the Defendant whipped
10 out a pocketknife first and then whipped out the big knife.

11 MR. MCELHANNON: But what I'm saying is, the only other
12 knife found was the one on the floor by the rail. It was
13 collected, but it wasn't placed into evidence, so it's not in
14 evidence and it had no DNA on it anyway, because they checked
15 it at SLED.

16 THE COURT: So, I know you are telling me what I can't
17 do. What are you suggesting that I do?

18 MR. MCELHANNON: I think they just have to take the
19 evidence as what evidence they have in the evidence room.
20 That's the only evidence they are allowed to consider at this
21 point is the actual evidence that's in there.

22 THE COURT: I understand that. That still doesn't answer
23 my question, Mr. McElhannon.

24 MR. MCELHANNON: I don't have an answer, Your Honor.

25 THE COURT: Mr. Campbell, do you have any suggestions?

1 MR. CAMPBELL: Your Honor, besides going into the fact
2 that they need to take what they heard on the witness stand
3 and rely on the law as you charged, there really is nothing
4 else there.

5 THE COURT: What if I do this: Ladies and gentlemen, I'm
6 not allowed to make any comments on the facts, because you
7 are the sole judges of the facts. On the other hand, I'm the
8 instructor on the law and if you would like me to clarify any
9 of the law, including the law on assault and battery with
10 intent to kill, I will be glad to, but I'm not allowed to
11 make any comment on the facts.

12 MR. CAMPBELL: I think that's all you can do. I guess
13 that's what I was trying to allude to.

14 THE COURT: That's what Scott is trying to say, too, I'm
15 sure.

16 MR. MCELHANNON: The only thing, Your Honor, is as far as
17 reading the charge over again, I think unless they
18 specifically ask for that, that doesn't need to be done.

19 THE COURT: You don't think I need to suggest it? Well, I
20 may suggest it. Let me just -- I am going to suggest it and
21 say, "If you do". I note your objection, but you know, you
22 never know what they are looking for. They may say, no.

23 MR. MCELHANNON: Absolutely.

24 THE COURT: All right. Would you mind bringing the jury
25 in?

1 MR. MCELHANNON: Your Honor.

2 THE COURT: Go ahead.

3 MR. MCELHANNON: Your Honor, I would just ask, if you do
4 re-charge them, if they decide they want a charge on assault
5 and battery with intent to kill, that based on that question,
6 and specifically about the knife that's in evidence, that you
7 would re-charge on reasonable doubt.

8 THE COURT: I note your objection.

9 MR. MCELHANNON: I think that's only fair.

10 THE COURT: I understand. I'm not going to do that. Bring
11 the jury in.

12 (Jury in at 1:57 PM)

13 THE COURT: Mr. Campbell, ladies and gentlemen of the
14 jury, I understand that you have a question and this purports
15 to be it: Does the charge of assault and battery with intent
16 to kill pertain only to the big knife? Is that your question?

17 MR. CAMPBELL: Yes, sir.

18 THE COURT: All right. Let me just tell you this: If you
19 will recall, when I charged you on the law and at the
20 beginning of the case, I told you that you were the judges of
21 the facts and what that actually means is, I'm not allowed to
22 make any comments on the facts, at all, and so for me to
23 answer your specific question, I would violate the rule about
24 commenting on the facts. However, I will be more than glad to
25 do one of two things: 1) I can re-charge you on the law of

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

1 assault and battery with intent to kill if you think that
2 would assist you or I can make a copy of my entire charge and
3 send it back to the jury room for your use. My concern about
4 doing the second aspect, sending the charge back to you is
5 that sometimes juries have a tendency to engage in legal
6 disputes and then you cross into my area, okay? Can you, are
7 you able to articulate what your concern is as far as the
8 question goes?

9 MR. CAMPBELL: Yes, sir. I believe so.

10 THE COURT: I tell you what might be a better practice,
11 instead of doing it in here like that, let me give it back to
12 you and you write it out again and then that way we don't
13 have something that comes out that doesn't need to come out.
14 Do you mind doing that?

15 MR. CAMPBELL: Sure.

16 THE COURT: In the meantime, poll your jury and if you
17 want me to re-charge you on the law or send it back to you,
18 my entire charge. I'll do one of those two things, as well.

19 MR. CAMPBELL: Okay.

20 THE COURT: Thank you, Mr. Campbell.

21 (Jury out at 2:00 PM)

22 THE COURT: Other than your prior objections, Mr.
23 McElhannon, do you have any additions or exceptions to my
24 questioning and communication with the jury?

25 MR. MCELHANNON: No, sir.

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

1 THE COURT: Mr. Campbell?

2 MR. CAMPBELL: No, sir.

3 THE COURT: All right. Y'all hang tight for a minute.

4 (Break)

5 (Jury in at 2:57 PM)

6 VERDICT

7 THE COURT: Mr. Campbell, it's my understanding that the
8 jury has reached a verdict.

9 MR. CAMPBELL: Yes, sir.

10 THE COURT: Is it unanimous?

11 MR. CAMPBELL: Yes, sir.

12 THE COURT: Would you pass it to the bailiff, please,
13 sir. (Foreman complies, bailiff hands document to the Clerk
14 of Court who, in turn, hands it to the Judge who looks at
15 document) Publish the verdict, please.

16 CLERK OF COURT: The State of South Carolina, County of
17 Anderson in the Court of General Sessions. The State of South
18 Carolina versus Don Ray Gibson, Defendant.

19 The Verdict: Indictment number 2009-GS-04-02046. We, the
20 jury, unanimously find the Defendant Don Ray Gibson is guilty
21 of assault and battery with intent to kill. Number two, not
22 guilty of possession of a weapon during the commission of a
23 violent crime. This is signed by Jason Campbell, Foreperson,
24 Anderson, South Carolina.

25 THE COURT: Mr. Foreperson, ladies and gentlemen of the

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1 jury, was that your verdict in the jury room and is that your
2 verdict now? If it is, would you raise your right hand. Let
3 record reflect that all jurors raised their hand.

4 Ladies and gentlemen, the Court is never interested in
5 what your verdict is or your decision, but we are concerned
6 that the process is followed. You stayed engaged throughout
7 the case. I watched each of you throughout this trial and I
8 appreciate your being engaged and participating in this
9 matter. You performed a good service for Anderson County and
10 the State of South Carolina and I'd like to say that I excuse
11 you for the week, but I'm not. I'm going to ask that you come
12 back on the third floor at 9:00 in the morning and you may be
13 selected on one more trial that we are going to do. However,
14 before that, I'd like for you to go back to the jury room.
15 I'd like to speak to you for a second before I pass sentence
16 on the Defendant. If you would step back to the jury room

17 (Jury out at 2:59 PM)

18 (Break)

19 THE COURT: Mr. McElhannon, do you have any motions?

20 MR. MCELHANNON: No, Your Honor.

21 THE COURT: Would you bring the Defendant around? Hold on
22 one second. I think some of the jurors wanted to come in.
23 Give them a second.

24 SENTENCING

25 THE COURT: Would you come around, please? (Defendant and

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

1 Mr. McElhannon approach the bench) Is this a LWOP?

2 MR. CAMPBELL: Yes, sir, Your Honor. I have some items I
3 need to put in as a Court's exhibit at the appropriate time.

4 THE COURT: Okay, sir. Go ahead, if you would.

5 MR. CAMPBELL: Your Honor, based on Mr. Gibson's past
6 record, and I'm going to read it into the record, we had
7 filed a LWOP notice, a life without parole notice. His prior
8 record is: 1969, a robbery. 1973, breaking and entering and a
9 grand larceny. '73, dangerous drugs, four counts. '73,
10 possession of stolen goods. In 1976, he was convicted of
11 murder. He was given a life sentence. Back then, life didn't
12 mean life. He escaped in 1979. While he was out from the
13 Department of Corrections, he committed armed robbery in
14 Pickens County. He was convicted of that. In 1979, convicted
15 of possession of contraband, which would have been in the
16 Department of Corrections. Prior to this incident, he was
17 paroled for the murder charge on July 31st, 2008, and
18 shortly, nine months later, this is where we are. I'm going
19 to go ahead and make this a Court's exhibit. I know it should
20 be in the file, but just to be on the safe side, we filed a
21 notice to seek a sentence of life without parole back on
22 September 17th, 2009. We served it on his attorney then, who
23 was Derrick Enderlin, and we served it on him. The affidavit
24 of service where my investigator Tammy Curley of our office
25 served it on him at the detention center and then, also, Mr.

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

1 McElhannon, at that point -- Mr. Enderlin was relieved and
2 Mr. McElhannon took over. To just be on the safe side, we
3 noticed him, even though he had a copy of the record and the
4 notice to Mr. Enderlin, we sent it to him, also, on October
5 18th, 2011. I want to make those Court's exhibits. Also, we
6 have certified copies of his previous conviction. In 1976,
7 the number is 76-GS- it just says, 37,39. He was convicted in
8 Oconee County for murder. I'll make that a Court's exhibit
9 and also, in '79-GS-39-1013, he was convicted in Pickens
10 County for armed robbery, so those are the bases for why we
11 are seeking the sentence of life without parole.

12 THE COURT: All right. Mr. McElhannon, there's not a
13 whole lot I can say.

14 MR. MCELHANNON: I understand, Your Honor. Mr. Gibson
15 understands that. It's unfortunate that we are here today. I
16 don't have anything I can say bad about Mr. Gibson, to be
17 honest. You know, like I said, it's been a year-and-a-half to
18 two years since I've been in the case. He's a very cordial,
19 polite man. We put up a strenuous defense. I still believe,
20 although we respect the jury's verdict and that's our system,
21 but we still believe that he was defending himself.

22 THE COURT: Mr. Gibson, would you like to say anything?

23 MR. GIBSON: No, sir.

24 THE COURT: I understand. Despite your lengthy record,
25 you've conducted yourself in a proper manner while you were

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

1 in my presence and I appreciate that. Thank you. I'm sure
2 your attorney told you, I have no discretion in this manner.
3 Since you have been found guilty, my sentence to you is life
4 without the possibility of parole. Good luck to you, sir.

