

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Chesterfield County
J. Michael Baxley, Circuit Court Judge
2010-GS-13-0192, 2010-GS-13-0263

Appellate Case No. 2012-213655

THE STATE,

Respondent,

v.

THOMAS STEWART,

Appellant

SUPPLEMENTAL RECORD ON APPEAL

JARRETT O. COCO, ESQ.
Nelson Mullins Riley & Scarborough, LLP
P. O. Box 11070
Columbia, SC 29211-1070

ROBERT M. DUDEK
Chief Attorney
Division of Appellate Defense
P. O. Box 11589
Columbia, SC 29211
(803) 734-1330

ATTORNEYS FOR APPELLANT

ALAN WILSON
Attorney General

JOHN W. McINTOSH
Chief Deputy Attorney General

DONALD J. ZELENKA
Senior Assistant Deputy Attorney General
Office of the Attorney General
P. O. Box 11549
Columbia, SC 29211
(803) 734-6305

WILLIAM B. ROGERS, JR.
Solicitor, Fourth Judicial Circuit
P. O. Box 616
Bennettsville, SC 29512
(843) 479-6516

ATTORNEYS FOR RESPONDENT

RECEIVED

OCT 29 2014

SC Court of Appeals

TABLE OF CONTENTS

Trial Transcript pages 470-496.. 1

CERTIFICATE OF SERVICE

1 Matter of fact, I need to do it for you.

2 MR. REDMOND: Beg the Court's indulgence.

3 BY MR. REDMOND:

4 Q. I'm going to slide you up a little bit closer here to
5 the microphone and hold this down. I don't want to hit
6 you with it. Slide this a little bit closer. That way so
7 you can -- if you can speak as loudly as you can. I'm
8 going to be brief, and I appreciate you're being here,
9 okay. Ms. Day, could you again state your name for the
10 record?

11 A. Carrie Lee Day.

12 Q. Okay. And, Miss Day, I don't mean to embarrass you,
13 but we've talked before. Were you 72 years old at the
14 time this happened?

15 A. Yes, sir.

16 Q. And I believe you're now 75 years of age?

17 A. Yes, sir.

18 Q. Well, congratulations on that longevity. I think we
19 all appreciate that, and we appreciate you're being
20 willing to be here today. Ms. Day, I'll just get right
21 into it. Did you know the victim, Bellany Clyburn?

22 A. Yes, I did.

23 Q. I believe you live in Chesterfield now?

24 A. Yes, I do.

25 Q. At the time did you live at Pageland Place

1 Apartments?

2 A. Yes, I did.

3 Q. You said you knew Bellany Clyburn?

4 A. Yes, I did.

5 Q. Okay. Now, did you know the Defendant?

6 A. Know of him. Not know him.

7 Q. Okay. Had you ever scene him there in that area
8 before?

9 A. Yes, sir.

10 Q. Let me direct your attention to January 1st of 2010.
11 That morning, could you tell the ladies and gentlemen of
12 the jury -- I'll just ask you this. Did you get a knock
13 on your door by one of Bellany Clyburn's children?

14 A. Yes, I did.

15 Q. Okay. Do you recall which child it was?

16 A. The baby.

17 Q. Okay. That would be Kyron?

18 A. Yes, sir.

19 Q. When Kyron knocked at the door I want you to tell us
20 from that point forward what happened?

21 A. He knocked at the door. He called me grandma. He
22 said, "Grandma, my daddy out there stabbing my momma." I
23 said, "What?" I came and run out the house. I was
24 cooking. I just came run out the house.