5 MR. GIBSON: Thank you, sir.

STATE OF SOUTH CAROLINA)
COUNTY OF ANDERSON) CERTIFICATE

BE IT KNOWN THAT I, THE UNDERSIGNED JO RICE, OFFICIAL COURT REPORTER FOR THE TWELFTH JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING TRANSCRIPT REPRESENTS A TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE TRIAL IN THE CAPTIONED CASE, RELATIVE TO APPEAL, BEFORE THE CIRCUIT COURT FOR ANDERSON COUNTY, SOUTH CAROLINA, SO GIVEN ON DECEMBER 12-14, 2011, TO THE BEST OF MY SKILL AND ABILITY;

THAT I AM NOT RELATED TO NOR AN EMPLOYEE OF ANY OF THE PARTIES HERETO, NOR A RELATIVE OR EMPLOYEE OF ANY ATTORNEY OR COUNSEL EMPLOYED BY THE PARTIES HERETO, NOR INTERESTED IN THE OUTCOME OF THIS ACTION.

IN WITNESS WHEREOF I HAVE HERE UNTO SET MY HAND AND SEAL THIS 29TH DAY OF MAY, 2015.

s/ Jo Rice

JO RICE
OFFICIAL COURT REPORTER

THE STATE OF SOUTH CAROLINA VERSUS DON RAY GIBSON

FORM 5

STATE OF SOUTH CAROLINA

COUNTY OF Anderson, S.C.Don Ray Gibson #82710
Full name and prison number (if any) of Applicant.

v.

State of South Carolina

IN THE COURT OF COMMON PLEAS

2017-CP-04-00024APPLICATION FOR
POST-CONVICTION RELIEF

2017 JAN -5 AM 11:59

FILED-CLERK'S OFFICE
ANDERSON SCINSTRUCTIONS - READ CAREFULLY

In order for this application to receive consideration by the Court, it shall be in writing (legibly handwritten or typewritten), signed by the applicant and verified (notarized), and it shall set forth in concise form the answers to each applicable question. If necessary, applicant may furnish his answer to a particular question on the reverse side of the page or on an additional page. Applicant shall make clear to which question any such continued answer refers.

Since every application must be sworn under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Applicants should, therefore, exercise care to assure that all answers are true and correct.

If the application is taken in forma pauperis, it shall include an affidavit (attached at the back of the form) setting forth information which establishes that applicant will be unable to pay fees and costs of the proceedings. When the application is completed the original shall be mailed to the Clerk of Court for the County in which the applicant was convicted.

1. Place of detention Perry Corr. Inst. 430 Oaklawn Rd. Pelzer, S.C. 29669
2. Name and location of Court which imposed sentence Anderson County, S.C.
3. Name(s) of co-defendant(s) (if any) Scotty Hamilton
4. The indictment number or numbers (if known) upon which and the offenses for which sentence was imposed:
 (a) 2009-GS-04-02046
 (b) _____
 (c) _____
5. The date upon which sentence was imposed and the terms of the sentence:
 (a) December 14th 2011
 (b) "LWOP" "Life without Parole"

A TRUE COPY

JAN -5-2017

Richard D. Hinder
ANDERSON CLERK OF COURT

(c) _____

6. Check whether a finding of guilty was made:

(a) after a plea of guilty _____

(b) after a plea of not guilty _____

(c) after a plea of nolo contendere _____

7. Did you appeal from the judgment of conviction or the imposition of sentence?

yes

8. If you answered "yes" to (7), list:

(a) the name of each Court to which you appealed:

i. South Carolina Court of Appeals

ii. _____

iii. _____

(b) the result in each such Court to which you appealed:

i. Dismissed

ii. _____

iii. _____

(c) the date of each such result:

i. March 30th 2016

ii. _____

iii. _____

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i. NONE GIVEN

ii. _____

iii. _____

~~9.~~ If you answered "no" to (7), state your reasons for not so appealing:

(a) _____

(b) _____

(c) _____

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully:

- (a) Ineffective Assistance of Counsel - Atty. failed to move for mistrial. "1"
 (b) Ineffective Assistance of Counsel - for Atty. failing to object to prosecutorial misconduct. "2"
 (c) _____

11. State concisely and in the same order the facts which support each of the grounds set out in (10):

- (a) See Attachment "A"
 (b) See Attachment "B"
 (c) _____

12. Prior to this application have you filed with respect to this conviction:

- (a) any petition in a State Court under South Carolina Law? yes
 (b) any petition in State or Federal Courts for habeas corpus or post-convictions relief? _____
 (c) any petition in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8)? _____
 (d) any other petitions, motions or applications in this or any other Court? _____

13. If you answered "yes" to any part of (12), list with respect to each petition, motion or application:

(a) the specific nature thereof:

- i. Appeal
 ii. _____
 iii. _____
 iv. _____

(b) the name and location of the Court in which each was filed:

- i. South Carolina Court of Appeals
 ii. _____
 iii. _____
 iv. _____

(c) the disposition thereof:

- i. Dismissed - No Op.
 ii. _____
 iii. _____

- iv. _____
- (d) the date of each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
- (e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
- i. _____
- ii. _____
- iii. _____
- iv. _____
14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed?
NO
15. If you answered "yes" to (14) identify:
- (a) which grounds have been presented:
- i. _____
- ii. _____
- iii. _____
- (b) the proceedings in which each ground was raised:
- i. _____
- ii. _____
- iii. _____
16. If any ground set forth in (10) has not previously been presented to any Court, State or Federal, set forth the ground and state concisely the reasons why such ground has not previously been presented:
- (a) Grounds set forth in '10' resulted from Counsel failing to move for mistrial
- (b) Counsel failure to object to prosecutorial ~~misconduct~~ misconduct.
- (c) _____
17. Were you represented by an attorney at any time during the course of:

- (a) your arraignment and plea? _____
- (b) your trial, if any? yes
- (c) your sentencing? yes
- (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? yes
- (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? yes
18. If you answered "yes" to one or more parts of (17), list:
- (a) the name and address of each attorney who represented you:
- i. M. Scott McElhannon - 110 East Benson St. Anderson, S.C. 29624
- ii. Benjamin John Tripp - Div. of Appellate Defense
1330 Lady St. Suite 401 - P.O. Box 11589
Columbia, S.C. 29211-1589
- iii. _____
- (b) the proceedings at which each such attorney represented you:
- i. Trial Counsel
- ii. Appellate Counsel
- iii. _____
19. State clearly the relief you seek in filing this application:
Vacate Sentence
20. Are you now under sentence from any other court that you have not challenged?
NO

2017-CP-04-00024

STATE OF SOUTH CAROLINA)

County of Anderson SC)

VERIFICATION

I, , being duly sworn upon my oath, depose and say that I have subscribed to the foregoing application; that I know the contents thereof; that it includes every ground known to me for vacating, setting aside or correcting the conviction and sentence attacked in this application; and that the matters and allegations therein set forth are true.

Donnie Gibson - ✓

SWORN to and subscribed before me this 27
day of December, 2016.

Nancy C. Merchant (L.S.)
Notary Public

My Commission Expires: 11-23-2023

FILED-CLERK'S OFFICE
ANDERSON SC
2017 JAN - 5 AM 11: 59
COMMON PLEAS AND
GENERAL SESSIONS

A TRUE COPY

JAN - 5 2017

Richard M. Kinley
ANDERSON CLERK OF COURT

2017-CP-04-00024

**APPLICATION TO PROCEED WITHOUT PAYMENT
OF COSTS AND AFFIDAVIT
IN SUPPORT THEREOF**

I, Donnie Gibson, hereby apply for leave to proceed in this action without prepayment of fees or costs or security therefor. In support of my application I declare under penalty of perjury that the following facts are true:

- (1) I am the applicant in this action and I believe I am entitled to redress.
- (2) Because of my poverty I am unable to pay the costs of said proceeding or give security thereof.

Donnie Gibson
Donnie Gibson
Applicant

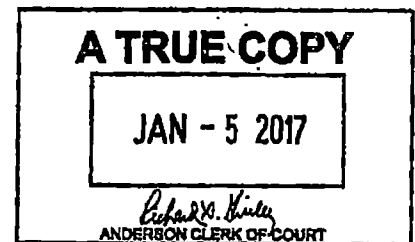
SWORN or affirmed to and subscribed before me this

16th day of December, 2016.

Nancy C. Marchant
Notary Public

My Commission Expires: 1-23-2023

FILED-CLERK'S OFFICE
ANDERSON SC
2017 JAN -5 AM 11:59
COMMON PLEAS AND
GENERAL SESSIONS



"Answers to questions 10 and 11"

11.

A)

i. Violation of U.S. Const. Amendments 5, 6, and 14, and S.C. Const. Art. 1, Sect's 3, and 23 and S.C. Rules of Professional Conduct, Preamble @ [27]; Rule 1.1 "Competence"; Rule 1.3 "Diligence"; and, Rule 3.1 "Meritorious Claims and Contentions", for attorneys failure to move for a mistrial due to being acquitted of "Possession of a weapon during the Commission of a violent crime", and Convicted of "Assault and Battery of a High and aggravated Nature with the intent to kill", Where a material Variance exists between the elements of the offenses and the evidence intended to prove them.

ii. Violation of U.S. Const. Amendments 5, 6, and 14, and S.C. Const. Art. 1, Sect's 3, 23, and, S.C. Rules of Professional Conduct, PREAMBLE @ [27]; Rule 1.1 "Competence"; Rule 1.3 "Diligence"; and Rule 3.1 "Meritorious Claims and "Contentions" for attorneys

failure to move for a mistrial due to Jury misconduct where the Jury failed to follow and apply the Law regarding reasonable doubt, as instructed by the Court.

B.)

Violation of U.S. Const. Amendment 5, 6, and 14, and S.C. Const. Art. 1, Sects, 3, 23, and S.C. Rules of Professional Conduct, PREAMBLE @ [27]; Rule 1.1 "Competence";

Rule 1.3 "Diligence"; and Rule 3.1

"Meritorious Claims and Contentions", for attorneys failure to object to,

Prosecutorial Misconduct and "Brady"

Violation, for states withholding of material evidence, where the state failed to

inform Defense Counsel that witness testimony had changed before trial, and Such testimony is relevant and material to guilt and, or punishment.

Had defense Counsel been informed, he Could have diligently investigated Said

Change in testimony, and Impeached
the witnesses for Perjury.

Attachment "A"

"Answers to questions "10" and "11"

#10-A-i

I do not have Counsel or a Copy of trial Counsels file, Access to discovery or funds for expert or investigative services, or the ability to conduct such. As a result, I cannot provide additional information at this time, although I believe there are other claims and information available. Further, with exception to the issues listed above, I do not waive the attorney-client privilege to any extent. I also request trial Counsel not provide any portion of my files to anyone without my express permission, Outside of these specific claims. Lastly, petitioner asserts his express right to amend this application and claims, as stated in the S.C. Rules of Civil Procedure (SCRCP).

#10-B-ii

ID.

FILED-CLERK'S OFFICE
ANDERSON SC

2017 JAN -5 AM 11: 59

COMMON PLEAS AND
GENERAL SESSIONS

"Certificate of Service"

I Don Ray Gibson swear under the penalty of perjury that I have mailed a correct and true copy of my "Post Conviction Relief" application to those persons whos addresses appear below, by first placing the original and one copy in a prepaid envelope and sending that to the Clerk of Court, and placing another copy in a prepaid envelope and sending that to the Attorney General's Office. That was done by way of the U.S. mail here at the Perry Correctional Institution in Pelzer S.C.

- Richard A. Shirley
Clerk of Court
P.O. Box 8002
Anderson, S.C. 29622
- Office of Attorney General
ALAN WILSON
P.O. Box 11549
Columbia, S.C. 29211

Respectfully,

Donnie Milton ✓

Don Ray Gibson #82710
Perry Correctional Institution
430 Oaklawn Rd.
Pelzer, S.C. 29669

A TRUE COPY

JAN - 5 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE TENTH JUDICIAL CIRCUIT
COUNTY OF ANDERSON	)	
Don Ray Gibson, #82710,	)	Case No.: 2017-CP-04-0024
	)	
Applicant,	)	
	)	RETURN AND MOTION FOR A
v.	)	MORE DEFINITE STATEMENT
	)	
State of South Carolina,	)	
	)	
Respondent.	)	

Respondent, making its Return to the Application for Post-Conviction Relief ("PCR") filed on January 5, 2017, would respectfully show this Court:

I.

Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. In August 2009, the Anderson County Grand Jury indicted Applicant for assault and battery with intent to kill (ABWIK) and possession of a weapon during the commission of a violent crime (2009-GS-04-02046). M. Scott McElhannon, Esquire, represented Applicant. Assistant Solicitors Rame Campbell, Esquire, and Josh Allen, Esquire, prosecuted the case. On December 12-14, 2011, Applicant proceeded to trial before the Honorable R. Lawton McIntosh and a jury. The jury found Applicant guilty on the charge of ABWIK and not guilty on the charge of possession of a weapon. Judge McIntosh sentenced Applicant to imprisonment for life without the possibility of parole for ABWIK.

Applicant filed a timely notice of appeal. Benjamin John Tripp, Esquire, of the South Carolina Office of Indigent Defense – Appellate Defense Division perfected the appeal pursuant to the procedure set forth in Anders v. California, 386 U.S. 738 (1967). The South Carolina Court of

Appeals affirmed Applicant's conviction on October 31, 2012. State v. Gibson, Op. No. 2016-UP-142 (S.C. Ct. App. filed March 30, 2016). The remittitur was returned to the circuit court on April 18, 2016.

Attached to this Return and incorporated by reference are the records of the Anderson County Clerk of Court regarding the subject conviction, Applicant's records from the South Carolina Department of Corrections, the trial transcript and the transcript of the hearing on Applicant's motion for reconsideration, Applicant's appellate records, and the application.

II.

In his application for post-conviction relief, Applicant alleges that he is being held in custody unlawfully for the following reasons:

1. "Ineffective Assistance of Counsel," in that:
 - a. Trial counsel failed to move for a mistrial after Applicant was convicted of ABWIK but acquitted on the charge of possession of weapon during the commission of a violent crime;
 - b. Trial counsel failed to move for a mistrial based on "jury misconduct where the jury failed to follow and apply the law regarding reasonable doubt, as instructed by the Court;"
2. Prosecutorial misconduct/Brady violation, in that:
 - a. "The State failed to inform Defense Counsel that witness testimony had changed before trial, and such testimony is relevant and material to guilty and/or punishment."

III.

Applicant's allegations of ineffective assistance of counsel are without merit. In a PCR action, Applicant bears the burden of proving the allegations in his application. Butler v. State, 286 S.C. 441, 334 S.E.2d 813 (1985). Where the application alleges ineffective assistance of counsel as a ground for relief, Applicant must prove that "counsel's conduct so undermined the proper

functioning of the adversarial process that [it] cannot be relied upon as having produced a just result.” Strickland v. Washington, 466 U.S. 668 (1984); Butler, 286 S.C. at 442, 334 S.E.2d at 814.

In evaluating allegations of ineffective assistance of counsel, the reviewing court applies the two-pronged test outlined in Strickland. 466 U.S. at 668. First, Applicant must prove that counsel’s performance was deficient. Id.; Cherry v. State, 300 S.C. 115, 117, 386 S.E.2d 624, 625 (1989). Under this prong, the court measures an attorney’s performance by its “reasonableness under prevailing professional norms.” Cherry, 300 S.C. at 117, 386 S.E.2d at 625 (quoting Strickland, 466 U.S. at 690). The proper measure of performance is whether the attorney provided representation within the range of competence required in criminal cases. Butler, 286 S.C. at 442, 334 S.E.2d at 814. “Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” Id. (citing Strickland, 466 U.S. at 690). Applicant must overcome this presumption to receive relief. Cherry, 300 S.C. at 118, 386 S.E.2d at 625. Second, counsel’s deficient performance must have prejudiced Applicant such that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id., 300 S.C. at 117-18, 386 S.E.2d at 625.

Respondent submits Applicant can satisfy neither requirement of the Strickland test. However, the allegation of ineffective assistance of counsel probably raises questions of fact that the record does not conclusively refute. Accordingly, Respondent requests an evidentiary hearing to fully resolve this issue. See Sharper v. State, 279 S.C. 264, 305 S.E.2d 247 (1983).

IV.

Applicant alleges prosecutorial misconduct in that the State failed to disclose to Applicant that witness testimony had changed before trial. Brady¹ requires the State to disclose evidence in its possession favorable to the accused and material to guilt or punishment. Clark v. State, 315 S.C.385, 388, 434 S.E.2d 266, 268 (1993). A Brady claim is based upon the requirement of due process. Such a claim is complete if the accused can demonstrate (1) the evidence was favorable to the accused, (2) it was in the possession of or known to the prosecution, (3) it was suppressed by the prosecution, and (4) it was material to guilt or punishment. Gibson v. State, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). Impeachment or exculpatory evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Clark, 315 S.C. at 388, 434 S.E.2d at 268 (citing U.S. v. Bagley, 473 U.S. 667 (1985)).

Respondent hereby moves for a more definite statement as to this allegation. Applicant has failed to set forth facts to "support each ground" or to explain with any specificity whatsoever the facts upon which his Brady claim is based. Applicant's trial stretched over three days and included testimony from multiple witnesses. The Uniform Post-Conviction Procedure Act requires Applicant to "*specifically set forth the grounds upon which the application is based.*" S.C. Code Ann. § 17-27-50 (1985) (emphasis added). Respondent respectfully submits that it is incumbent upon Applicant, through counsel, to amend his application to set forth specific facts upon which his allegation is based so that Respondent may adequately prepare for an evidentiary hearing. Therefore, Respondent requests that Applicant be required to amend his application to set forth specifically the grounds on which his Brady violation claim is based.

V.

Respondent therefore requests that this Court convene an evidentiary hearing on the allegations of ineffective assistance of counsel and a potential Brady violation. However, Respondent retains the right to move for dismissal of Applicant's Brady violation claim at the evidentiary hearing if Applicant fails to amend.

VI.

Each and every allegation contained within the application not expressly admitted, qualified, or explained in this Return is hereby denied.

VII.

WHEREFORE, Respondent requests that an evidentiary hearing be held on the claims of ineffective assistance of trial counsel and a potential Brady violation.

{Signatures on the following page.}

¹ Brady v. Maryland, 373 U.S. 83 (1963).

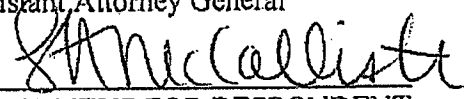
Respectfully submitted,

ALAN WILSON
Attorney General

ROBERT BOLCHOZ
Chief Deputy Attorney General

MEGAN HARRIGAN JAMESON
Deputy Attorney General

LINDSEY A. MCCALLISTER
Assistant Attorney General

By: 
ATTORNEYS FOR RESPONDENT

Office of the Attorney General
P.O. Box 11549
Columbia, SC 29211
Telephone: (803) 734-3737

9/12, 2017

STATE OF SOUTH CAROLINA)

COUNTY OF ANDERSON)

DONNIE RAY GIBSON, #82710)

Applicant,)

vs)

STATE OF SOUTH CAROLINA,)

Respondent,)

IN THE COURT OF COMMON PLEAS

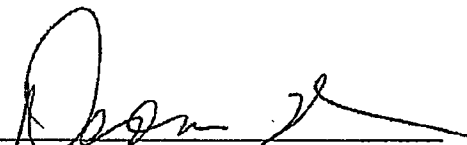
2016-CP-04-0024

AFFIDAVIT OF SERVICE BY MAIL

1. I am an employee of the Respondent in the above-captioned action.
2. Regular communication by mail exists throughout the State of South Carolina and that this is a proper circumstance of service by mail.
3. I have this day served a copy of the **Return and Motion for a More Definite Statement** in the above-captioned matter on the following person by depositing same in the United States mail, postage prepaid:

Susannah Conyers Ross, Esquire
 Ross & Enderlin, PA
 330 East Coffee St.
 Greenville, SC 29601

DATED this the 12th day of September, 2017.


 Deonna Rogers, Legal Assistant
 For Respondent

STATE OF SOUTH CAROLINA	)	
	)	COURT OF COMMON PLEAS
COUNTY OF ANDERSON	)	
Donnie Ray Gibson,	)	
	)	
Applicant,	)	
	)	
v.	)	Case No. 17-CP-04-0024
	)	
State of South Carolina,	)	
	)	
Defendant.	)	

TRANSCRIPT OF HEARING

The within Post-Conviction Relief Hearing in the above-captioned matter was held on February 22, 2018, before The Honorable J. Cordell Maddox in the Court of Common Pleas; attended by counsel as follows:

APPEARANCES:

Rodney W. Richey, Esq.
 33 Market Point Drive
 Greenville, South Carolina 29607
 ...Appearing for Applicant

Kelly Oppenheimer, Assistant AG
 OFFICE OF ATTORNEY GENERAL
 P O Box 11549
 Columbia, South Carolina 29211-1549
 ...Appearing for State of South Carolina

Vivian H. Cross
Circuit Court Reporter -10th Judicial Circuit
 P O Box 704
 Belton, South Carolina 29627
vcross@sccourts.org

Donnie Ray Gibson v State of South Carolina**2****Case No. 17-CP-04-00224****PCR Hearing of February 22, 2018****Before The Honorable J. Cordell Maddox****INDEX**

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1

2

3

THE COURT: What we got? Which one are we on?