25 Q. I didn't ask you this. You came out the house.

1 Where is your apartment situated compared to where Ms.
2 Clyburn's apartment was?

3 A. Beyond Bellany's door.

4 Q. Okay. I think the next apartment complex? The next
5 section over?

6 A. E4.

7 Q. Now, and I interrupted you and I apologize?

8 A. Kyron comes to the door and knocked, "My daddy is
9 stabbing my mommy."

10 Q. You go out. You were cooking, I believe you said?

11 A. I was.

12 Q. And you go outside. And from that point forward tell
13 these ladies and gentlemen of the jury what you observed?

14 A. When I went out that young man over there was already
15 stabbing the children's mother. And I just walked on
16 around there, and I said, "Hey." He didn't say nothing.
17 So I just walked on around. So I was scared to get up
18 close to be honest. So I walked around and just he was
19 just steady stabbing her. There was nothing I could do
20 but just stand there.

21 And when she rolled over -- no, he turned her over.
22 He rolled her over and stabbed her. I know I seen him
23 stab her three times in the chest. And I walked on to my
24 son.

25 Q. And then did you see when Miss Clyburn tried to get

1 up and get to your daughter, Anita Little's, apartment?

2 A. Yes, I did.

3 Q. And was she able to make it into the apartment?

4 A. No, sir.

5 Q. And do you recall and did you see about where she
6 fell?

7 A. Yes, sir.

8 Q. All right. Where was that?

9 A. Between her door and (undecipherable) door.

10 Q. Okay. Just right there at the door, near the door?

11 A. Yes, sir.

12 Q. And does Anita Little -- she lives in H4 of the
13 apartment complex?

14 A. Right.

15 Q. Okay. That was two doors down from where Bellany
16 Clyburn?

17 A. Yes, sir.

18 Q. Now, when you first saw him stabbing her, were they
19 outside when you saw the Defendant stabbing Bellany
20 Clyburn?

21 A. Yes, sir.

22 Q. And at any time did you see another black male come
23 in the direction trying to help Bellany? In other words
24 did you see a -- another black male other than the
25 Defendant come out of Bellany Clyburn's apartment?

1 A. No, sir, I didn't.

2 Q. Okay. Cause we heard that before, and you did not
3 see it?

4 A. That didn't happen.

5 Q. At any time while you saw her did Bellany Clyburn
6 have anything in her hand? Any way was she attacking the
7 Defendant?

8 A. No, she didn't.

9 Q. Was this a one sided attack?

10 A. Right.

11 Q. Let's talk about the S.U.V. real quick. Did you see
12 a white S.U.V. with gold trim parked in the apartment
13 complex on December 31st 2009?

14 A. Yes, I did.

15 Q. Okay. And did you see when that S.U.V. left the
16 scene of Ms. Clyburn's murder?

17 A. Yes, I did.

18 Q. Now, tell us what you saw. And let's start from that
19 point. You see her staggering forward. Tell us what took
20 place from that point forward.

21 A. When he left?

22 Q. Yes, when he left?

23 A. When he left a friend of mine threw the candle threw
24 the window and I said there wasn't nothing I could do but
25 get the tag number.

1 Q. And you got the tag number?

2 A. I got the tag number.

3 Q. And you said a friend threw something?

4 A. Threw a candle through the window.

5 Q. You saw when that happened?

6 A. Yes, sir.

7 Q. And do you remember who it was that did that?

8 A. T.J.

9 Q. T.J. I think -- do you know his last name?

10 A. I don't want to lie. I can't remember.

11 Q. But you know him as T.J?

12 A. I know him.

13 Q. And were there -- had a lot of people come out by the
14 time the Defendant left?

15 A. Yeah, a lot of family came.

16 Q. And at the time that Defendant left and whoever
17 through the candle holder in there were there a lot of
18 people yelling in the direction of Defendant?