4

5

MS. OPPENHEIMER: Donnie Ray Gibson, Your Honor.

6

7

THE COURT: Okay.

8

9

10

MS. OPPENHEIMER: May it please the Court, the first matter is Donnie Ray Gibson versus the State of South Carolina, Docket Number 2017-CP-04-0024.

11

12

13

14

15

16

During the August 2009 term, the Anderson County Grand Jury indicted the Applicant for assault and battery with intent to kill and the possession of a weapon during the commission of a violent crime. M. Scott McElhannon represented him on these charges.

17

18

19

20

21

22

23

On December 12th and 14th, 2011, Applicant proceeded to a jury trial before The Honorable R. Lawton McIntosh. The jury convicted Applicant as indicted, for assault and battery with intent to kill and acquitted him of possession of a weapon during the commission of a violent crime.

24

25

Judge McIntosh sentenced the Applicant to life without the possibility of parole.

Donnie Ray Gibson v State of South Carolina

4

Case No. 17-CP-04-00224

PCR Hearing of February 22, 2018

Before The Honorable J. Cordell Maddox

1 Thereafter, Applicant filed a Motion to
2 reconsider and a hearing into the matter was
3 convened on March 13th, 2015. Judge McIntosh
4 denied that Motion.

5 Applicant filed a timely notice of appeal
6 and then Appellate Defender Benjamin J. Tripp
7 perfected an *Anders* appeal on Applicant's
8 behalf.

9 Applicant then filed a *pro se* document
10 entitled Motion to Respond to *Anders* brief.

11 Thereafter the Court of Appeals dismissed
12 the Applicant's appeal and granted counsel
13 relief to withdraw.

14 The *remititur* was issued on April 18th,
15 2016.

16 On March 5th, 2017, Applicant filed an
17 application for post-conviction relief
18 alleging ineffective assistance of counsel in
19 failing to move for a mistrial when Applicant
20 was acquitted of possession of a weapon
21 during the commission of a violent crime and
22 convicted of ABWIK; failure to move for a
23 mistrial when the jury failed to follow and
24 apply the law of reasonable doubt; and
25 failure to object to prosecutorial misconduct

Donnie Ray Gibson v State of South Carolina
Case No. 17-CP-04-00224
PCR Hearing of February 22, 2018
Testimony of Applicant Donnie Gibson - Direct Examination

1 when witness testimony changed before trial.

2 The State made its Return and Motion for
3 a more definite statement on September 12th,
4 2017, requesting an evidentiary hearing be
5 held.

6 Applicant is represented by Ronald Richey
7 and both he and Mr. Gibson are present today.

8 THE COURT: Okay. Yes, sir?

9 MR. RICHEY: Your Honor, that's the
10 history of the case. I will tell the Court
11 that we, Applicant and Attorney General, that
12 we are going to allege failure to investigate
13 and failure to do a plea offer in the case.

14 THE COURT: Okay.

15 MR. RICHEY: So we're ready to move
16 forward with the case.

17 THE COURT: All right. You can call
18 your first witness.

19 MR. RICHEY: We call my client.

20 (APPLICANT TAKES WITNESS STAND)

21 DONALD GIBSON, having been sworn to tell
22 the truth, and nothing but the truth,
23 testified as follows:

24 DIRECT EXAMINATION

25 BY MR. RICHEY:

Donnie Ray Gibson v State of South Carolina
Case No. 17-CP-04-00224
PCR Hearing of February 22, 2018
Testimony of Applicant Donnie Gibson - Direct Examination

6

1 Q. Mr. Gibson, are you in the Depart-
2 ment of Corrections right now?

3 A. Yes, sir.

4 Q. What are you there for?

5 A. Serving a life sentence for assault
6 and battery with intent to kill.

7 Q. Okay. And -- you were convicted in
8 Anderson County?

9 A. Yes, sir.

10 Q. Who represented you on those
11 charges?

12 A. Mr. McElhannon.

13 Q. You filed this case to say -- for
14 ineffective assistance of counsel, correct?

15 A. Yes, sir.

16 Q. And once thing is that you believe
17 that your attorney did not properly
18 investigate the case, based on a video;
19 correct?

20 A. Yes, sir.

21 Q. Let me kind of give some history for
22 the Court to kind of know where we are coming
23 from. This was supposedly a bar fight,
24 correct?

25 A. Yes, sir.

Donnie Ray Gibson v State of South Carolina
Case No. 17-CP-04-00224
PCR Hearing of February 22, 2018
Testimony of Applicant Donnie Gibson - Direct Examination

1 Q. And this happened when you
2 supposedly left the bar and came back -- I'm
3 not saying that's true, but that's what they
4 said. Correct?

5 A. Yes, sir.

6 Q. So at that bar, it is your position
7 that there was a video, a film of what
8 happened in the bar. Correct?

9 A. Yes, sir.

10 Q. Did you talk to your lawyer about
11 obtaining that film?

12 A. I did.

13 Q. Do you know whether he ever got it?

14 A. No, never got it.

15 Q. And you feel that he did not
16 effectively represent you because he did not
17 get that film? Or video. Excuse me.

18 A. Well, it would have showed what
19 happened inside the bar that caused it. They
20 said that I was the cause of it, that's what
21 the Solicitor said, but that would have
22 showed different.

23 Q. Right, and that was -- that video
24 would have been three years ago, correct?

25 A. Yeah, if ---

Donnie Ray Gibson v State of South Carolina

8

Case No. 17-CP-04-00224

PCR Hearing of February 22, 2018

Testimony of Applicant Donnie Gibson - Direct Examination

1 Q. Or four?

2 A. (No verbal response).

3 Q. At least three years ago, correct?

4 A. If not longer.

5 Q. So you believe that video was

6 pivotal to your case?

7 A. Yes, sir.

8 Q. And this -- this particular crime,
9 it is your position that you did not commit
10 it. Correct?

11 A. Right.

12 Q And this video would have shown that
13 the incident did not occur. Correct?

14 A. That I didn't start the fight,
15 right.

16 Q. So your position is that counsel
17 didn't do an effective job of investigating
18 your case; correct?

19 A. Yes, sir.

20 Q. In terms -- in your case, you were
21 not offered a plea offer; correct?

22 A. No -- right.

23 Q. And you believe that your lawyer was
24 ineffective for not pursuing that and seeing
25 what he could do with that?

1 A. He had came to me -- acted like it
2 wasn't a big deal that it didn't go through,
3 and I just think that there was something
4 else that we could have done, that could
5 have been done about it.

6 Q. To these witnesses that testified
7 against you at trial, it's your position that
8 counsel should have objected to their
9 testimony; correct?

10 A. Yes, sir.

11 Q. Why do you believe that?

12 A. Well, they waited until we got in
13 the courtroom to even let us know that they
14 were even changing their testimony. From
15 everything I know, we should have had warning
16 before that to prepare for it.

17 Q. And it is your position that your
18 attorney should have asked for a continuance
19 based on that?

20 A. Yes, sir.

21 Q. Now, you believe that your lawyer
22 should have filed a Motion, uh, a Motion to
23 set aside the verdict after the trial.
24 Correct?

25 A. Yes, sir.

Donnie Ray Gibson v State of South Carolina
Case No. 17-CP-04-00224
PCR Hearing of February 22, 2018
Testimony of Applicant Donnie Gibson - Direct Examination

10

1 Q. And -- but you're aware that he
2 later filed that Motion, the Motion about the
3 verdict?

4 A. Yes, sir.

5 Q. But it is your position that he
6 should have done it immediately after trial?

7 A. I think so, (affirmative nod).

8 Q. And filed for a mistrial, is that
9 correct?

10 A. Yes, sir.

11 Q. And you told your attorney at all
12 times that you were not guilty; right?

13 A. Yes, sir.

14 Q. And you have alleged prosecutorial
15 misconduct, was that based on the witnesses;
16 correct?

17 A. That and I think the Solicitor
18 leading the witnesses, the ones that changed
19 their story.

20 Q. So that goes along with the
21 witnesses at pretrial changing what they were
22 saying?

23 A. Yes, sir.

24 Q. And you think that the State should
25 have been prevented from doing that?

1 A. Yes, sir.

2 Q. Do you believe that there was
3 anything else that your attorney could have
4 done?

5 A. No, sir. I think he did everything
6 that he could given what'd happened at trial.

7 Q. Thank you, no further questions.

8 A. Okay.

9 Q. Please answer any questions that the
10 Attorney General has.

11 A. Yes, sir.

12 THE COURT: Yes, ma'am?

13 CROSS-EXAMINATION

14 BY MS. OPPENHEIMER:

15 Q. Do you recall how many times you met
16 with Mr. McElhannon before your trial?

17 A. About four.

18 Q. Do you recall reviewing the
19 discovery with him?

20 A. Some of it, yes, ma'am.

21 Q. Did you review the statements of the
22 various eyewitnesses?

23 A. No.

24 Q. Did you review your statement to law
25 enforcement?

Donnie Ray Gibson v State of South Carolina

12

Case No. 17-CP-04-00224

PCR Hearing of February 22, 2018

Testimony of Applicant Donnie Gibson - Cross Examination

1 A. I didn't give a statement to law
2 enforcement.

3 Q. Do you recall discussing possible
4 defenses with your attorney?

5 A. Yes.

6 Q. Okay. What were those?

7 A. There wasn't too much. I didn't
8 have a knife. One of the other people had a
9 knife, which was proven. Then they came up
10 and said that I was the one that had it.

11 Q. Okay. Did you give Mr. McElhannon
12 any leads or potential witnesses to
13 investigate?

14 A. No. I didn't know anyone there to
15 give as a witness for it.

16 Q. Did you ever see this video that was
17 in the bar?

18 A. No, ma'am.

19 Q. Do you know where this video is?

20 A. The owner said that he had just
21 gotten the place so he didn't have a key to
22 get to it, but that it was on. He said that
23 there were four cameras that were on.

24 Q. Did you ask Mr. McElhannon to file a
25 Motion to reconsider?

Donnie Ray Gibson v State of South Carolina
Case No. 17-CP-04-00224
PCR Hearing of February 22, 2018
Testimony of Applicant Donnie Gibson - Cross Examination

13

1 A. Yes.

2 Q. And he did that?

3 A. Yes, ma'am.

4 Q. Do you remember appearing before
5 Judge McIntosh on that Motion?

6 A. Yes, ma'am.

7 Q. And Mr. McElhannon argued that the
8 sentence should be reconsidered because the
9 verdict was inconsistent; right?

10 A. Yeah.

11 Q. So he did everything that you asked
12 him to do?

13 A. Yes, ma'am.

14 MS. OPPENHEIMER: No further questions.

15 THE COURT: Anything on redirect?

16 MR. RICHEY: No, sir.

17 THE COURT: Thank you, sir. You can
18 step down.

19 (WITNESS STEPS DOWN)

20 MR. RICHEY: We call Scott McElhannon.

21 (WITNESS TAKES STAND)

22 SCOTT MCELHANNON, having been sworn to
23 tell the truth, and nothing but the truth,
24 testified as follows:

25 DIRECT EXAMINATION

Donnie Ray Gibson v State of South Carolina

14

Case No. 17-CP-04-00224

PCR Hearing of February 22, 2018

Testimony of Scott McElhannon - Direct Examination

1 BY MR. RICHEY:

2 Q. Sir, where are you employed?

3 A. I am now employed with the Tenth
4 Circuit Solicitor's Office here in Anderson.

5 Q. At the time of this case -- well,
6 let me go back a little bit. Do you recall
7 representing Mr. Gibson?

8 A. Absolutely.

9 Q. When you represented him what was
10 your employment at that time?

11 A. I was a sole practitioner here in
12 Anderson.

13 Q. Okay. You were in the courtroom
14 during his testimony, correct?

15 A. That's right.

16 Q. And you heard the issues that were
17 raised?

18 A. That's correct.

19 Q. And one of the issues that was
20 raised was about this video in the bar. Can
21 you tell what information that you had about
22 the video?

23 A. The information that I had was that
24 the bar ownership had changed hands recently
25 and that the new owner could not access the

Donnie Ray Gibson v State of South Carolina
Case No. 17-CP-04-00224
PCR Hearing of February 22, 2018
Testimony of Scott McElhannon - Direct Examination

1 video. That was pursuant to the testimony by
2 Rob Gebing, who was the lead investigator in
3 the case at the time.

4 And if I remember correctly there was
5 also testimony that the video would have only
6 shown -- if it was successful, would have
7 only shown inside the bar, people coming in
8 the front door actually into inside the bar.
9 This altercation happened on the back porch
10 of the Hog Tails Bar. There was no testimony
11 and there was no evidence that there was a
12 camera that would have been pointing out
13 towards the back porch.

14 I understand what Mr. Gibson is saying
15 about what started the altercation and that
16 video, if there was a video, may have shown
17 that. But it wouldn't have shown the actual
18 altercation and whether he had a knife or
19 not.

20 Q. And you tried this case and they
21 alleged that he had a knife, is that correct?

22 A. That's correct.

23 Q. Do you recall any investigation or
24 anything about the knife, whether he had it
25 or didn't have it?

Donnie Ray Gibson v State of South Carolina

16

Case No. 17-CP-04-00224

PCR Hearing of February 22, 2018

Testimony of Scott McElhannon - Direct Examination

1 A. The witnesses' testimony all say
2 that he had the knife. Our defense was
3 actually self-defense. It was he didn't --
4 that he was defending himself, because there
5 was no dispute that he was being ganged on by
6 numerous people on the back porch. The only
7 dispute was whether or not he actually had a
8 knife that cut the victim or someone else had
9 a knife. I felt that we disproved that he
10 had a knife or that there was enough
11 reasonable doubt that the jury could come
12 back and acquit him, to be honest; but they
13 didn't.

14 Q. In terms of this plea offer, did you
15 pursue a plea offer with him?

16 A. This is a ways -- the incident
17 happened in 2009, so we're talking about nine
18 years ago.

19 I was appointed to represent Mr. Gibson
20 on March 1st, 2010. Derek Enderlin apparently
21 represented Mr. Gibson prior to me being
22 appointed and he got off the case. I believe
23 there was an offer to Mr. Enderlin of a ten-
24 year sentence. At some point, I think Mr.
25 Gibson had actually signed a sentencing sheet

1 but had never gone through with the plea on
2 that.

3 I guess when Mr. Enderlin got off of the
4 case, the State filed a notice of intent to
5 seek life without parole based on three
6 strikes against Mr. Gibson. That was on
7 September 17th of 2009. So he already had the
8 notice of intent to LWOP before I ever got
9 the case on March 1st, 2010.

10 The solicitor in the case, Assistant
11 Solicitor Rame Campbell, actually when I got
12 involved in the case basically withdrew his
13 LWOP intent and offered twenty years. I took
14 that to Mr. Gibson. I actually went to Perry
15 and met with Mr. Gibson.

16 He -- you know, I understood his
17 situation. He was on parole when this
18 happened. They were going to violate him on
19 parole because he shouldn't have been at a
20 bar anyway being on parole.

21 So he said he couldn't take a plea to
22 anything because basically that would be Life
23 anyway. In twenty years, uh, -- he couldn't
24 take that plea offer.

25 So I went back to Mr. Campbell and said,

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1 'he is not going to do that, he is not going
2 to plead to twenty years.' At that point Mr.
3 Campbell filed the second notice of intent to
4 seek life without parole on October 18th,
5 2011.

6 I went to Perry the week before in
7 October of 2011 and Mr. Gibson declined the
8 offer, then the new LWOP intent was served on
9 us after that.

10 Q. He was on parole and thought that if
11 he accepted any offer that he would be
12 revoked on parole?

13 A. That's correct. Regardless, it was
14 a no-win situation for Mr. Gibson.

15 Q. In terms of these witnesses'
16 statements changing and all that, do you feel
17 like you objected to the testimony based on
18 that, any of that?

19 A. As far as I remember, and I read
20 part of the transcript -- it's rather lengthy
21 and I haven't had a chance to read through
22 the whole thing again, but I believe that I
23 cross-examined every witness that got on the
24 stand. I thought that I did a good job, and
25 I actually thought, there again, that I

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1 created a reasonable doubt.

2 Q. And about this -- one of the things
3 was that you didn't file a Motion, that you
4 didn't move for a mistrial at the end of the
5 trial. I realize that you filed that Motion
6 disputing the verdict but the, uh, do you
7 believe that that would have been more
8 effective if you'd have done it at that
9 trial?

10 A. No. Actually, to be honest, I don't
11 think that there were grounds to ask for a
12 mistrial. I think everything went the way
13 that it was supposed to procedurally and I
14 didn't believe that there was any grounds for
15 a mistrial. What I did do was to file a
16 Motion for a new trial. I did that on
17 December 19th, 2011. So I guess six days
18 after the jury returned the verdicts. I did
19 that within the ten days provided ---

20 Q. And you did that based on what?

21 A. I did it based on the fact that I --
22 I actually thought that it was wrong that
23 they found him in possession of a knife when
24 the only testimony was that there was a
25 knife. I mean that the victim was cut with a

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1 knife. But they convicted him of assault and
2 battery with the intent to kill.

3 The law at the time, as it is still
4 today, pursuant to *State v. Alexander*, they
5 -- that has since been abolished, no
6 inconsistent verdicts. The jury can find
7 inconsistent verdicts.

8 I was just hoping that maybe I would have
9 a shot at it, but Judge McIntosh disagreed.

10 Q. Do you believe that you spent
11 sufficient time with Mr. Gibson to represent
12 him?

13 A. I do, as he stated. I have nothing
14 against Mr. Gibson. We got along great. I
15 represented him for about ten years. He was
16 always cordial and polite. And I understand
17 where he is coming from, he's sitting there
18 with life without parole; but I think that I
19 did everything that I possibly could to try
20 to get him acquitted.

21 Q. Thank you. Please answer any
22 questions that the Attorney General may have
23 for you.

24 A. Yes, sir.

25

CROSS-EXAMINATION

1 BY MS. OPPENHEIMER:

2 Q. Do you remember about how many times
3 you met with Mr. Gibson?

4 A. He said four. I think that it was
5 probably more than four. I have them written
6 down in my file, I just don't have it with me
7 up here.

8 Q. Okay.

9 A. A minimum of four. It was probably
10 closer to eight or ten. When he was out here
11 at the Anderson detention center, I would go
12 out.

13 Q. Did you file any *Brady* or Rule 5
14 Motions?

15 A. Yes.

16 Q. Did you review the discovery
17 material?

18 A. Absolutely.

19 Q. Did you review the statements from
20 the various eyewitnesses?

21 A. Yes, I did.

22 Q. Did you review the DNA and blood
23 analyses on the various evidence that was
24 collected?

25 A. Absolutely. Again, that was part of

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1 our defense, whose DNA was on the knife
2 blade.

3 Q. Can you give the Court a general
4 overview of what the State alleged occurred?

5 A. They alleged that Mr. Gibson and his
6 -- I believe that it was his nephew, a
7 relative of his, had been at Hog Tails Bar.
8 Some gentleman inside, uh, when they were
9 inside came over and kinda got into an
10 altercation with Mr. Gibson. Mr. Gibson says
11 the man actually struck him when he stuck out
12 his hand to shake his hand.

13 They ended up -- the bouncers ended up
14 telling Mr. Gibson and his friend to leave.
15 They basically kicked them out of Hog Tails.

16 The testimony was -- or the State was
17 alleging that about an hour, an hour and a
18 half later that Mr. Gibson and Mr. Hamilton
19 showed back up to Hog Tails and came up on
20 the back porch.

21 All the people that -- the band was
22 taking a break and all the people that had
23 been inside Hog Tails was out on the back
24 porch because it was a hot night.

25 When they came up on the back porch, a

1 fight ensued. They allege that Mr. Gibson
2 had a "long bladed knife" and cut -- I want
3 to say that the guy's name was Jason
4 Marcengill, I believe was the victim's name,
5 on the neck. That was the State's allegation
6 against Mr. Gibson. That he then fled the
7 scene.

8 Mr. Gibson stated in his statement to law
9 enforcement -- he did not give a written
10 statement. What happened was that about a
11 week or several days after the incident
12 Detective Gebing, I believe, called Mr.
13 Gibson on the phone. Mr. Gibson had told Rob
14 Gebing that he was going to file warrants
15 against the people who jumped on him, for
16 assault and battery. But Rob Gebing talked
17 to Mr. Gibson, you know, on the phone and
18 told him that he had warrants for assault and
19 battery with intent to kill and that type
20 thing. So there was an audio statement
21 between Rob Gebing and Mr. Gibson, but there
22 was no written statement.