19 A. Yes, sir, it was.

20 Q. Okay. In what you observed was the victim trying to
21 get away from the Defendant?

22 MR. YOUNG: Objection. Speculation.

23 THE COURT: Actually, sustain as to leading.

24 MR. REDMOND: I'll rephrase.

25 BY MR. REDMOND:

1 Q. Did you see -- you've already testified. Did you see
2 the Defendant stabbing the victim?

3 A. Yes, I did.

4 Q. Did you see the -- was the victim trying to move
5 physically in a direction away from the Defendant?

6 A. Yes, she was.

7 Q. Okay. So he was trying to move -- she was trying to
8 move away?

9 A. He was trying to get her collar pulling her back.

10 Q. Okay. Could you repeat that, please?

11 A. He had her, the back of her clothes pulling her back.

12 Q. And did he do that while he was stabbing her?

13 A. Yes, he did.

14 MR. REDMOND: Beg the Court's indulgence.

15 BY MR. REDMOND:

16 Q. Did you hear him say anything? Did you hear Thomas
17 Stewart say anything while he was stabbing her?

18 A. I did hear him say one thing.

19 Q. And what's that.

20 A. "I'm going to kill you."

21 Q. Could you repeat that?

22 A. "I'm going to kill you." That's all I heard him say.

23 Q. That's all that I have. Please answer any questions
24 that the Defense may have.

25 THE COURT: Cross-examination.

CROSS-EXAMINATION

- 1
- 2 BY MR. YOUNG:
- 3 Q. Good afternoon, Ms. Day?
- 4 A. Good afternoon.
- 5 Q. You nervous?
- 6 A. No, sir.
- 7 Q. Ms. Day, after -- when it happened out there,
- 8 Pageland Place Apartments, were you asked to go to the
- 9 police department?
- 10 A. Yes, sir.
- 11 Q. How did you get there?
- 12 A. I don't remember how I got there, but I know I was up
- 13 there.
- 14 Q. Did you ride with your daughter and granddaughter?
- 15 A. Probably.
- 16 Q. Manita and Kimberly?
- 17 A. Yes, I did.
- 18 Q. When you went to the police department you were asked
- 19 to make a statement; is that correct?
- 20 A. Yes, sir.
- 21 Q. Were you put into a room by yourself?
- 22 A. No.
- 23 Q. Did all of y'all sit down at a table together?
- 24 A. Yes.
- 25 Q. Did all of y'all write your statements together?

1 A. We didn't. We sat there while the police wrote them.

2 Q. You sat there while the police wrote them? Did you
3 hear Ms. Little -- did you hear Manita Little give her
4 statement to the police?

5 A. Not really. Not really.

6 Q. Not really. Were you in the room with her when she
7 gave her statement?

8 A. I was in the room with her.

9 Q. Did you hear Kimberly Little give her statement to
10 the police?

11 A. No, because I was in another world, all right.

12 Q. Okay, but y'all were all in a room together?

13 A. Yes, sir.

14 Q. Have you reviewed a copy of your statement?

15 A. No, I haven't.

16 Q. Do you mind if I show you a copy of your statement,
17 and I just ask you to review it. Ms. Day, today your
18 testimony was that Kyron Stewart told you when he knocked
19 on the door that daddy was stabbing my mommy?

20 A. Right.

21 Q. Is that correct?

22 A. Correct.

23 Q. And you've reviewed your statement that you gave on
24 January the 1st 2010, correct?

25 A. Um hum.

1 Q. And in your statement you said that Kyron said this
2 man is hurting my momma.

3 A. He said, "stab my momma." So much was going on I
4 could have made a mistake right then. I do know heard
5 the baby say, and I know what I said.

6 Q. So you may have been mistaken when you wrote your
7 statement on January the 1st?

8 A. It's a mistake. So much was going on you can't
9 think.

10 Q. Yes, ma'am. Ms. Day, when you first went outside and
11 looked outside did you see Ms. Clyburn standing outside of
12 her apartment?

13 A. He was stabbing her.

14 Q. He was on top of her. She was already ---

15 A. He had her -- that man had her in the back of her
16 collar stabbing her, and she was trying to get away.

17 Q. And that was the first thing that you saw?

18 A. It sure was.

19 Q. Did you say that Ms. Clyburn, when you first looked
20 outside, was saying, "Get him out of my house?"

21 A. I believe she did tell him get him out of my house
22 because she was trying to get away to my daughter's house
23 and then she fell.

24 Q. So just so I'm clear Ms. Clyburn is outside of her
25 apartment, correct?

1 A. Yes, he was stabbing her out there.

2 Q. And she was saying, "Get him out of my house,"
3 correct?

4 A. He went in there and got a knife stabbing her out the
5 door.

6 Q. Did you see Ms. Clyburn with a knife?

7 A. No, I didn't.

8 Q. Did you see another knife out there?

9 A. No, I didn't.

10 Q. Did you see Mr. Stewart come out of the house?

11 A. He was already out the house stabbing her.

12 Q. And I'm just asking you if you would follow along
13 with me on your statement. You said, "So I came outside
14 and was trying to find somebody to get him out of her
15 house;" is that correct?

16 A. In front of her door stabbing her.

17 Q. Okay. "So as I was walking to my daughter's house he
18 came walk running outside behind her."

19 A. No. No. No. He came out behind her stabbing her.
20 He wasn't running. He walked out there stabbing her out
21 of her house.

22 Q. Okay. So your statement on the 1st is not correct?

23 A. It's almost correct, but when I seen him he was
24 coming out the house stabbing her. Had her in the back of
25 her clothes pulling her back.

1 (WHEREUPON, Defendant's Exhibit No. 91 was marked for
2 identification only.)

3 MR. REDMOND: No objection to that all coming in.

4 MR. YOUNG: Your Honor, at this time I would offer
5 Defense Exhibit 91 into evidence.

6 THE COURT: Without objection 91 is in evidence.

7 (WHEREUPON, Defendant's Exhibit No. 91 was admitted
8 into evidence.)

9 MR. YOUNG:

10 Q. Thank you, Ms. Day.

11 A. You're welcomed.

12 THE COURT: And is there re-direct?

13 MR. REDMOND: Briefly, Your Honor. Beg the Court's
14 indulgence for just a moment.

15 THE COURT: Yes, sir.

16 REDIRECT EXAMINATION

17 BY MR. REDMOND:

18 Q. On January the 1st 2010 when you gave the statement
19 at Pageland Police Department did you tell them that the
20 Defendant was the one that was stabbing -- the one that
21 was stabbing Bellany Clyburn?

22 A. Pardon me.

23 Q. Did you tell Pageland Police Department that the
24 Defendant was the one stabbing Bellany Clyburn?

25 A. Yes, I did.

1 Q. And in fact in booking it I'll let you look at
2 Defense 91 again. In it -- in that statement don't you
3 say that the Defendant was stabbing Bellany Clyburn?

4 THE COURT: Counsel, don't lead your witness, please.

5 MR. REDMOND: I apologize, Your Honor.

6 BY MR. REDMOND:

7 Q. And let me just ask you this. Is there any doubt in
8 your mind that it was the Defendant that was stabbing
9 Bellany Clyburn?

10 A. No.

11 Q. Okay. Is there any doubt that it was him? And I saw
12 you just pointed at him?

13 A. It was him, period.

14 Q. Okay. And it's been three years?

15 A. Yes, it has.

16 Q. Do you remember every detail of what was going on
17 that day?

18 A. It was so much of what was going on. But I know he
19 was the one doing the stabbing. Definitely.

20 Q. And did she do any stabbing back that you saw?

21 A. No. She didn't have nothing to stab with.

22 Q. And was she physically trying to move away from him?

23 A. She was trying to get away to get to my daughter's
24 house.

25 Q. As he was stabbing her?

1 A. As he was stabbing her.

2 Q. And those things are things you remember clearly?

3 A. Clearly.

4 MR. REDMOND: I have nothing further, Your Honor.

5 THE COURT: All right. Anything new brought up on
6 that?

7 MR. YOUNG: No, Your Honor.

8 COLLOQUY

9 THE COURT: On redirect. All right, ma'am, please,
10 watch your step stepping down, and you're free to leave.
11 You may remain with us or you may leave in you wish.
12 Counsel, what do you estimate to be the length of your
13 next witness?