23 Q. Based on this, your defense strategy
24 was self-defense?

25 A. Other than he didn't cut the victim

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1 with a knife, my other defense was self-
2 defense. He'd been beaten on, which was the
3 testimony that several witnesses gave.
4 Actually one of them stated that he kicked
5 him in the face, that he kicked Mr. Gibson in
6 the face. So that was the appropriate
7 defense.

8 Q. And you said that -- you mentioned
9 your cross-examination of the various
10 witnesses. Do you feel like you brought out
11 the inconsistencies in their various
12 statements.

13 A. I did, (affirmative nod).

14 Q. You felt that you thoroughly cross-
15 examined them about those?

16 A. I felt I did. Yes.

17 Q. And you highlighted the fact that
18 the victim's blood was not found on the
19 knife?

20 A. That's correct.

21 Q. And that it wasn't found on the
22 jacket either?

23 A. That's correct.

24 Q. In regards to this video, just to
25 clarify, was there a video available at the

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1 time?

2 A. The State -- there again, you asked
3 if I filed a *Brady* Motion, and I did. The
4 State never produced a video to me. So, you
5 know, if there was a video I guess that would
6 be a *Brady* violation on their part. But I
7 don't think that there was a video -- there
8 again, it wouldn't have shown what caused the
9 initial altercation. But the testimony was
10 that Mr. Gibson and his nephew had left the
11 premises after that altercation and then some
12 time later, an hour or an hour and a half,
13 came back. So under the law that might have
14 been a cooling down period where that
15 altercation wouldn't have anything to with
16 what happened on the back porch.

17 Q. Was there testimony at trial as to
18 why there was no video produced?

19 A. Yes.

20 Q. And you filed a Motion to reconsider
21 in this case?

22 A. I did.

23 Q. Mr. Gibson asked you to do that?

24 A. (No verbal response).

25 Q. And it was denied?

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1 A. Yes.

2 Q. Okay. You said that you didn't
3 believe that the verdict rose to the level of
4 a mistrial?

5 A. No. No, I -- I mean, under the law
6 that you have to look at for a mistrial there
7 was nothing that I saw that would allow me to
8 actually honestly ask Judge McIntosh for a
9 mistrial. There was no juror misconduct or
10 anything of that nature.

11 Q. Okay. The first plea offer, you
12 said you were not involved in the case when
13 that was given?

14 A. I don't believe so because it was
15 ten years, apparently. Like I said, I have
16 sentencing sheets that have Mr. Gibson's
17 signature on them and Rame Campbell's
18 signature but no defense attorney's
19 signature. So I don't think that I was
20 involved at that point. The first offer that
21 I had was September 22nd, 2010, and that was
22 twenty years.

23 Q. And Mr. Gibson indicated that he
24 wouldn't take any plea deals?

25 A. He indicated that he couldn't

1 because it was effectively a life sentence if
2 he did that.

3 Q. Did Mr. Gibson ever contact you
4 after the trial?

5 A. Yes, by letter.

6 Q. He wrote you letters?

7 A. Yes.

8 Q. Do you have a copy of those with
9 you?

10 A. I do.

11 MS. OPPENHEIMER: May I approach, Your
12 Honor?

13 THE COURT: Yes, ma'am.

14 CROSS-EXAMINATION CONTINUED

15 BY MS. OPPENHEIMER:

16 Q. Are these the letters that he wrote
17 to you?

18 A. Yes.

19 Q. While he was in prison?

20 A. Yes.

21 Q. After the trial?

22 A. Yes, ma'am.

23 Q. Are they a fair and accurate
24 representation of the letters that you
25 received from him?

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1 A. Those are actually the letters,
2 those are the originals.

3 Q. Okay.

4 MS. OPPENHEIMER: Your Honor, at this
5 time I would like to admit these letters into
6 evidence as State's 1 and 2.

7 THE COURT: Any objection?

8 MR. RICHEY: No objection.

9 MS. OPPENHEIMER: Defendant's. I'm
10 sorry.

11 THE COURT: Without objection.

12 (SO ENTERED AS DEFENSE EXHIBIT 1)

13 (SO ENTERED AS DEFENSE EXHIBIT 2)

14 MS. OPPENHEIMER: Your Honor, at this
15 time I would ask that Mr. McElhannon read
16 these letters into the record.

17 THE COURT: Okay. Sure.

18 MR. MCELHANNON: I am not sure which
19 one came first, (reviewing).

20 Okay, this is the first one, (reading):
21 "Dear Mr. McElhannon: How are you doing
22 today? Sorry it's been so long since I've
23 got in touch with you. I really need to get
24 a copy of all the transcripts of the trial
25 and anything that pertains to the trial. Is

1 it possible for you to give me these things?
2 Would you please contact me and let me know
3 the status of things? Again, I want to thank
4 you for everything that you've done for me
5 and my family. With best regards, I am
6 respectfully yours, Donnie Gibson."

7 That was Defendant's Exhibit 2.

8 Defendant's Exhibit 1, (reading):

9 "Dear Mr. McElhannon: How are you? I hope
10 you remember me, you fought my case most
11 diligently and I will always remember that
12 and you. December 14th, 2014 will be three
13 years since my trial and December 19th, 2014,
14 will be three years since you challenged the
15 verdict. I never figured that it would take
16 this long. It is time to move along now. Is
17 there something that we can do to get the
18 situation -- to get this in motion? Again I
19 thank you for all that you have done.
20 Sincerely, Donnie Gibson."

21 CROSS-EXAMINATION CONTINUED

22 BY MS. OPPENHEIMER:

23 Q. So in those letters he indicated
24 that he was happy with you?

25 A. I thought so. To be honest, I think

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1 he still is today. I mean, I did all that I
2 could for Mr. Gibson.

3 Q. And he thanked you for the job that
4 you did on his case?

5 A. He did.

6 Q. Did you have any indication that the
7 State was getting any of the witnesses to
8 change their testimony?

9 A. No. Like I said, I read part of the
10 transcript again. I was in a case last week,
11 all week long, and I didn't have a chance to
12 read the entire transcript but, uh, -- if was
13 leading, I would have objected to his
14 leading. I would have done that normally as
15 a course.

16 Q. And you cross-examined them
17 thoroughly about ---

18 A. I did. Again, there were numerous
19 witnesses that had things in their direct
20 testimony that they did not have in their
21 written statements, and I thoroughly cross-
22 examined them on that.

23 MS. OPPENHEIMER: I have nothing
24 further.

25 THE COURT: Anything on redirect?

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1 MR. RICHEY: No, sir.

2 THE COURT: You may step down.

3 (WITNESS STEPS DOWN)

4 THE COURT: Have y'all got time for me
5 to take a five-minute break? I've got to
6 make a quick call. How many more witnesses
7 have you got? Is that it?

8 MR. RICHEY: That's it.

9 MS. OPPENHEIMER: We have no witnesses.

10 THE COURT: Okay, so both sides rest.
11 Sir, let me tell you what I got. They gave
12 me this this morning, I got your records this
13 morning. It will take me some time to go
14 through these things. So I'll take it under
15 advisement. I'll let the parties know, they
16 will prepare an Order and send it to me,
17 depending on how I rule. Then I'll sign it.
18 But it's going to take me -- I've got -- this
19 is yours. So don't go back and think you're
20 going to hear anything from me for a couple
21 of weeks. Okay?

22 APPLICANT: Okay.

23 THE COURT: Be safe.

24 (HEARING CONCLUDED)

25

Certificate of Court Reporter

Deborah Garrison

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Donnie Ray Gibson, #82710,

Applicant,

v.

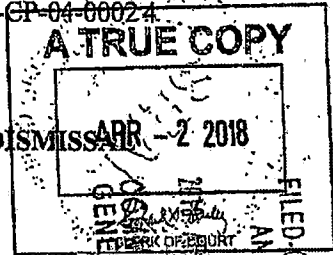
State of South Carolina,

Respondent.

IN THE COURT OF COMMON PLEAS
FOR THE TENTH JUDICIAL CIRCUIT

Case No. 2017-GP-04-00024

ORDER OF DISMISSAL - 2 2018



PROCEDURAL HISTORY

This matter comes before the Court by way of an application for post-conviction relief filed January 5, 2017. Respondent made its Return and Motion for More Definite Statement on September 12, 2017, requesting an evidentiary hearing be held. An evidentiary hearing was convened on February 22, 2018, at the Anderson County Courthouse. Applicant was present at the hearing and was represented by Rodney W. Richey, Esquire. Respondent was represented by Assistant Attorney General Kelly Oppenheimer of the South Carolina Attorney General's Office.

The records before this Court indicate that Applicant is presently confined in the South Carolina Department of Corrections pursuant to orders of commitment of the Anderson County Clerk of Court. During its August 2009 term, the Anderson County Grand Jury indicted Applicant for assault and battery with intent to kill and possession of a weapon during the commission of a violent crime (2009-GS-04-02046). M. Scott McElhannon, Esquire represented Applicant on these charges. On December 12-14, 2011, Applicant proceeded to a jury trial before the Honorable R. Lawton McIntosh. The jury convicted Applicant as indicted for assault and battery with intent to kill and acquitted him of possession of a weapon during the

commission of a violent crime. Judge McIntosh sentenced him to a term of imprisonment for life without the possibility of parole.

Applicant filed a timely notice of appeal, and then-Appellate Defender Benjamin J. Tripp perfected an appeal on Applicant's behalf. Following the submission of an *Anders*¹ brief, Applicant filed a *pro se* document entitled "Motion to respond to *Anders* Brief." By Order dated March 30, 2016, the South Carolina Court of Appeals dismissed Applicant's appeal and granted counsel's request to withdraw. *State v. Gibson*, Op. No. 2016-UP-142 (S.C. Ct. App. Filed March 30, 2016). The Remittitur was issued on April 18, 2016.

In his application for post-conviction relief, Applicant alleges he is being held in custody unlawfully for the following reasons:

1. Ineffective Assistance of Counsel – Atty. Failed to move for mistrial.
 - a. Due to being acquitted [sic] of "Possession of a weapon during the Commission of a violent crime," and Convicted of "Assault and Battery of a High and aggravated [sic] Nature with the intent to kill " [and]
 - b. Failure to move for a mistrial due to Jury misconduct where the Jury failed to follow and apply the law regarding reasonable doubt, as instructed by the Court.
2. Ineffective Assistance of Counsel – for Atty. Failing to object to prosecutorial misconduct.
 - a. Failure to object to, Prosecutorial Misconduct and "Brady" Violation, for states withholding of material evidence, where the state failed to inform Defense Counsel that witness testimony had changed before trial.