14 MR. REDMOND: Actually, Your Honor, this would
15 conclude our live witnesses. We've got the two that are
16 back to back, the two videotapes of the boys, and ---

17 THE COURT: Let's take our afternoon break. Ladies
18 and gentlemen, we will stand down now for a few minutes.
19 Those that may wish to go outside to take the break.
20 We'll remain where we are while you either leave the
21 courtroom or exit to the outside.

22 (WHEREUPON, the jury panel was excused from the
23 courtroom at 2:55 p.m.)

24 THE COURT: All right. Court in recess now
25 approximately 15 minutes.

1 (WHEREUPON, Court was in recess at 2:55 p.m. and
2 reconvenes at 3:14 p.m.)

3 MR. YOUNG: Your Honor, are you going to give them
4 the stipulation?

5 THE COURT: I am.

6 MR. YOUNG: Thank you.

7 THE COURT: And what I will intend to tell them is
8 that by agreement with the Defendant -- well, I probably
9 say it this day. "Typically, witnesses do not appear by
10 videotape in a criminal trial, but because of the tender
11 age of the witnesses by agreement of the Defendant who has
12 waived his right to confront the witnesses and
13 cross-examine the -- rather than have the witnesses appear
14 at trial their taped statements taken shortly after the
15 incident are going to be placed in evidence."

16 First of all, is that a correct summation of what's
17 happened?

18 MR. REDMOND: Yes, sir.

19 THE COURT: And is that agreeable to the State?

20 MR. REDMOND: Yes, sir.

21 THE COURT: And to the Defendant?

22 MR. YOUNG: Yes, Your Honor.

23 THE COURT: All right. Let's bring in the jury.

24 (WHEREUPON, the jury enters the courtroom at
25 2:15 p.m.)

1 VIDEOTAPED STATEMENT OF JALEN DAVIS

2 THE COURT: All right. Welcome back to the
3 courtroom, ladies and gentlemen. Typically in a criminal
4 trial we do not have witnesses that appear by videotape
5 because the Defendant has a right to confront a witness
6 through counsel as well as to cross-examine a witness.

7 And with regard to our next two witnesses, because of
8 their tender age, they're younger age, the Defendant has
9 waived that right, and these witnesses will be presented
10 rather than by live testimony by playing the video of
11 their taped statement that was given relatively soon after
12 this incident occurred.

13 That's by agreement of both sides of this case, and
14 you may proceed.

15 MR. REDMOND: Thank you, Your Honor. If it please
16 the Court. We've got the tape queued, and I can go ahead
17 and play it and publish it at this time.

18 THE COURT: Go ahead.

19 MR. REDMOND: Your Honor, this is going to be the
20 videotaped statement of Jalen Davis.

21 THE COURT: All right. Do we need to do a voice?
22 Got a volume check on this? Have you ---

23 MR. REDMOND: I have not. Looks like, according to
24 this, as far as the computer is maxed out ---

25 MR. FOARD: I think we're all right, Judge.

1 THE COURT: Okay. Go ahead.

2 (WHEREUPON, the videotaped statements of JALEN DAVIS
3 was played for the jury.)

4 MR. REDMOND: For the record, just to make the record
5 clear who was present during the interview. On camera you
6 saw in the interview was Jalen Davis that we just saw.
7 That was, of course, Jalen Davis. It was his father, and
8 I apologize. I don't have his father's name, but his
9 father was there sitting next to Young Jalen Davis. Then
10 you had Christina Gainey with S.L.E.D. and, of course,
11 Mikkos Newman with Pageland P.D.

12 VIDEOTAPED STATEMENT OF KYRON STEWART

13 On this tape now we're about to hear from Kyron
14 Stewart. And Miss Clyburn son's. He is seated on the lap
15 of Pastor David. He's been here during the course of the
16 trial. He had to leave today early. Of course, we've got
17 Mikkos Newman here and we've got Christina Gainey.

18 (WHEREUPON, the videotaped statement of KYRON STEWART
19 was played for the jury.)

20 MR. REDMOND: That concludes those statements, Your
21 Honor.

22 THE COURT: All right. Very good. Please call your
23 next witness.

24 COLLOQUY

25 MR. REDMOND: Your Honor, at this time the State a

1 has completed it's testimony. The only thing, just as a
2 matter of habit, I'd like to go through, with the number
3 of exhibits we've got, just want to make sure that
4 everything that has been admitted that has been admitted.
5 So if the Court would allow me to formally rest once I've
6 had the opportunity to do that. Then we can, obviously,
7 proceed with anything else in the case.

8 THE COURT: All right. Counsel, step up a moment.
9 Let's talk about scheduling, please.

10 (WHEREUPON, a bench conference was held off the
11 record in the presence of the jury, but out of the
12 hearing of the jury.)

13 THE COURT: All right. Ladies and gentlemen of the
14 jury, the State tells me that they are just about to rest.
15 You heard it here in the courtroom, and at the conclusion
16 of any -- in any case at the conclusion of one side or the
17 other in the case the Court has to stop, review the
18 evidence, revisit certain matters which may still be
19 pending on the record.

20 And, thus, I believe it's probably best or most
21 efficient for us not to go forward this afternoon any
22 further with the Defendant's case, if the Defendant wishes,
23 to put up a case, but to stop for the day and to come back
24 tomorrow. Mr. Foard.

25 MR. YOUNG: Your Honor, may we approach one more time.

1 about the schedule?

2 THE COURT: Yes, you may.

3 (WHEREUPON, a bench conference was held off the
4 record in the presence of the jury, but out of the
5 hearing of the jury.)

6 THE COURT: All right. So there is no need for you
7 to remain here this afternoon. It won't be any more
8 testimonial evidence in this case today. And so what
9 we're going to do is stop for the day, and then we'll come
10 back tomorrow and i anticipate that the Defendant at that
11 time will be given an opportunity to put a case, call
12 witnesses if they wish.

13 And whether they intend to or whether they do not the
14 Court would intend that tomorrow we will argue and charge
15 and send this case to you at some point during the day.
16 So that most likely we would conclude it as some point
17 tomorrow afternoon. Late afternoon or evening. I just
18 tell you that so you can have your own personal schedules
19 in your mind as you consider that.

20 But what we'll do is rather than start at 9:30 in the
21 morning, so that the lawyers can go ahead and prepare for
22 closing arguments, we'll start at ten o'clock again just
23 as we did a couple of days ago. We will see you tomorrow
24 morning at 10:00.

25 Now, of course, please, again the same admonition

1 that we've had every night. Please don't discuss the case
2 with anyone, the facts, the allegations in the case. Just
3 get a good nights rest, and come back at ten o'clock
4 tomorrow morning in the jury room and we'll be ready to
5 go. Now, there is one other thing that I want to discuss
6 with you, and that is this. Let's see, Mr. Gainey is one
7 of our alternates, and Mr. Sellers is one of our
8 alternates. I'm going to ask you two gentlemen tomorrow
9 morning when all the jury is together to preside over the
10 jury choosing their own foreperson among themselves. It
11 should not be the two of you, although you may have a vote
12 on the issue. It should not be that either one of you is
13 chosen because ultimately you may not deliberate with the
14 jury.

15 But I would suggest to you, ladies and gentlemen, as
16 you choose your own foreperson tomorrow that the best
17 foreperson, whether that be forewoman or foreman is
18 certainly your decision, is an individual who is not a
19 controller or dictator of opinion, but someone who you
20 know to be a moderator and facilitator of discussion
21 because, ultimately, your verdict must not only be a
22 consensus verdict; that is that everyone agrees. But it
23 must be a unanimous verdict in this case.

24 And so you know one another well enough by now, and
25 you may have known one another fairly well before you got

1 here to choose among yourselves the foreperson. And,
2 again, I'd ask our two alternates to preside. I thank you
3 in advance for doing that. Let's wait until in the
4 morning until everyone is in, and once you do and make
5 that decision, please, write the name of the chosen juror
6 on the -- on a piece of paper, knock on the door and give
7 it to us, and we'll seat the foreperson in the
8 foreperson's seat and we'll be ready to go after you all
9 do that.