At the hearing, Applicant proceeded forward on the claims of ineffective assistance of counsel in his original application, as well as additional claims of ineffective assistance of counsel for failure to investigate and for failure to convey a plea offer.

¹ *Anders v. California*, 386 U.S. 738 (1967).

STATEMENT OF FACTS ADDUCED AT TRIAL

On April 26, 2009, Damon Marcengill was at Hog Tails bar with his girlfriend, and his brother, Jason Marcengill. Tr. 38, 96, 97, 108. At some point in the evening, Damon and Applicant got into an altercation inside the bar. Tr. 40, 43, 50, 109, 117, 121, 147, 170, 181. During the fight inside, Jason also became involved. Tr. 97, 146-47, 170, 181. As a result, Applicant was escorted outside the bar. Tr. 99, 109, 122-23, 148, 161, 171. Employees at the bar described Applicant as being mad and stating "[he] would leave, but [he'll] be back" when he was escorted out of the bar. Tr. 123, 148.

Later that night, Applicant came back to the bar with another individual, Scott. Tr. 51, 100, 101, 124, 149, 172-73. Applicant and Scott immediately proceeded to the back porch of the bar and approached Damon. Tr. 52, 110, 111, 124, 126. Applicant and Damon began arguing, at which point someone went to get Jason out of his truck. Tr. 100, 110, 126, 174. Jason arrived on the back deck from the parking lot and approached Applicant and Scott. Tr. 101, 110, 174. Upon seeing Jason, a physical altercation broke out on the back porch—specifically between Applicant and Damon and Scott and Jason. Tr. 52, 55, 86, 101-02, 110, 126-27, 153, 174. At some point, Applicant produced a knife and began slashing at Damon with it. Tr. 52-53, 86, 89, 92, 126, 176. Damon did not have a knife or any other type of weapon. Tr. 54, 87, 103, 128, 155, 179, 186. As a result of this altercation, Damon was cut on his side, arm, neck, and face. Tr. 41, 54, 111, 114-15, 154.

TESTIMONY PRESENTED AT THE EVIDENTIARY HEARING

At the evidentiary hearing, Applicant testified on his own behalf and presented the testimony of M. Scott McElhannon (hereinafter "Counsel"). This Court also had before it a copy

of Applicant's trial transcript, the records of the Anderson County Clerk of Court, Applicant's appellate records, and Applicant's records from the South Carolina Department of Corrections.

During the evidentiary hearing, Applicant testified he met with Counsel about four times before trial. He testified he and Counsel reviewed some of the discovery but did not review the statements of witnesses. Applicant further testified he and Counsel discussed defenses, including he did not have a knife, but someone else did. He testified he did not give Counsel any leads or witnesses to investigate. He further testified an investigation into a video at the bar, where this incident occurred, was never done. He testified he talked to Counsel about obtaining the video, but no one ever obtained it. Applicant further testified the video would have shown the inside of the bar and the cause of the fight inside the bar, which would have shown that he did not start this fight. He testified he has not seen this video and does not know its location.

Applicant also testified he was never offered a plea and believes Counsel was ineffective for failing to pursue a plea. He testified Counsel came to him with a deal, but it did not go through. He further testified something else should have been done to obtain a plea offer.

Applicant testified Counsel did not object to witness testimony at trial. He testified he was unaware that witness testimony had changed until the day of trial, and Counsel should have requested a continuance because of the change in testimony. He elaborated the solicitor led the witnesses at trial, which caused them to change their testimony.

Applicant also testified Counsel should have asked for a mistrial based on inconsistent verdict. He testified Counsel filed a motion to set aside the verdict, which should have been done immediately after trial. He elaborated he asked Counsel to file this motion, which Counsel did. Applicant further testified Counsel argued inconsistent verdict in his motion to reconsider.

Applicant testified Counsel is a very fine man and did everything he could have done. He elaborated Counsel did everything he asked of him.

Next, Applicant presented testimony from Counsel. Counsel testified he is now employed at the Tenth Circuit Solicitor's Office, but at the time of his representation of Applicant, he was in private practice. Counsel testified he was appointed to represent Applicant on March 1, 2010. He testified he met with Applicant approximately eight to ten times at the detention center. Counsel further testified he spent sufficient time with Applicant over the course of his representation, which was about two years, and was prepared for trial. He elaborated he had a good relationship with Applicant during his representation and did everything he could do for Applicant.

Counsel testified Derek Enderlin was Applicant's first attorney. He testified during Enderlin's representation of Applicant, there was an offer of ten years, with which Counsel was not involved, but Applicant did not go through with the plea. He testified on September 17, 2009, the State filed a notice of life without the possibility of parole based on his prior convictions². He further testified he did not get the case until March 1, 2010. Counsel testified thereafter, the solicitor withdrew the notice of life without the possibility of parole and offered twenty years, which was the only offer the State presented to him. He testified he took this offer to Applicant around October 11, 2011. Counsel further testified Applicant did not want to accept the plea because he was on parole at the time, which would have been violated had he accepted the offer. Counsel testified after Applicant rejected that plea offer, the State filed its second notice of life without the possibility of parole on October 18, 2011.

² Applicant has several previous convictions dating back to 1969. Notably, Applicant was convicted of murder in 1976 for which he received a life sentence. He escaped from prison in 1979; and while out, he was convicted of armed robbery. The 1976 and 1979 convictions were the bases for which the State sought life without the possibility of parole.

Counsel testified the State alleged Applicant and his nephew were at Hog Tails bar. Counsel further testified Applicant got into an altercation with the victim and was consequently thrown out of the bar. He elaborated Applicant and his nephew then went back to the bar some time later and started another fight with the victim on the back porch. He testified the State alleged Applicant had a knife, cut the victim's neck with it, and then fled.

Counsel testified he filed *Brady* and Rule 5, SCRCrimP, motions and reviewed the discovery with Applicant. He testified they reviewed witness statements and the DNA results found on the knife. He further testified the victim's blood was found on neither the knife nor Applicant's jacket. He elaborated the identity of the DNA on the knife was part of his defense. Counsel testified Applicant did not make a written statement to law enforcement but did talk to Detective Gebing on the phone, which resulted in an audio statement. Counsel testified his defense at trial was Applicant did not cut the victim, as well as self-defense because Applicant was being beaten while at the bar.

He testified the video at the bar could not be accessed because bar ownership had changed and the new owner did not have access to the video. Counsel testified the video was not available, as the State did not produce it. He elaborated there was testimony at trial as to why the video was not produced. He further testified the video would have only shown the inside of the bar and the front door, not the back porch, which is where this fight occurred. He elaborated there was no evidence of cameras on the back porch and would not have shown whether or not Applicant had a knife.

Counsel also testified the only evidence Applicant had a knife during the bar fight was from witness testimony. He testified his defense was self-defense because there was no dispute that Applicant was being beaten by a number of people. He elaborated the only question was

whether or not Applicant actually had a knife. Counsel testified he thought if Applicant did not have a knife, then he would have been acquitted, but that was not what happened.

Counsel also testified he cross-examined every witness and thought he had created reasonable doubt. He elaborated he highlighted inconsistencies in the witnesses' written statements and their testimony on direct during cross-examination. He further testified the State did not lead the witnesses to change their testimony, and he would have objected to leading if they had been.

He testified there were no grounds for a mistrial, as the procedure at trial was proper. He elaborated the verdict did not rise to the level of a mistrial, and he did not see any juror misconduct or anything of that nature. He further testified he did file a motion for a new trial six days after the verdict, as Applicant requested, which was within the ten day time period. He elaborated he filed this motion based on his belief that the verdict was incorrect for saying Applicant did not have a knife but yet convicting him of assault and battery with intent to kill. Counsel further testified at the time of his motion, *State v. Alexander* had been issued, which abolished the rule against inconsistent verdicts, but he filed the motion regardless. He testified the court denied his motion.

Counsel also testified Applicant contacted him twice by letter after the trial. In those letters, Applicant thanked Counsel for everything he did and indicated Counsel fought his case diligently.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Court has had the opportunity to review the record in its entirety and has heard the testimony at the post-conviction relief hearing. This Court has further had the opportunity to observe the witnesses presented at the hearing, closely pass upon their credibility, and weigh

their testimony accordingly. Set forth below are the relevant findings of facts and conclusions of law as required pursuant to S.C. Code Ann. §17-27-80 (1985).

Ineffective Assistance of Counsel

In a post-conviction relief action, an applicant has the burden of proving the allegations in the application. Rule 71.1(e), SCRCP; *Butler v. State*, 286 S.C. 441, 334 S.E.2d 813 (1985). When an applicant alleges ineffective assistance of counsel as a ground for relief, the applicant must prove that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668 (1984); *Butler*, 286 S.C. 441, 334 S.E.2d 813.

The proper measure of performance is whether an attorney provided representation within the range of competence required in criminal cases. Courts presume that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Butler*, 286 S.C. 441, 334 S.E.2d 813. The applicant must overcome this presumption to receive relief. *Cherry v. State*, 300 S.C. 115, 386 S.E.2d 624 (1989).

Courts use a two-pronged test in evaluating allegations of ineffective assistance of counsel. First, the applicant must prove that counsel's performance was deficient. Under this prong, attorney performance is measured by its "reasonableness under professional norms." *Cherry*, 300 S.C. at 117, 386 S.E.2d at 625 (citing *Strickland*). Second, counsel's deficient performance must have prejudiced the applicant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cherry*, 300 S.C. at 117-18, 386 S.E.2d at 625.

After careful review based on the standard discussed above, this Court finds that Applicant has failed to carry his burden in this action. Below are this Court's findings in regards to each of Applicant's allegations of ineffective assistance of counsel.

Counsel's alleged failure to move for mistrial when Applicant was acquitted of possession of a weapon during the commission of a violent crime and conviction of assault and battery with intent to kill.

Applicant alleges Counsel was ineffective for failing to move for a mistrial when Applicant was convicted of assault and battery with intent to kill, yet acquitted of possession of a weapon during the commission of a violent crime. "A criminal defendant convicted by a jury on one count [cannot] attack that conviction because it was inconsistent with the jury's verdict of acquittal on another count." *United States v. Powell*, 469 U.S. 57, 58 (1984). Although such a verdict could be the result of compromise or mistake on the part of the jury, such verdicts "cannot be upset by speculation or inquiry into such matters." *Dunn v. United States*, 284 U.S. 390, 394 (1932). Similarly, South Carolina has abolished the rule prohibiting inconsistent verdicts. *State v. Alexander*, 303 S.C. 377, 401 S.E.2d 146 (1991).