10 Now, any questions about scheduling? So we'll see
11 you tomorrow morning at ten o'clock. And out of respect
12 for you what we will all remain where we are while you
13 depart the courtroom.

14 (WHEREUPON, the jury panel was excused from the
15 courtroom at 3:44 p.m.)

16 THE COURT: Have a good day. All right. Jury is
17 clear. Now, while we are out of the presence of the jury
18 are there any motions for here at the close of the State's
19 case?

20 MR. SECOR: Me first?

21 THE COURT: Yes, sir, Mr. Secor. Go ahead.

22 MR. SECOR: The Defendant, moves pursuant to Rule
23 19(A) of the rule -- of the South Carolina Rules of
24 Criminal Procedure. Specifically regarding the defense of
25 self-defense. Pursuant to State v. Dixie, 394 SC 491,

1 2011. The argument being that we do not believe the State
2 has beyond a reasonable doubt disproven each of the four
3 elements of self-defense.

4 THE COURT: Now, our court reporter is asking that
5 you speak up a little more so that she can follow you.

6 MR. SECOR: I'm sorry.

7 THE COURT: Yeah, I think that you said that the
8 State has failed to disprove the four elements of the
9 self-defense. Did I understand you to say that?

10 MR. SECOR: Yes, sir.

11 THE COURT: Okay. Go ahead.

12 MR. SECOR: The State failed to disprove beyond a
13 reasonable doubt the four elements of self-defense. His
14 alibi in this case is outlined in Dickey. Dickey is
15 spelled D-I-C-K-E-Y. The citation 394 SC 491 from the
16 year 2011 which is cited in State v. Wiggins, 500 SC
17 2(D)492.

18 Regarding the specific indictment of murder we would
19 also move pursuant to South Carolina Rules of Criminal
20 Procedure 19(A) under the theory of proof and variance
21 with the indictment as outlined in State v. Jones, 342 SC
22 248 from the year 2000 which held that the directed
23 verdict was proper where there was a material variance
24 between the indicted crime and the crime proven at trial.

25 It would be our position specifically regarding the

1 element of malice that the State has failed to put forth
2 sufficient evidence to survive directed verdict on that
3 element. And that the proof they have put forth is far
4 greater and stronger for an indictment of voluntary
5 manslaughter. But in light of the fact that they indicted
6 him for murder we would move for a directed verdict.

7 THE COURT: All right. Let's take those two. What
8 response do you have?

9 MR. REDMOND: Briefly, Your Honor, I think in the
10 light most favorable to the State, which is of course, the
11 standard based on the evidence that's been presented we do
12 have -- we would contend an abundance of evidence that
13 would sustain a conviction for murder.

14 On the issue of self-defense that's been raised by
15 the Defense I think that with the evidence that's been
16 presented at this point, clearly, there is enough for the
17 State to overcome an argument of s self-defense. And if
18 fact for this jury to convict of the offense of murder.

19 If the Court needs me to I can be much more detailed,
20 but I think the evidence if viewed as a whole is clearly
21 enough to get us to a jury for them to make the
22 determination on this issue as on the issue of guilt of
23 murder. And as it relates to the Defense's contention
24 that the crime as indicted is somehow inconsistent we
25 would simply that he was indicted for murder.

1 The allegations and the elements that are set forth
2 are -- have been -- we have introduced evidence to that
3 regard. Specifically on the issue of malice I do want to
4 address that briefly. There are a couple of things that I
5 would like to raise. One, that based on the evidence
6 that's been present, including motive evidence which could
7 obviously be argued based on the warrant that had been
8 taken out and based on the order of protection that had
9 been taken out two days before Ms. Clyburn's death.
10 Basically, two days before -- three days before her death.
11 Two days before he and our contention stakes out her
12 apartment.

13 And I think that we had, obviously, introduced enough
14 evidence to make that particular argument. Further, Your
15 Honor, I would submit to you that on the issue of us
16 proving malice even though I'm aware that the Court cannot
17 instruct the jury that use of a weapon is evidence of
18 malice we are still as stated -- I do not have the case in
19 front of me, but we still are entitled to argue that use of
20 a weapon is evidence of malice.

21 And we understand that the Court does not have to
22 instruct -- cannot instruct it, but we can still argue it.
23 So I think with that, and obviously, it was a knife that
24 he was going to use. So with that, Your Honor, I think we
25 have sustained our burden up to this point to get past the

1 directed verdict motion.

2 THE COURT: All right. My understanding of the case
3 you're referring to is that when the use of the deadly
4 weapon is the only evidence of malice the Court what does
5 not instruct as that time that the use of a deadly weapon
6 may be inferred as malice. Is that your understanding?

7 MR. REDMOND: That is my understand, Your Honor.
8 Yes.

9 THE COURT: All right. Just a moment, please. All
10 right. The Court is prepared to rule on these two motions
11 at this time. First of all as to the issue of malice the
12 Court is aware that it's not this judge of the law's
13 position to weigh what really is an issue of fact. The
14 question before me is, is there sufficient evidence in
15 this record that would tend to prove; that is
16 appropriately admissible evidence in the record, that
17 would tend to prove the element of malice.

18 If the Court needs to construe the facts it must be
19 construed in the light most favorable to the non-moving
20 party at this juncture, which of course would be the
21 State. The Court finds that malice may be proved either
22 by direct or express evidence or it maybe proved by
23 inferred or circumstantial evidence.

24 The Court finds that based on this record there is
25 sufficient evidence of malice both direct; that is express

1 and inferred that would require the Court to send the
2 issue to the jury because it is a matter of fact for the
3 jury to determine. So I deny your motion with regard to
4 the absence or alleged absence of malice.

5 Further, on the issue of self-defense I said to those
6 who are here, and we will charge the jury to this tomorrow
7 that the burden is on the State under current South
8 Carolina law, basically, to disprove the self-defense
9 assertion made by the Defendant, which is a little
10 different than the Defendant being required to prove what
11 many see as an affirmative defense because the Defendant
12 has no burden of proof.

13 The question for the Court is, is there sufficient
14 evidence in this record put forth by the State that would
15 disprove a defense of self- defense. South Carolina law
16 requires that in order to successfully assert a
17 self-defense defense it must be shown that the Defendant
18 was without fault in bringing on the conflict or
19 altercation.

20 It must be shown that the Defendant was or reasonably
21 believed that he was in imminent danger at the time of the
22 incident. And it must also be shown that the Defendant
23 could not retreat; that is in other words the Defendant
24 had a duty to retreat or otherwise it must be shown why
25 the Defendant could not retreat. Again, burden of proof

1 on the state to disprove self-defense.

2 I find that on each of these elements of
3 self-defense, and there are more components and elements
4 of self-defense. I just named only certain ones of them
5 that the State has placed sufficient evidence in the
6 record that would disprove the assertion of self-defense
7 on the part of the Defendant.

8 I find that by direct and circumstantial evidence
9 including the testimony of eyewitnesses, the evidence of
10 animus, which is in this record between the Defendant and
11 the deceased, as well as some of the statement made by the
12 Defendant which the Court perceives to bare on the issue
13 and to provide evidence actually against the assertion of
14 self-defense or a finding of self-defense.

15 For all of these reasons the Court denies those
16 motions finding these to be jury issues. Anything
17 further, now, from Defense at the end of the State's.

18 MR. SECOR: We just ask that Your Honor note and
19 state on the record any appropriate and all previously
20 made objections are properly preserved.

21 THE COURT: The Court will decline to weigh in on
22 whether there's been a proper preservation of error. I
23 have ruled upon what has been stated to me in the best of
24 my ability, and I do not believe that there are any issues
25 which have not yet been ruled upon. But the Court