Here, Applicant was charged with both assault and battery with intent to kill (ABWIK) and possession of a weapon during the commission of a violent crime. The jury convicted Applicant of ABWIK while simultaneously acquitting him of the possession charge. Counsel testified this verdict did not rise to the level of a mistrial, as everything procedurally during the trial was proper. However, Counsel did file a timely motion for a new trial even though the law permits inconsistent verdicts. Because Counsel filed the motion for a new trial based on inconsistent verdicts, this Court finds Counsel's performance was reasonable under professional norms. Furthermore, Applicant has failed to establish any resulting prejudice from this alleged

deficiency. Inconsistent verdicts are permitted and cannot be attacked on that basis. Therefore, there is no indication the result of the proceeding would have been different had Counsel moved for a mistrial on this ground. Still further, the denial of Counsel's motion for a new trial is indicative such a motion at trial would have also been unsuccessful. Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to move for a mistrial due to jury misconduct

Applicant alleges Counsel was ineffective for failing to move for a mistrial due to jury misconduct. Specifically, Applicant alleges Counsel was ineffective for failing to move for a mistrial when the jury "failed to follow and apply the law regarding reasonable doubt, as instructed by the court." Applicant wholly failed to present any testimony or argument regarding this claim at the evidentiary hearing, consequently abandoning this allegation. Therefore, this Court finds this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to object to prosecutorial misconduct and Brady³ violation

Applicant alleges Counsel was ineffective for failing to object to prosecutorial misconduct and a *Brady* violation for the State withholding material evidence. Specifically, Applicant alleges the State failed to inform Counsel witness testimony had changed before trial. "A *Brady* claim is based on the requirement of due process." *Gibson v. State*, 334 S.C. 515, 524, 514 S.E.2d 320, 324 (1999). In order to be successful on a *Brady* claim, the applicant must demonstrate: (1) the evidence was favorable to the accused; (2) it was in the possession of or known to the prosecution; (3) it was suppressed by the prosecution; and (4) it was material to guilt or punishment. *Id.* (citing *Kyles v. Whitley*, 514 U.S. 419 (1995); *Brady v. Maryland*, 373 U.S. 83 (1963); *State v. Von Dohlen*, 322 S.C. 234, 471 S.E.2d 689 (1996)). This rule applies to

³ *Brady v. Maryland*, 373 U.S. 83 (1963).

not only exculpatory evidence but also impeachment evidence. *Id.* (citing *United States v. Bagley*, 473 U.S. 667 (1985)).

Counsel testified he filed *Brady* and Rule 5 motions and reviewed all discovery material with Applicant, including all of the witness statements. He further testified he was able to thoroughly cross-examine each witness on the inconsistencies between their statements to law enforcement and their testimony at trial. He explained he cross-examined each witness and believed he was able to create reasonable doubt through his cross-examination. Counsel's performance was reasonable under professional norms, as he was able to thoroughly highlight the differences in these witnesses' statements. In addition, there is no indication that any of the statements provided by these witnesses—either given to law enforcement or made at trial—were favorable to Applicant. Each witness put Applicant at the bar fighting with Damon. Furthermore, there is no indication the State suppressed any of these statements, as all eyewitness statements were provided to Counsel during discovery. Therefore, this Court finds Applicant has failed to establish any deficiency on the part of Counsel or any resulting prejudice. This allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to investigate

Applicant alleges Counsel was ineffective for failing to investigate. Specifically, Applicant alleges Counsel was ineffective for failing to obtain a videotape of the bar on the night of the incident. "[C]riminal defense attorneys have a duty to undertake a reasonable investigation, which at a minimum includes interviewing potential witnesses and making an independent investigation of the facts and circumstances of the case." *Walker v. State*, 397 S.C. 226, 235, 723 S.E.2d 610, 615 (Ct. App. 2012) (reversed on other grounds by *Walker v. State*, 407 S.C. 400, 756 S.E.2d 144 (2014)). Moreover, "failure to conduct an independent

investigation does not constitute ineffective assistance of counsel when the allegation is supported only by mere speculation as to result." *Porter v. State*, 368 S.C. 378, 385-86, 629 S.E.2d 353, 357 (2006) (citing *Moorehead v. State*, 329 S.C. 329, 334, 496 S.E.2d 415, 417 (1998)). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins v. Smith*, 539 U.S. 510, 521-22 (2003).

Here, Counsel testified the video at the bar could not be accessed because bar ownership had changed and the new owner did not have access to the video. Counsel testified the video was not available, as the State did not produce it. He elaborated there was testimony at trial as to why the video was not produced. Specifically, Detective Rob Gebing testified at trial he attempted to obtain videos from the bar, but he was unsuccessful. Tr. 228. He explained the bar had changed management, and new management was unaware of how to obtain the footage. Tr. 228. Detective Gebing further testified there was only one camera at the back door of the bar, and no evidence of any cameras outside. Tr. 228. Counsel also testified the video would have only shown the inside of the bar and the front door, not the back porch, which is where this fight occurred. He elaborated there was no evidence of cameras on the back porch and would not have shown whether or not Applicant had a knife. Therefore, this Court finds Counsel's investigation into the video—or lack thereof—was reasonable under the circumstances.

Moreover, Applicant has wholly failed to provide this Court with these alleged videotapes, leaving this Court only to speculate as to what they may have shown on the night of this incident. Applicant alleges this video would have shown he did not start the fight on the back porch. However, Applicant also testified he has never seen this video and does not know of its location. Applicant's bare assertions as to what these alleged videotapes showed, without

more, do not give rise to the level of proof required for Applicant to meet his burden. Based on the foregoing, this Court finds that this allegation must be denied and dismissed with prejudice.

Counsel's alleged failure to convey plea offer

Applicant alleges Counsel was ineffective for failing to convey a plea offer from the State. In order to prevail on a claim counsel was ineffective for failing to convey a plea offer, the applicant must show: (1) plea counsel's failure to communicate the State's initial plea offer constituted deficient performance and (2) the applicant was prejudiced by the deficient performance, in other words there was a reasonable probability that but for this deficient performance, the applicant would have accepted the original plea offer. *Davie v. State*, 381 S.C. 601, 675 S.E. 416 (2009).

Here, Counsel testified, the solicitor made a plea offer of twenty years imprisonment, which was the only offer with which Counsel was presented. He testified he presented this offer to Applicant around October 11, 2011, but Applicant did not want to accept the plea because he was on parole at the time, which would have been violated had he accepted the offer. Because Counsel did indeed present Applicant with the plea offer presented by the State, this Court finds Applicant has failed to establish any deficiency on the part of Counsel.

Furthermore, this Court finds Applicant has failed to establish any resulting prejudice from this alleged deficiency. Because Applicant was on parole at the time of this incident, Applicant indicated he would not have accepted any plea offers—which would have been a clear violation of his parole. Therefore, Applicant has wholly failed to establish despite Counsel's alleged deficiencies, he would have accepted the plea offer. This Court finds this allegation must be denied and dismissed with prejudice.

CONCLUSION

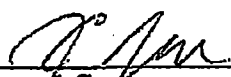
Based on all the foregoing, this Court finds and concludes that the Applicant has not established any constitutional violations or deprivations that would require this court to grant his application. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

This Court notes that Applicant must file and serve a notice of appeal within thirty days from the receipt by counsel of written notice of entry of judgment to secure the appropriate appellate review. See Rule 203, SCACR. Pursuant to *Austin v. State*, 305 S.C. 453 (1991), an Applicant has a right to an appellate counsel's assistance in seeking review of the denial of post-conviction relief. Rule 71.1(g), SCRCP, provides that if the applicant wishes to seek appellate review, post-conviction relief counsel must serve and file a Notice of Appeal on the Applicant's behalf. Applicant is directed to South Carolina Appellate Court Rule 243 for appropriate procedures for appeal.

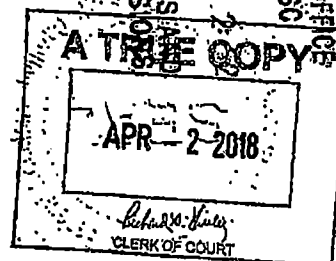
IT IS THEREFORE ORDERED:

1. That this application for post-conviction relief must be denied and dismissed with prejudice; and
2. The Applicant must be remanded to and remain in the custody of the State

AND IT IS SO ORDERED this 30 day of March, 2018.


J. CORDELL MADDOX, JR.
Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina



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WITNESSES

R Gebing, Anderson County Sheriff's Dept.

DOCKET NO. 2009-GS-04-02046

The State of South Carolina

County of Anderson

COURT OF GENERAL SESSIONS

AUG 25 2009

Term

A TRUE COPY

ARREST WARRANT NUMBER

J896886 & J878036

THE STATE

VS.

Don Ray Gibson

ACTION OF GRAND JURY

TRUE BILL

AUG 25 2009

Foreperson of Grand Jury

Date: Foreperson

RLC

Indictment for

**Assault / Assault and battery with Intent to Kill
(ABWIK)**

SC Code: 16-03-0620

CDR Code: 0014

**Possession of a weapon during the
commission of a violent crime**

SC Code: 16-23-0490

CDR Code: 0549

VERDICT

Foreperson of Petit Jury

Date: 12-14-11

STATE OF SOUTH CAROLINA)
COUNTY OF Anderson)

INDICTMENT

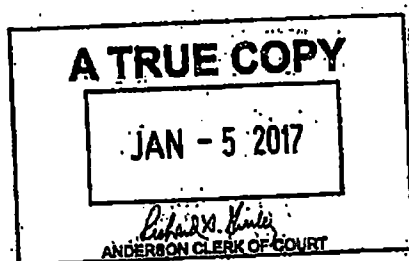
At a Court of General Sessions, convened on AUG 25 2009 the Grand Jurors of
Anderson County present upon their oath:

Assault / Assault and battery with Intent to Kill (ABWIK)

That Don Ray Gibson did in Anderson County, on or about April 26, 2009, commit an assault and battery upon Damon Marcengill, by stabbing the victim with a knife. All in violation of Section 16-3-620, *Code of Laws of South Carolina*, (1976), as amended.

Possession of a weapon during the commission of a violent crime

That Don Ray Gibson did in Anderson County, on or about April 26, 2009, possess a ~~firearm~~ ^{knife} during the commission of a violent crime, to wit: Assault and Battery with intent to kill, all in violation of Code Section 16-23-490, Code of Laws of South Carolina (1976), as amended.



Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

FOREPERSON X *[Signature]*

Ramel L. Campbell
ASSISTANT SOLICITOR